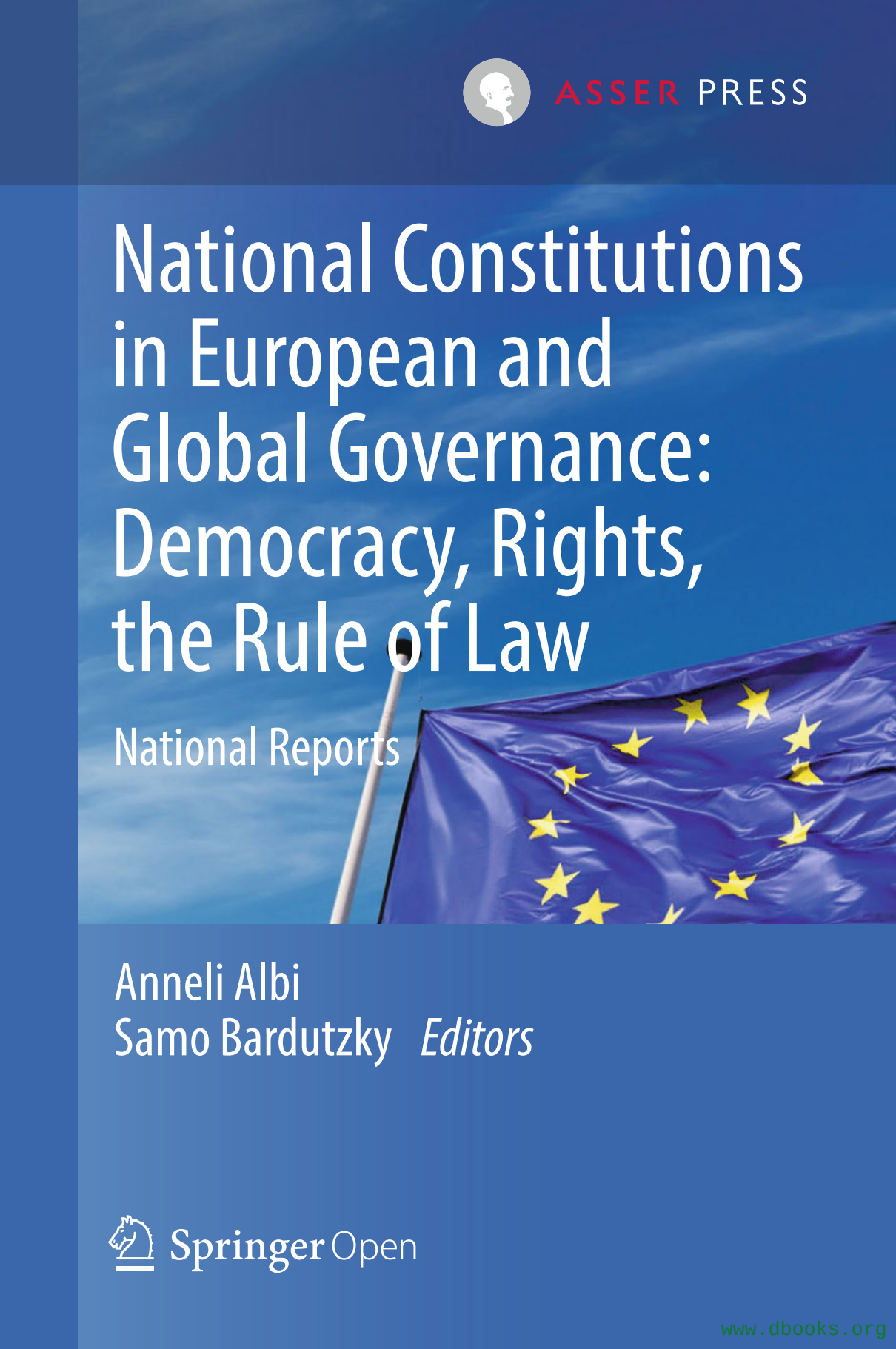
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National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law
National Reports
Anneli Albi
Samo Bardutzky Editors
Springer Open

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National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law

Anneli Albi · Samo Bardutzky
Editors

National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law

National Reports

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Preface

We are delighted to bring to the readers what in our view is a truly fascinating book, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*. The book contains twenty-nine in-depth national reports, which are available online in two volumes via Open Access. The book will be accompanied by a comparative monograph − referred to in this book as the 'Comparative Study' − as is explained in greater detail in the introductory chapter; the Comparative Study will be published later this year.

The national reports were prepared in the framework of the five-year research project 'The Role and Future of National Constitutions in European and Global Governance'. The research project was funded through a 1.2 million EUR grant, awarded by the European Research Council (ERC) (Grant Agreement No. 284316; project acronym: ConstEurGlobGov), as part of the EU's Seventh Framework Programme.

The reports are the result of extensive research by more than sixty contributors, whose posts and affiliations are listed at the beginning of each national report. The full, alphabetical list of all contributors is provided in the 'Contributors' section.

However, here we would like to make special mention of and gratefully acknowledge the central, pivotal contribution of the main constitutional law experts to the preparation and co-ordination of the twenty-nine national reports. The list of the main constitutional law experts for the countries covered in the research project is provided below.

We would also like to express particular gratitude to the considerable number of scholars specialising in the field of criminal law who kindly joined the project to share their expertise with regard to questions relating to the European Arrest Warrant. Equally, we would like to deeply thank all the other research collaborators for their extensive research and written contributions covering the range of themes addressed by the project.

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The main constitutional law experts who were approached to carry out and co-ordinate the research for the project's national reports are as follows:

Austria:	Konrad Lachmayer
Belgium:	Patricia Popelier and Catherine Van De Heyning
Bulgaria:	Evgeni Tanchev and Martin Belov
Croatia:	Iris Goldner Lang
Cyprus:	Constantinos Kombos and Stéphanie Laulhé Shaelou
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Germany:	Dieter Grimm and Mattias Wendel
Greece:	Xenophon Contiades
Hungary:	Márton Varju and Nóra Chronowski
Ireland:	Gerard Hogan
Italy:	Giuseppe Martinico, Oreste Pollicino and Barbara Guastaferro
Latvia:	Kristīne Krūma
Lithuania:	Irmantas Jarukaitis
Luxembourg:	Jörg Gerkrath
Malta:	Peter G. Xuereb
The Netherlands:	Leonard Besselink and Monica Claes
Poland:	Stanisław Biernat
Portugal:	Francisco Pereira Coutinho
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Spain:	Aida Torres Pérez
Sweden:	Joakim Nergelius
Switzerland:	Anne Peters
United Kingdom:	Alison L. Young and Patrick Birkinshaw

Once again, we are very grateful to the above constitutional law experts as well as to all the research collaborators for having generously given their time, expertise, attention and goodwill in carrying out extensive research for the project and for contributing constructively to the analysis of the new challenges posed to constitutional law by EU and transnational governance.

It must be noted that at the time of the book going to press, the overall constitutional and political climate has changed significantly since the start of the project in 2012, with widespread nationalist and illiberal developments in the interim in and beyond Europe. The timeline of the project is outlined in the introductory chapter, where it is explained that the present book does not address the more recent changes. Instead, the book explores the deeper comparative European constitutional culture and understanding of the rule of law, the common

and diverse elements in the comparative European constitutional landscape, and how these have been affected or changed by EU and global governance.

We hope that the national reports will make a significant contribution towards thinking and discussion about the future direction of travel for national, comparative, EU and global constitutionalism.

Canterbury, UK
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February 2019

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The editors would like to express their deepest gratitude to the following colleagues and institutions whose contributions have made this comprehensive, two-volume book possible.

First of all, we are profoundly grateful to the national constitutional law experts and their research collaborators for having generously given their time, expertise, attention and goodwill in carrying out extensive research for the project and for contributing constructively to the analysis of the new challenges posed to constitutional law by EU and transnational governance.

For linguistic editing, we would like to express our infinite appreciation to Siiri Aulik for having edited this large-scale book of 1,500 pages with consistently wonderful enthusiasm, diligence, patience and care. Many of the authors of the country reports have joined us in thanking Siiri for her magnificent work.

We would also like to express our special gratitude to Colin Moore for having carried out the extensive editing of referencing throughout the book.

Our warm thanks also go to Cathy Norman, Sian Robertson, Sarah Slowe, Sarah Gilkes, Ruth Woodger, Jane Benstead, Jody Turner, Zoe Wood, Ben Obembe, Jon King and Jenny Rafferty from the University of Kent for their very efficient assistance with administrative and financial matters. We also greatly appreciated the assistance of Cathy Norman and Serena Natile in the process of organising a work-in-progress seminar at Kent in 2014 to discuss the draft papers.

We would also like to extend our thanks more broadly to Kent Law School for having provided a supportive environment in which to carry out this research. Indeed, many of the research questions have their origin in the workshops held over the years—and in discussions with colleagues—at the Centre for Critical International Law (CECIL) and Kent Centre for European and Comparative Law (KCECL), especially with regard to some of the more debatable impacts of the policies of global financial institutions on social justice and development (we would particularly like to acknowledge the work of current and former colleagues Toni Williams, Iain Ramsay, Paddy Ireland, Kate Bedford and Donatella Alessandrini). The critical and interdisciplinary research environment also opened up broader,

structural questions about the epistemology of research in EU and international law (with special thanks to current and former colleagues Harm Schepel, Simone Glanert, Bernard Ryan, Geoffrey Samuel and Wade Mansell). We would also like to thank Sally Sheldon, Dermot Walsh and Donal Casey for their contributions to the overall grant project.

Regarding the publishing process, we would like to express our immense appreciation to the staff at T.M.C. Asser Press and Springer Verlag. We would especially like to thank Philip Van Tongeren, Frank Bakker, Marjolijn Bastiaans, Antoinette Wessels, Kiki Van Gurp and Brigitte Reschke for their consistently enthusiastic, helpful and patient approach to bringing the book to fruition.

Last, but most importantly, we would like to acknowledge the very generous funding provided by the European Research Council as part of the EU's Seventh Framework Programme (Grant Agreement No. 284316). The grant made it possible to carry out this large-scale, extensive and systematic research on comparative constitutional law that otherwise quite possibly would never have been brought to life.

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In Memoriam Kristīne Krūma

It is with deep sadness that I am writing to inform readers that Dr. Kristīne Krūma, the constitutional law expert for Latvia for the present ERC funded research project 'The Role of National Constitutions in European and Global Governance', passed away on 4 July 2016 after a serious illness. Dr. Kristīne Krūma held the post of Associate Professor and Prorector of the Riga Graduate School of Law and was formerly a justice at the Constitutional Court of Latvia.

I have immensely appreciated Kristīne's work both in her capacity as a constitutional court judge and as a scholar, and I remember her as a very kind and warm colleague. I have been particularly impressed by how Kristīne, on the one hand, was a strong champion of European and international law and cooperation and emphasised the need to redefine classic national concepts such as sovereignty. Yet on the other hand, especially in her role as the judge rapporteur in the IMF austerity cases at the Constitutional Court of Latvia, she also sought to ensure a fairer balance between the exigencies of tackling the economic crisis and the impact of drastic cuts on those affected, including pensioners, children, disabled persons and parents of newborn children.

Kristīne was an internationally esteemed scholar, frequent invited speaker at academic conferences and a valued member of numerous collaborative projects. The pre-eminent European constitutional law professor Leonard Besselink from the University of Amsterdam asked me to add the following note: 'I will remember her gentle character, and acute sense and awareness of where rule of law, discrimination and fundamental rights could be involved where social or other policies seemed to ignore them'.

For the present book, Dr. Kristīne Krūma prepared a highly interesting national report 'The Constitution of Latvia—A Bridge Between Traditions and Modernity', in co-operation with Sandijs Statkus. In the Comparative Study that accompanies the book, it emerges that the Latvian Constitutional Court, along with its German and Portuguese counterparts, would appear to be the only courts in Europe to have taken a more proactive approach to finding a better balance and upholding fundamental rights and constitutional values in the context of the IMF and EU crisis measures and austerity programmes. In addition to its more well-known stance in

protecting the legitimate expectations of individuals in the context of the austerity measures, the Latvian Constitutional Court notably underlined that taking international loans is an important matter of state and public life which must be decided by the legislator on the basis of the principle of separation of powers and that, furthermore, the government cannot restrict fundamental rights by assuming international obligations. In so doing, the Court protected an important continental European constitutional tradition that dates back to the nineteenth century but which has increasingly come under strain in EU and global governance.

In my view, Kristīne has left a highly valuable legacy to the legal thinking on constitutional values and the rule of law-based state in the context of transnational governance.

Everyone who knew Kristīne will be deeply saddened by her death. Our sincere condolences go to Kristīne's husband, Ivars, and daughter, Zane. According to Kristīne's last will, her ashes were scattered into the Baltic Sea.

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Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AJIL	American Journal of International Law
Am. J. Comp. L.	American Journal of Comparative Law
AöR	Archiv des öffentlichen Rechts
CETA	Comprehensive Economic and Trade Agreement
Charter	Charter of Fundamental Rights of the European Union
CIA	Central Intelligence Agency
CJEU	Court of Justice of the European Union
CML Rev.	Common Market Law Review
Colum. J. Transnat'l L	Columbia Journal of Transnational Law
COSAC	Conference of Community and European Affairs Committees of Parliaments of the EU
CPT	European Committee for the Prevention of Torture
E.L.Rev.	European Law Review
EAW	European Arrest Warrant
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECB	European Central Bank
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECSC Treaty	Treaty establishing the European Coal and Steel Community
ECtHR	European Court of Human Rights

EDC Treaty	Treaty instituting the European Defence Community
EEA	European Economic Area
EEC Treaty	Treaty establishing the European Economic Community
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFTA	European Free Trade Area
EIB	European Investment Bank
EJIL	European Journal of International Law
EJSL	European Journal of Social Law
ELJ	European Law Journal
ELTE Law Journal	Eötvös Loránd University Law Journal
EMU	European Monetary Union
EPL	European Public Law
ESM Treaty	Treaty Establishing the European Stability Mechanism
ESM	European Stability Mechanism
EU	European Union
EuCLR	European Criminal Law Review
EuConst	European Constitutional Law Review
EuGRZ	Europäische Grundrechte-Zeitung
EUR	Euro
European Constitutional Treaty	Treaty establishing a Constitution for Europe
Fiscal Compact	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
FRA	European Union Agency for Fundamental Rights
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
Harv. Law Rev.	Harvard Law Review
IASB	International Accounting Standards Board
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL Journal	The Vienna Journal of International Constitutional Law
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ILO	International Labour Organization
IMF	International Monetary Fund

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IOSCO	International Organization of Securities Commissions
LJ	Lord Justice
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review
Maastricht Treaty	Treaty on European Union
MEP	Member of European Parliament
MJ	Maastricht Journal of European and Comparative Law
MLA	Mutual Legal Assistance
MLR	Modern Law Review
MoU	Memorandum of Understanding
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
NJB	Nederlands Juristenblad
NSA	United States National Security Agency
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
NTER	Nederlands Tijdschrift voor Europees Recht
NTM	Nederlands Tijdschrift voor de Mensenrechten
OECD	Organisation for Economic Cooperation and Development
OMT	Outright Monetary Transactions
PL	Public Law
RevIntlDroitComp	Revue internationale de droit comparé
SEA	Single European Act
SEK	Swedish krona
SIS	Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TTIP	The Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations Organization
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USA	United States of America
USSR	Union of Soviet Socialists Republics
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties

WB	World Bank
WP IDEIR	Working Papers on European Law and Regional Integration
WTO	World Trade Organization
Yale L.J.	Yale Law Journal
YEL	Yearbook of European Law
ZSE	Zeitschrift für Staats- und Europawissenschaften

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Part I
Introduction

Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project

Anneli Albi and Samo Bardutzky

Abstract The Introduction provides an overview of the research project 'The Role and Future of National Constitutions in European and Global Governance', which was funded by a five-year grant of 1.2 million EUR, awarded by the European Research Council (ERC). The research findings are published in the present two-volume book, containing national reports from twenty-eight EU Member States, and a twenty-ninth report – focusing on constitutional reforms related to global governance – from Switzerland. The reports are based on the project Questionnaire. The main themes are threefold: (a) constitutional amendments with a view to EU membership; (b) constitutional adjudication at the national level regarding EU measures such as the Data Retention Directive, European Arrest Warrant and ESM Treaty; and (c) novel challenges that are increasingly highlighted in the wider context of global governance (i.e. beyond the classic international treaties that advance human rights, peace and environmental protection) in relation to democratic participation, judicial review and the rule of law. Whilst in the mainstream discourse national constitutions have typically

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The introductory chapter to the book was prepared as part of the research project 'The Role and Future of National Constitutions in European and Global Governance', funded by European Research Council (ERC) grant No. 284316 (Project acronym: ConstEurGlobGov). The views are solely those of the authors, and cannot be attributed to the ERC or to the European Union. We would like to thank linguistic editor Siiri Aulik for her helpful assistance and comments. However, the views and any errors are solely those of the authors. Updates regarding the research project are available on the project website https://research.kent.ac.uk/roc/.

All websites noted in the Introduction were accessed on 21 March 2018.

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been approached from a top-down perspective and with a focus on sovereignty, the present bottom-up study allows for the perspective to be broadened by looking at how EU and transnational law have affected constitutional cultures in specific areas, such as fundamental rights protection, rule of law safeguards and constitutional review. The reports are accompanied by a linked book with a Comparative Study, which divides the constitutional systems of the EU Member States into three broader constitutional cultures and identifies overarching trends, changes and processes regarding constitutionalism. The comparative research findings are briefly outlined in the Introduction, inviting discussion on what ought to be the direction of travel for national, comparative European, EU and global constitutionalism. The project and the reports explore constitutional developments up until 2014-15 and do not address the more recent illiberal trends.

Keywords Comparative constitutional law and comparative European constitutional achievements · Political, post-totalitarian and traditional legal constitutions Constitutional amendments regarding EU integration · Fundamental/constitutional rights · The rule of law and the social democratic *Rechtsstaat* · European Arrest Warrant · Data Retention Directive · ESM Treaty, euro crisis, mutualisation of debt and democracy · Autonomous EU and global constitutionalism
The governance paradigm and neofunctionalism · Changing language of constitutionalism at the transnational level · Uniformity and diversity

1 The Reasons for Revisiting the Role of the National Constitutions

We are delighted to bring to the readers what in our view is a truly fascinating book, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*, with two combined volumes containing twenty-nine national reports, and which will shortly be accompanied by a linked comparative monograph that is hereinafter referred to as the 'Comparative Study'.[1] With the important transformations in the discourse on EU and global constitutionalism over the last few decades, we consider this to be an opportune moment to take a step back and revisit what is, or ought to be, the role of national constitutions in the new transnational legal environment. Indeed, the book comes at a time when both the European Union and the broader discourse on constitutionalism are at crossroads, with many important questions about their future directions at the centre of discussions.

Before the euro crisis, on the broader level of global constitutionalism, one leading scholarly article summarised the ongoing processes – primarily in relation to democratic legitimacy – as 'the end of constitutionalism as we know it'.[2] Another book brought together leading scholars of constitutional theory to examine issues

[1] For the publication details of the Comparative Study, see below the text accompanying note 44.
[2] Kuo 2010.

relating to what in the title was rhetorically phrased as 'The twilight of constitutionalism?'[3] Some scholars have additionally noted the emergence of a thin, weak, procedural version of the rule of law, judicial review and democratic control in the context of European and global economic co-operation, with reduced opportunities for citizens to challenge public decisions.[4] Furthermore, the extent to which the vocabulary of constitutionalism may have changed emerges from a recent influential monograph, *Beyond Constitutionalism*, by Nico Krisch, who calls for breaking away from and discarding the paradigm of constitutionalism in post-national law altogether, in favour of a paradigm of pluralism.[5] Krisch has summarised what seems to be the prevailing view amongst EU and global governance lawyers: 'the prospect of domestic constitutionalism shaping global governance or controlling its impact is very limited', and the only hope would be 'to turn the clock back and begin to withdraw from regional and international structures of cooperation'.[6]

An increasing number of scholars have begun to express heightened concerns about the decline of constitutionalism in the context of the euro crisis management. For example, Agustín Menéndez has documented the breadth of the European Union's 'constitutional mutation',[7] warning that 'the breakdown of constitutional law will result in the mid- or long-run in the breakdown of the Social and Democratic *Rechtsstaat*'.[8] Gunnar Beck cautions that the recent euro crisis adjudication in the European and national courts has allowed a bending of the rules to suit the executive to the extent that 'the Rechtsstaat is effectively suspended'.[9] The prevailing theories in Italy, as summarised by Andrea Simoncini, are that the euro crisis measures have accelerated a 'decline of European constitutionalism', with constitutions 'destined to be obsolete' in 'the present age [that is] no longer the age of constitutions'.[10] A small but growing number of scholars have even expressed concern about the EU having taken an authoritarian turn in the euro crisis governance. Christian Joerges and Maria Weimer have cautioned against the entrenchment of 'authoritarian executive managerialism'[11] that 'threatens to discredit the idea of the rule of law and its intrinsic linkages to democratic rule'.[12] Alexander Somek finds that in the EU's euro crisis management, 'formal legal constraints are bent in order to accommodate necessities'; he is concerned that this has led to

[3] Dobner and Loughlin 2010, p. xi.

[4] Harlow 2006, p. 195; Galera 2010, p. 302.

[5] Krisch 2010, pp. 21, 26, 79, 303. On the changing vocabulary of constitutionalism, see Martinico 2015, pp. 5 et seq., and below notes 74 and 92, along with the accompanying text.

[6] Krisch 2010, pp. 20–21.

[7] Menéndez 2014.

[8] Menéndez 2013, pp. 522–533, quote at p. 523.

[9] Beck 2012, pp. 446–449, as cited in Bobek 2014, p. 423.

[10] Simoncini 2013, pp. 158–159, 186.

[11] Joerges and Weimer 2012.

[12] Joerges 2014, p. 26.

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'authoritarian liberalism' and 'loss of political agency', with the executive branch gaining power, as the constraints on governance are economic.[13] Michael Wilkinson, also describing the EU crisis governance as 'authoritarian liberalism', has observed a process of 'de-democratisation', 'de-legalisation' and the overriding of Europe's constitutional law with market teleology.[14]

However, what has hitherto received negligible attention is the way in which European constitutionalism and the European constitutional law discourse **had already changed in the years preceding the financial crisis, during the 'state of normalcy'**. In particular, two key EU measures – the European Arrest Warrant Framework Decision[15] and the (eventually annulled) Data Retention Directive[16] – are emblematic of broader changes in fundamental rights protection, constitutional review and judicial practice. In the following paragraphs, we will bring some examples of the issues explored in the national reports in the present two-volume book and in the accompanying Comparative Study. We consider the quotes cited to be both disconcerting – as they signal an uncertain fate for some of the historical achievements of European constitutionalism – as well as motivating for lawyers and scholars who may have had concerns about strain on well-established fundamental rights and values within individual national constitutional orders but without awareness that such concerns are often more widely shared.

By way of such examples, with regard to the European Arrest Warrant (EAW), the Italian report poignantly documents the way in which the national legislature was caught between criticism regarding infringements of fundamental rights in the context of the EAW and pressure from the European Commission, which was relentless in its calls for a faithful and complete implementation of the controversial Framework Decision. The report summarises concerns articulated by governmental committees and numerous legal scholars in Italy. Among the latter, the eminent constitutionalist Cesare Pinelli characterised the EAW as 'the first serious threat of disablement of the constitutional guarantees to the right of liberty'.[17] In Ireland, the automaticity involved in giving effect to foreign prosecutorial and judicial decisions has been a constant source of concern for the Irish courts, which the Irish report extensively documents with examples from case law.[18] In Slovenia, scholarship has

[13] Somek 2014, pp. 23–24.

[14] Wilkinson 2016, pp. 29 et seq.

[15] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[16] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[17] Pinelli 2012, p. 2399, as cited in the report on Italy by Martinico, Guastaferro and Pollicino in this book [The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?], Sect. 2.3.5.1.

[18] The report on Ireland by Hogan in this book [Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country], Sects. 2.3.1.1 and 2.3.6.

warned that the 'uncritical application of the principle of mutual recognition bears the danger of transforming the judge into a kind of a "ticking box" automaton checking only pre-established criteria and neglecting his/her duty of a critical assessment and safeguarding fundamental (constitutional) rights to the defendant'.[19] From the Netherlands, concerns expressed by Judge Rob Blekxtoon from the District Court of Amsterdam are summarised in the accompanying Comparative Study. Judge Blekxtoon has written that his 'quiet life was disturbed' and he 'began writing critical articles on the European Arrest Warrant in various journals and law reviews', and that he even took the initiative in 2005 to publish the *Handbook on the European Arrest Warrant* in his effort to save 'the well-established principles of extradition law which serve to safeguard the interests of the requested persons'.[20] Judge Blekxtoon additionally wrote that he was 'very disappointed', as he had been 'told by people closely following the drafting of the EAW Framework Decision that the officials responsible for the outcome did not really want to listen to the experts present at the negotiations who knew what they were talking about'. It had been 'more important to speed up matters for political reasons'.[21]

Turning to the Data Retention Directive, the Austrian report spells out a concern that also implicitly arises from several other reports – that a 'taboo' has been 'broken':

> … Austrian society and the state did everything to escape this unconstitutional situation and finally succeeded. The damage, however, was already done. The taboo was broken and since [… the annulment of the Directive], Austrian police authorities have increased political pressure for re-implementation.[22]

The Slovenian report notes that if the Data Retention Directive

> had been a purely domestic legislative project, it would have probably met insurmountable constitutional and democratic obstacles. But as it originated in the EU, it became part of the law in a very different atmosphere.[23]

Along with the above measures, the present edited volume predominantly focuses on the constitutional impact of the pre-financial crisis developments and the question of **what is, or ought to be, the normal state of affairs in European constitutionalism**.

It should be noted early on that the project and the reports explore constitutional developments up until 2014-15 and do not address Brexit or the more recent illiberal trends. The timeline of the project is explained below in Sect. 5.

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[19] Erbežnik 2014, p. 131, as cited in the report on Slovenia by Bardutzky in this book [The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain], Sect. 2.3.5.3.

[20] Blekxtoon 2009, p. V.

[21] Ibid., p. V.

[22] The report on Austria by Lachmayer in this book [The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity], Sect. 2.12.

[23] The report on Slovenia by Bardutzky in this book [The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain], Sect. 2.13.

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2 Overview of the ERC-Funded Research Project 'The Role and Future of National Constitutions in European and Global Governance'

The issues explored in the previous section are at the centre of the large-scale research project 'The Role and Future of National Constitutions in European and Global Governance'. The research project was funded by a five-year grant of 1.2 million EUR, awarded by the European Research Council (ERC) (Grant Agreement No. 284316; project acronym: ConstEurGlobGov), as part of the EU's Seventh Framework Programme.

The present two-volume book contains the first main aspect of the research: the twenty-nine national reports prepared by leading constitutional law experts. The national reports were written on the basis of a Questionnaire, which was prepared by Professor Anneli Albi, the Principal Investigator of the research project, in consultation with Dr Samo Bardutzky, who worked for several years as the project's Research Associate. The two volumes are accompanied by a linked, complementary book containing a Comparative Study. These aspects of the research project will be outlined in greater detail here and in the subsequent sections.

In designing the project's Questionnaire and thereby also the general framework of the national reports, the idea was to **bring together case law, doctrine and constitutional debates from the perspective of a multitude of national constitutional systems**. We sought to provide viewpoints from national and comparative constitutional law in order to offer a fuller understanding of European constitutional law than what has prevailed in the mainstream English language European constitutional discourse, where **the starting point has typically been the autonomous nature of EU constitutional law** and its **top-down reception** in the Member States. Additionally, whilst existing comparative studies are typically based on a limited number of case studies, we committed to covering all of the twenty-eight Member States of the Union, and added a twenty-ninth report – focusing on constitutional reforms related to global governance – from Switzerland. The inclusion of smaller and what are often regarded as more peripheral countries has not only allowed the project to give a greater voice and visibility to the diverse constitutional systems, but has also unearthed numerous interesting and important broader trends, patterns and changes that warrant wider attention and discussion. Some of these will be summarised at the end of this introductory chapter.

The editors would like to express their greatest gratitude for the generous grant funding from the ERC, which has made it possible to carry out such comprehensive and systematic research on comparative constitutional law that otherwise quite possibly would never have been brought to life. The views and any errors are solely those of the editors and authors, and cannot be attributed to the European Research Council or to the European Union.

We are also pleased that this book has been published by T.M.C. Asser Press, which has a long-established tradition of publishing in the field of interaction between EU law and national legal systems. One key Asser Press book that has

become part of a well-established canon in the field is the so-called 'Red Book', *The Constitutional Impact of EU Enlargement at EU and National Level*, which explores how national constitutions both in the older and new Member States have been adjusted to accommodate EU membership.[24] Another leading Asser Press publication that sparked interest in the research that follows is the above-mentioned *Handbook on the European Arrest Warrant*, edited by Judge Blekxtoon.[25]

3 The Questionnaire

The national reports have been structured and written on the basis of the above-mentioned Questionnaire, which is reproduced in the next chapter. The Questionnaire invited constitutional law experts to consider national case law, doctrine and policy documents in three main areas, and was divided into three parts.

Part 1 explored how constitutions reflect the transfer of powers from domestic to European and global institutions, and thus to what extent they provide legitimacy to the shift in the exercise of power to the transnational level and retain their social relevance. Part 2 of the Questionnaire looked beyond the question of transfer of sovereignty, which has been the predominant focus of the discourse so far, and asked for reflection on constitutional values that have a continued importance in the contemporary globalising and pluralist legal setting, such as the protection of fundamental rights, the rule of law and constitutional review. The experts were tasked with outlining constitutional court judgments that tackle the protection of these rights and values in transnational judicial dialogues, e.g. regarding the Data Retention Directive, the European Arrest Warrant, the Treaty Establishing the European Stability Mechanism (ESM Treaty) and European Commission and International Monetary Fund (IMF) economic crisis/austerity measures. The Questionnaire also invited assessment of the responsiveness of the European Court of Justice (CJEU) with regard to these rights and values, as well as assessment of the standard of protection at supranational level. Finally, Part 3 sought to explore the novel challenges that are increasingly highlighted in the wider context of global governance (i.e. beyond the classic international treaties that advance human rights, peace and environmental protection) in relation to legitimacy, democratic control, accountability and the rule of law.

It should be noted that the Questionnaire was prepared in 2013–2014 when critical scholarly and public discussion about EU and transnational governance was rare and very limited.

[24] Kellermann et al. 2001.

[25] Blekxtoon 2005; cf. also Blekxtoon 2009, p. V, supra n. 20 and the accompanying text.

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4 The Constitutional Law Experts

The constitutional experts from whom the reports were commissioned are leading scholars in the field of constitutional law or European constitutional law, with an extensive record of publications in the field of interaction between national and EU constitutional law (in English, given the overall nature of the book, which inevitably had to take priority over our commitment to bring other voices and languages to the fore). In some countries, two experts were invited as joint experts, while in other cases, the main constitutional expert opted to invite one or more research collaborators, given the extensive scope of the Questionnaire. In particular, we are pleased that several scholars specialising in the field of criminal law kindly joined the project to cover the questions relating to the European Arrest Warrant. The main constitutional experts are listed in the Preface. We are honoured that a number of distinguished, current and former judges of constitutional courts and other highest courts have joined us here as scholarly colleagues. In the intervening years, we were honoured to observe that several colleagues were subsequently appointed as Judge or Advocate General to the European Court of Justice. The editors are delighted to be able to present the full, collected reports which, thanks to countless hours of thorough, patient and perceptive research by more than sixty colleagues, make for rich and thought-provoking reading.

In the framework of the project, the Network of Constitutional Experts was established in the hope that it would provide a more long-term structure and forum for deliberating perspectives from comparative constitutional law in the context of transnational governance.

The project questions and draft reports were discussed at a work-in-progress seminar 'Assessing the Responsiveness of the EU to Constitutional Rights: Data Retention, Arrest Warrants and Beyond', held at the University of Kent on 28–29 August 2014. In addition to contributions from project experts, we were honoured to have presentations from a number of guest speakers who are distinguished judges and/or scholars working in related areas. The themes covered included: cases regarding the EU Data Retention Directive (Brun-Otto Bryde, Jiři Zemanek and Gerard Hogan); case law on social rights affected by the IMF austerity measures (Kristīne Krūma); the EU's democratic responsiveness (Damian Chalmers); the shift towards authoritarian executive managerialism in euro crisis governance (Christian Joerges); rights protection issues in the context of the European Arrest Warrant (Valsamis Mitsilegas, Esther Herlin-Karnell); and the constitutional issues surrounding the Trans-Atlantic Trade and Investment Partnership (TTIP) (Harm Schepel).

5 The National Reports and the Timeline of the Project

The structure of the national reports follows the three parts of the Questionnaire.[26] In principle, the authors were expected to follow the numbering of the questions from the Questionnaire, so that the reader would be able to compare the situation in a number of jurisdictions regarding a particular issue. To a great extent, this is indeed the case. Nevertheless, as the accounts of the individual constitutional systems differ, the editors did not insist on the numbering and, in many instances, the answers to questions have been merged. In the editorial process, we aimed to ensure that the reports would, as far as possible, be written in a way that would allow for them to be read independently without reference to the Questionnaire.

Whilst the reports are relatively lengthy – in the range of 19,000–23,000 words – they are also simultaneously not long enough, as they essentially provide but a glimpse of both the constitutional culture as well as of the constitutional doctrine and debates in the individual areas explored. Experts were not expected to answer all of the questions in an equal level of detail; they were invited to focus on issues of particular relevance for the Member State in question. Where the national discussions were considered particularly to be of broader, Europe-wide interest, an editorial decision was made to accommodate a longer report (e.g. Germany, Cyprus and Estonia).

In terms of the timeline, it should be noted that the majority of the reports were submitted during 2015, with some having been received in 2014 and some later in 2016. The Comparative Study was written in 2016–2019. The publication of the national reports was delayed, as the comparative analysis was initially meant to take the form of a shorter comparative report to be included in the present volumes. However, as the analysis grew in length, depth and breadth, it was eventually decided that it would be published as a separate but linked book.

It is important to note that the **aim of the project was to take stock of and identify the challenges posed to the Member States' constitutional law up until 2014–2015**; the reports and the Comparative Study **do not include more recent developments**. This book therefore does not cover the Brexit referendum (although a brief post scriptum note has been added to the British report), France's state of emergency regime after the November 2015 terrorist attacks in Paris or the developments in Poland from autumn 2015 that prompted the European Commission to act under the EU rule of law framework. The book also does not explore the recent, more wide-spread turn towards illiberal constitutional trends, at least beyond the national report on Hungary.

Instead, **the project explores the deeper comparative European constitutional culture and the approach to the rule of law as it had been consolidated before the financial crisis** and before the other more recent crises and illiberal developments. The project examines the common and diverse elements in the comparative European constitutional landscape, and how these have been affected

[26] With the exception of the report on Switzerland (see below).

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or changed by the ongoing transition to autonomous EU constitutional law and global governance. In the accompanying Comparative Study, the comparative European constitutional achievements prior to the recent illiberal turn are collated and documented in greater detail, **in the hope that these will serve as guidance for a quest to restore the values of European constitutionalism** that have been eroded, and help shield the values that remain.

6 The Structure of the Two-Volume Book: The Categorisation and Typology of Europe's National Constitutional Cultures

The national reports are structured in the present two-volume book on the basis of a somewhat revised typology of Europe's national constitutions, which is developed and explained in greater detail in the linked Comparative Study. As was once remarked by Dieter Grimm, former judge of the German Federal Constitutional Court and one of the national constitutional experts for Germany, '[t]ypologies are not ends in themselves. They help to answer questions' depending on the 'research interests that a scholar of constitutionalism pursues'.[27] The basis for the typology that underlies the structure of the present book is the dichotomy between **historical constitutions** on the one hand and **revolutionary constitutions** on the other, as developed by Leonard Besselink and outlined in the Questionnaire.[28] A similar division of Europe's national constitutions has also been suggested by other scholars, at times with somewhat different terminology. For example, Cesare Pinelli writes about 'evolutionary' or incrementally evolving constitutions, 'artificial' constitutionalism that prevailed on the European continent since the 1789 Revolution, and the more recent formation of a constitutional tradition in continental Europe that was based on the collapse of totalitarian regimes.[29] Within the present research project, the categorisation of the constitutional systems became somewhat more nuanced as the national reports were gradually received and as the broad and diverse landscape of national constitutions in Europe began to reveal itself to the editors of the book. As will be explained briefly in this introductory chapter, the categorisation of the constitutional systems is closely linked to the essence of the research question pursued by this project, which is **how EU law and global governance have affected the different national constitutional cultures**. Whilst in the mainstream EU discourse, national constitutions have typically been approached as a relatively monolith set of instruments that primarily protect

[27] Grimm 2012, pp. 98–99.

[28] See Besselink 2006, p. 113 et seq., and as summarised in the Questionnaire [Questionnaire for the Constitutional Law Experts of the Research Project 'The Role and Future of National Constitutions in European and Global Governance'], Sect. 1.1.1 in this book.

[29] Pinelli 2016, p. 258 and, on the same page, footnotes 4 and 5, with references.

sovereignty, the present bottom-up study allows for the perspective to be broadened by looking at the effects of EU law in specific areas of constitutional culture, such as fundamental rights protection, rule of law safeguards and constitutional review.

Following the above revised typology, in the first category, as explained in greater detail in the accompanying Comparative Study, are the **political or historical constitutions**. These constitutional systems are characterised by the predominance of parliament and the absence of or a weak role for a constitutional court, and by a generic bill of rights that in some cases is historically older or based on the European Convention on Human Rights (ECHR). Additionally, the broader orientation of these constitutions is to incrementally incorporate changes *ex post facto* rather than to pre-determine the acceptable margins of behaviour for institutions in advance. In this category, we have placed the United Kingdom, Malta, the Netherlands, Luxembourg, and the Nordic countries Sweden, Denmark and Finland. Emblematically, the national report on the Netherlands is entitled 'The Pragmatics of a Flexible, Europeanised Constitution'. It emerges from the report that the Constitution, which dates back to 1814–15, bans constitutional review of Acts of Parliament, and constitutional rights are not justiciable upon the judicial review of Acts, with the ECHR and the EU Charter being applied instead.[30] The national reports on these constitutional cultures are placed in the opening part of the book (Part II), after the introductory chapters (Part I). The Constitution of Switzerland, which is explored in a separate chapter, also belongs to this type of constitutional culture.

This category is followed by what in Besselink's dichotomy are referred to as 'revolutionary' constitutions, which have a strongly legal character and are enforceable by courts (Parts III–V of the book). In general constitutional theory, this type are also referred to as 'legal' constitutions. The majority of the constitutions of the Member States of the European Union can be considered as 'legal' or 'revolutionary' in character. However, as explained in greater detail in the Comparative Study, in this project the category of 'legal' or 'revolutionary' constitutions is divided into two sub-categories, which would seem more expressive in terms of conveying the constitutional impact of the EU constitutional order on the different constitutional cultures. The new proposed sub-categories are:

(1) post-totalitarian or post-authoritarian constitutions; and
(2) traditional or hybrid legal constitutions, which have strict elements combined with historical or flexible, less prescriptive aspects.[31]

The central features of the constitutions in the first of these sub-categories – **the post-totalitarian or post-authoritarian constitutions** – stand in clearest contrast to the features that characterise the political or historical constitutions. In the post-totalitarian constitutional cultures, which embody **the 'Never again' ethos**, constitutional review

[30] The report on The Netherlands by Besselink and Claes in this book [The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution].

[31] For an explanation of this categorisation, see a brief explanation below in this section, and a fuller explanation with references to literature in the accompanying Comparative Study.

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by constitutional courts plays a central role, the constitutions contain extensive and detailed bills of rights, and the constitutions and constitutional courts pre-determine the margins of constitutionally acceptable political behaviour. The post-totalitarian or post-authoritarian constitutions are presented in two groups, and are referred to hereinafter as the 'post-totalitarian' constitutions; the differences between totalitarian and authoritarian regimes will be explained in greater detail in the Comparative Study. The first group of post-totalitarian constitutions are those adopted after the atrocities of the Second World War in Germany and Italy, and those adopted after the end of the dictatorships of the 1970s in Spain, Portugal and Greece (Part III of the book). The second group are the post-communist constitutions of Central and Eastern Europe, adopted or brought back to life in the 1990s in the aftermath of the fall of the Berlin Wall in 1989. Here we study the constitutions of the countries that became the 'new' Member States: Poland, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Romania, Bulgaria and Croatia (Part IV of the book). These countries share a history of arbitrary exercise of power under socialist and communist regimes. Accordingly, their constitutions have entrenched strict constitutional safeguards as a reaction to the human rights violations and abuses of public power experienced by the people living under the pre-1990s regimes.[32]

In fact, the eminent constitutionalist Cesare Pinelli regards the above constitutions as representing a broader continental European constitutional tradition, for the understanding of which the collapse of the totalitarian regimes in these countries is essential.[33] Prompted by a sense that the understanding of this tradition is fading in the mainstream English language EU constitutional discourse and that its classic elements are often brushed aside as representative of old-fashioned protection of sovereignty or of idiosyncratic national constitutional identity, the accompanying Comparative Study embarks on identifying **a list of twelve distinctive features of the post-totalitarian type of constitution**. These features include the following. Whereas in the political or historical type of constitutions parliament is supreme as an expression of the people's will in line with the influences of the Enlightenment and the French Revolution, in the countries that experienced totalitarianism, the constitutional design had to go further. Here the constitutional design proceeds from the understanding that democracy is not always capable of ensuring rights and the rule of law, and thus they have been removed from the realm of politics and are ensured by constitutional courts.[34] Furthermore, some core provisions (typically regarding the democratic, social state governed by the rule of law; core fundamental

[32] The historical background and the central tenets of the post-communist constitutionalism are explained in particular in the report on the Czech Republic by Kühn with reference to the respective judgments of the Czech Constitutional Court [The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires], Sects. 1.1.1 and 2.1.3, and in the report on Poland (pre-2016) by Biernat and Kawczyńska [The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context], Sects. 1.1.1–1.1.2, in this book.

[33] Pinelli 2016, p. 258.

[34] See e.g. Pinelli 2016, pp. 264–266, and Somek 2014, pp. 15 et seq., 84–85 and 90–95.

rights) are unamendable or subject to a special, stringent amendment procedure, often involving a referendum. With the exception of Greece, the constitutional systems of all post-totalitarian countries feature a strong, centralised constitutional court,[35] and constitutional review is typically rigorous, with a statistically high rate of annulment of legislation, in particular in cases of so-called abstract review. These courts often follow the intellectual leadership of the German Constitutional Court, and have cemented the legal character of the constitutional safeguards provided in the bills of rights and the clauses protecting the *Rechtsstaat* or *stato di diritto*, i.e. 'the state governed by the rule of law'. Crucially, these constitutions embody a value order centred on fundamental rights and based on human dignity; they typically start with extensive, detailed, directly applicable and justiciable chapters on fundamental rights and rule of law safeguards. Indeed, the editors were surprised to find that the respective constitutional provisions – especially as regards safeguards for deprivation of liberty, access to courts and the protection of the home, privacy and secrecy of communications – are often worded in a way that is notably more stringent and/or offers more extensive protection than the relatively generic provisions set out in the ECHR and the EU Charter of Fundamental Rights. The respective provisions are written out in the national reports for ease of reference. These constitutions typically also include extensive provisions on social rights and/or the social state, which form part of the concept of human dignity. This reflects the recognition that a life lived in dignity and with freedom of choice requires that a basic level of material needs is met; based on historical lessons, the social state dimension aims to avoid the root causes of the emergence of authoritarian regimes, which are economic insecurity and dependence.[36] The overall aim of the constitutional design was to avoid 'a social situation that would [give] rise to mass support for another militant, anti-democratic, populist movement'.[37] The Comparative Study additionally documents the extensive and often constitutionally codified protection of the rule of law and its different sub-principles (e.g. parliamentary reservation of law; rules on publication of laws; the rules governing the limitation of rights; the principles of legal certainty; legitimate expectations and non-retroactivity) in this constitutional tradition.

The second sub-category of 'legal' or 'revolutionary' constitutions was – after considerable reflection – designated as **'traditional or hybrid legal constitutions'**, and these are placed in a separate part of the book (Part V). The reference to 'legal' constitutions aims to signify that these constitutions have a legal character, are binding in nature and enforceable in courts, and set the broad, constitutionally acceptable margins for the political institutions and civil servants *in advance*. However, they also contain more historical, political, or otherwise flexible or less prescriptive elements. The constitutional systems placed in this category are those of France, Belgium, Ireland, Austria and Cyprus. The constitutions of the first four of these countries have historical bills of rights with limited justiciability (e.g.

[35] In Estonia, this function is carried out by the Constitutional Review Chamber of the Supreme Court.

[36] For historical background, see e.g. Somek 2014, pp. 10–13, 85–86 and 155.

[37] Somek 2014, pp. 85–86.

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France's 1789 Declaration of the Rights of Man and of the Citizen, and Austria's 1867 Basic Law on the General Rights of Nationals), and the protection of fundamental rights is predominantly reliant on the ECHR. In France and Belgium, the mandate for constitutional review was initially confined to guaranteeing respect for the constitutional separation of powers scheme,[38] and thus full human rights based review is more recent.[39] In France and Ireland, the approach to judicial review is regarded as deferent to the governing institutions, as observed in the respective national reports. The constitutions date back to the pre-World War II period in Belgium (1831), Austria (1920) and Ireland (1937). The Cypriot Constitution is described in the Cyprus report as 'a hybrid model' due to special circumstances in the country.[40] The ways in which these constitutional systems are less strict and extensive in protection than the post-totalitarian constitutions are outlined in greater detail in the Comparative Study.

Hungary has been placed in a separate part of the book (Part VI), and an editorial note has been added to the report. In the recent past, Hungary's Constitution was in the category of post-totalitarian constitutions, and its Constitutional Court was widely acclaimed for its activist approach to constitutional review and the protection of fundamental rights and rule of law safeguards. The changes that have occurred since 2010 and which have been widely described as a turn to illiberal constitutionalism are explored in the national report, entitled 'Constitutional (R) evolution or Regression?'.[41]

The national report on Poland, a country which has recently followed the trend of illiberal constitutional reforms started by Hungary, was completed before these developments began to unfold. For the purposes of this study, therefore, the Polish Constitution is considered to be in the category of post-totalitarian constitutions in the 'new' Member States. It is notable that based on the case law of the Polish Constitutional Tribunal cited in the Polish report,[42] it is evident that at least up until

[38] De Visser 2014, p. 7.

[39] In France, fundamental rights did not become justiciable for individuals until 2010, following a constitutional amendment of 2008 whereby *ex post* control of constitutionality was introduced into French constitutional law, allowing individuals to challenge the constitutionality of legislative provisions that violate their rights. The Belgian Constitutional Court was established relatively lately, in the 1980s – first as the 'Court of Arbitration' – with the task of adjudicating federal competences. Fundamental rights review of legislation was formally introduced in 2003. See, respectively, the report on France by Burgorgue-Larsen, Astresses and Bruck [The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved], and the report on Belgium by Popelier and Van de Heyning [The Belgian Constitution: The Efficacy Approach to European and Global Governance], in this book.

[40] See the report on Cyprus by Kombos and Laulhé Shaelou in this book [The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation].

[41] The report on Hungary by Chronowski, Varju, Bárd and Sulyok in this book [Hungary: Constitutional (R)evolution or Regression?].

[42] See the report on Poland by Biernat and Kawczyńska in this book [The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context].

that time (autumn 2015), the Polish Constitutional Tribunal had taken one of the most stringent approaches to the protection of the post-totalitarian understanding of constitutionalism and the rule of law, including in the context of EU law. This deserves wider awareness, as in the mainstream European constitutional discourse, many of the respective cases of the Polish Constitutional Tribunal (pre-2016) have in a somewhat reductionist and even unfair manner been portrayed as representative of a Eurosceptic and sovereignty-protective approach.

The final part of the book (Part VII) contains the report from Switzerland, which is the only country covered by this research project that is not a member of the EU. Experts from Switzerland were invited to participate because of the **important constitutional reforms adopted in Switzerland to guarantee parliamentary participation in global governance issues** as well as a role for direct democracy in these matters.[43] It emerges from the other reports that the Swiss reforms, by and large and comparably speaking, can be considered both pioneering as well as extensive. In other countries, international law has traditionally remained a matter of one-way reception. It is thus hoped that the Swiss experience will be of considerable wider interest, and will foster thinking and discussion elsewhere.

7 The Comparative Study: Outlining the Broader Trends and Processes Emerging from the National Reports

The wealth of material collated in the national reports is synthesised in a comparative monograph written by the Principal Investigator of the project, Anneli Albi. This will be published as an accompanying, linked book entitled *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. A Comparative Study* (T.M.C. Asser Press, 2019), and is referred to in the present book as the 'Comparative Study'.[44] The Comparative Study outlines a number of important issues and challenges that are shared by a significant (but not always overlapping) range of Member States. Furthermore, **it identifies broader, overarching trends and processes** that at times surprised the editors and in our view warrant wider attention.

By way of examples, these include **the shift in a large number of Member States from the rule of parliamentary reservation of law to the use of governmental decrees** when implementing EU law, including – somewhat strikingly – when limiting fundamental rights and imposing sanctions.

[43] See the report on Switzerland by Kunz and Peters in this book [Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland].

[44] Readers writing a book review are kindly asked to obtain a copy of both books – the two-volume book with the national reports as well as the Comparative Study – from the publisher, and to review these together.

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The existence of **a wider, endemic strain on constitutional values** emerged most clearly in relation to **the near-automatic process of extraditions under the European Arrest Warrant system**. Numerous ombudspersons, NGOs and associations of defence lawyers, courts and especially lower instance courts, a considerable number of dissenting judges in the highest national courts, as well as other institutions and scholars – especially scholars in the field of criminal law – in a large number of Member States have expressed significant concerns about the presumption of innocence and other defence rights, and about the absence of judicial review in extradition cases. Judicial review is not allowed even in cases where serious fundamental rights concerns have been expressed in the context of deprivation of personal liberty. Strikingly, in several reports it was observed that the European Commission, in its critical evaluation reports, has required constitutional and legislative amendments to remove protective provisions in the Member States (see especially the accounts in the reports on Cyprus, Croatia, Ireland and Italy).

Regarding the **EU Data Retention Directive**, whilst in the mainstream European discourse the constitutional challenges have widely been portrayed as cases representing national constitutional identity, it emerged that **privacy** and **protection of home and correspondence** have '**deep roots**' **in the continental European constitutional tradition**.[45] They have especially been subjected to **heightened protection and safeguards in the post-totalitarian constitutions**, given the historical experience of these countries with pervasive state surveillance. Although the Directive was eventually annulled by the CJEU on the second round, the far-reaching consequences have been difficult to undo. A 'taboo' was broken, as observed above in the Austrian report. As with the EAW, there has been a **spillover** from the originally intended use for serious crime into other areas. Additionally, in a development representative of a wider trend, a uniform, autonomous, self-referential standard was set by the CJEU in *Digital Rights Ireland*[46] on the basis of Arts. 7 (privacy) and 8 (data protection) of the EU Charter combined with the principle of proportionality. The more stringent approach and the diversity of the rights protected under many national constitutions and by many national constitutional courts were by and large displaced.

By way of examples from other areas, in the approach to **the rules on publication of laws**, for post-totalitarian constitutional systems there has been a shift through CJEU case law from the rule that an unpublished law is void and non-existent *ab initio/ex tunc* to the 'valid but not enforceable against individuals' approach that applies in France and Belgium. Similarly, with regard to the post-totalitarian constitutional systems, the Comparative Study documents significant changes in the approach to **limitation of fundamental rights** and in the interpretation of the principles of **legitimate expectations** and **non-retroactivity** as

[45] Hogan 2014, pp. 162–164. See also the report on Ireland by Hogan in this book [Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country], Sect. 2.10.1.

[46] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

well as **the principle of proportionality** through CJEU case law. Additionally, several national reports mentioned **strains on legal certainty** and on the clarity and '**quality of law**'.[47] A further host of profound changes emerged in a chapter exploring the **'relocation' of judicial review from constitutional courts to the European Court of Justice** in increasingly wide areas of law. These changes are discussed in the Comparative Study in the light of emerging literature where concerns have been expressed about the displacement or exclusion of constitutional courts and national highest courts, along with their well-established case law.[48]

Another area where widespread disquiet emerged concerns **the severe and prolonged erosion of the social state dimension of Europe's post-totalitarian and some traditional legal constitutions through the EU and/or IMF euro crisis measures**, e.g. by **curtailing social rights** (as well as funding for social benefits by redirecting state funds e.g. to the ESM) and reducing the protection of workers.[49] The strain on the social state is most clearly evident in the reports on Portugal, Greece, Latvia, Romania and Spain.[50] The euro crisis developments are further explored from the perspective of constitutionalisation as constitutional entrenchment – through the Treaties – of a certain economic order. As part of this broader theme, the Comparative Study explores constitutional issues relating to the

[47] This issue is explored report on Finland by Ojanen and Salminen [Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism], the report on Cyprus by Kombos and Laulhé Shaelou [The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation] and the report on Denmark by Krunke and Baumbach [The Role of the Danish Constitution in European and Transnational Governance] in this book. For specific guidance that implementation of EU law ought not to weaken the 'quality of law', see the work of the Finnish Parliament's Constitutional Law Committee, as outlined in the report on Finland by Ojanen and Salminen in this book [Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism], Sect. 2.3.6.

[48] See e.g. Komárek 2014, pp. 16 et seq.

[49] Whilst the observations regarding the social welfare dimension are also relevant e.g. with regard to the Nordic countries, in the political type of constitutions, social rights tend to be regulated at the legislative level rather than being entrenched through the text of the constitution. As it was seen above (see the text accompanying links to n. 36 and 37 respectively), historically, in the case of Germany and subsequently other post-totalitarian constitutions, protection of the social state was prompted by the lessons that the root causes of the rise of authoritarian and totalitarian governments are economic insecurity and dependence. This historical observation would seem to have significant contemporary relevance, but has perhaps been unduly neglected in the prevailing discourse where recent illiberal developments have predominantly been attributed somewhat generically to populism and nationalism.

[50] See the report on Portugal by Pereira Coutinho and Piçarra [Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution], the report on Greece by Contiades, Papacharalambous and Papastylianos [The Constitution of Greece: EU Membership Perspectives], the report on Latvia by Krūma and Statkus [The Constitution of Latvia – A Bridge Between Traditions and Modernity], the report on Romania by Iancu [Romania – The Vagaries of International Grafts on Unsettled Constitutions], and the report on Spain by Solanes Mullor and Torres Pérez [The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance] in this book.

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privatisation of public services and the entrenchment of independent regulatory agencies in the process of market liberalisation, which are mentioned in several national reports.[51]

The revised typology of constitutional systems that was briefly outlined in the preceding section is relevant for the understanding of the **broader patterns that emerge in the Comparative Study in terms of whether EU law has given rise to constitutional conflicts in individual Member States**. It should be noted that the study here does not concern areas where rights have been advanced – typically in an activist manner – in fields of EU law such as free movement, non-discrimination, gender equality and consumer protection, which have been extensively researched in the existing literature.[52] In general terms – with of course exceptions – a pattern can be discerned whereby EU law has strengthened the protection of fundamental rights and the general principles of law and has expanded judicial review in countries with a political or historical constitutional system. However, this strengthening has often come at the cost of a reduction in the priority of parliamentary and democratic processes. These developments are perhaps most evocatively captured in the titles of the national reports from the UK ('Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification'[53]) and Sweden ('The Constitution of Sweden and European Influences: The Changing Balance between Democratic and Judicial Power'[54]). At the same time, EU law has caused strain with regard to the standards previously established by the constitutional courts in the Member States with a post-totalitarian constitutional culture, both in

[51] See the report on Spain by Solanes Mullor and Torres Pérez [The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance], the report on Portugal by Pereira Coutinho and Piçarra [Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution], the report on Belgium by Popelier and Van de Heyning [The Belgian Constitution: The Efficacy Approach to European and Global Governance], the report on Slovenia by Bardutzky [The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain], the report on Austria by Lachmayer [The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity], the report on Croatia by Goldner Lang, Đurđević and Mataija [The Constitution of Croatia in the Perspective of European and Global Governance], the report on Finland by Ojanen and Salminen [Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism], and the report on Hungary by Chronowski, Varju, Bárd and Sulyok [Hungary: Constitutional (R)evolution or Regression?] in this book.

[52] This so-called 'double standards' issue is explained in greater detail in the Questionnaire in this book [Questionnaire for the Constitutional Law Experts of the Research Project 'The Role and Future of National Constitutions in European and Global Governance'] (Introduction to Sect. 2 and Sect. 2.6.1). See also Coppel and O'Neill 1992, pp. 670 et seq.

[53] See the report on the United Kingdom by Young, Birkinshaw, Mitsilegas and Christou in this book [Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification].

[54] The report on Sweden by Nergelius in this book [The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power].

Western Europe and in Central-Eastern Europe.[55] This is conveyed in the clearest terms in the title of the Slovenian report ('The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain'[56]). This finding has a further important dimension in the light of other observations in the national reports – which we initially noted with interest and subsequently with an increasing sense of unease – concerning the **numerous direct and indirect ways in which EU law and the CJEU case law have led to the uniformisation and homogenisation of the Member States' constitutional law**. This includes the transition to a uniform ECHR/EU Charter standard in increasingly wider areas of law, including where this entails downgrading national standards of protection.

Another broader pattern in terms of correlation between the type of constitution and the effects of EU law emerged in relation to **constitutional amendments regarding European integration**. In broad lines, this could be based on a distinction between an '**efficacy approach**' and a '**legitimacy approach**', which is drawn in the Belgian report on the basis of Patricia Popelier's study of EU clauses in the national constitutions.[57] As summarised in the Belgian report:

> Two main approaches can be discerned: an 'efficacy approach', which is predominantly occupied by the concern for efficient through-put of EU law, and a 'legitimacy approach', which is specifically concerned with providing legitimacy to inflowing EU law. If a legitimacy approach is adopted, ideally, (a) the transfer of powers is submitted to special procedural and/or substantive conditions, (b) the precedence of EU law over the constitution is contested and (c) constitutional or supreme courts play the role of watchdogs over the constitution, assuming the power to ultimately delineate competences. If an efficacy approach is adopted, (a) the transfer of powers to the EU is allowed without special formal conditions, (b) the precedence of EU law over national law, including the constitution, is uncontested and (c) the judicial review of EU laws and treaties is constrained.[58]

Popelier's study observes that in Belgium, the Netherlands and Luxembourg, an efficacy approach clearly dominates, with Germany being on the other side of the spectrum.[59] This research finding is confirmed in the Comparative Study.[60]

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[55] It is important to note that these conclusions specifically concern the rights explored in the project Questionnaire. In other areas, e.g. as regards prison conditions, media pluralism, the strength of civil society and the actual level of social welfare entitlements, the countries with a political or historical constitutional culture often have some of the highest standards in Europe.

[56] The report on Slovenia by Bardutzky in this book [The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain].

[57] Popelier 2014, as summarised in the report on Belgium by Popelier and Van de Heyning in this book [The Belgian Constitution: The Efficacy Approach to European and Global Governance], Sect. 1.5.3.

[58] The report on Belgium by Popelier and Van de Heyning in this book [The Belgian Constitution: The Efficacy Approach to European and Global Governance], Sect. 1.5.3.

[59] Popelier 2014, p. 316.

[60] See also, for example, the extensive constitutional conditions and adjudication outlined in the report on Germany by Grimm, Wendel and Reinbacher [European Constitutionalism and the German Basic Law], and the observations about the absence of constitutional conflicts in the report

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Additionally, it emerges that a solution akin to the 'efficacy' approach has also been adopted in Ireland, Cyprus and Estonia, whereas the 'legitimacy' approach prevails in most of the post-totalitarian constitutional cultures. The tensions that an 'efficacy'-based approach presents to a post-totalitarian constitution that has been influenced by the German Constitution are perhaps most evident in the Estonian report. What might appear to be the ideal solution from the perspective of the EU legal order – suspending conflicting constitutional provisions in order to ensure the full supremacy and effectiveness of EU law – has led to widespread concerns amongst Estonian lawyers about negating the hitherto binding, enforceable and rights-protective Constitution, as well as to practical difficulties in constitutional adjudication by the Supreme Court.[61]

Whilst the working title of the book was '*The Role of National Constitutions in European and Global Governance*', the above findings led us to expand the title and add '***Democracy, Fundamental Rights, the Rule of Law***'. With this subtitle, we sought to draw attention to the fact that these values have in fact been central to the national constitutions since the Enlightenment, and that these values have also provided the key, expressly worded conditions governing the transfer of powers to the supranational level, especially in the constitutions of Germany, Slovenia and Portugal, as well as in the case law of many constitutional courts. This is important to bear in mind, given that in the mainstream European constitutional discourse, the **national constitutions have primarily come to be associated** with a somewhat old-fashioned protection of **sovereignty** or, more recently, **national constitutional identity**. Sovereignty and the assessment of Euro-friendliness or Euroscepticism have also been the prevailing lens of assessment in the scholarly literature on constitutional courts, where unduly harsh and reductionist language has often been used with regard to those constitutional courts that have sought to retain some degree of constitutional review or uphold constitutional values in the context of EU law.[62] In the Comparative Study, it is submitted that many of the constitutional rights and values that have come under strain in the context of EU law are in fact **comparative European constitutional achievements**,[63] which in several aspects quite possibly represent **the most advanced constitutionally codified and judicially protected fundamental rights, social rights and rule of law safeguards in**

on Luxembourg by Gerkrath [The Constitution of Luxembourg in the Context of EU and International Law as 'Higher Law'], both in this book.

[61] For a summary of the discourse, see the report on Estonia by Ernits, Ginter, Laos et al. in this book [The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law] in this book, Sects. 1.2.3, 1.2.4, 1.5.3, 1.3.4, 2.3, 2.7 and 2.8.

[62] These trends in the scholarly literature have been documented with references in Albi 2015a, Sect. I and Albi 2015b, Sect. VIII.

[63] The expression 'constitutional achievements' is borrowed from Dieter Grimm, who uses it more generally in relation to the democracy and rule of law elements in modern constitutions (Grimm 2012, p. 104). See also Somek (2014, p. 10), who regards especially the constitutions based on the German model as representing the emancipation of constitutionalism – see below n. 99 and the accompanying text.

the world. However, the understanding of these has started to fade, as will be noted below.

At this juncture, it should be underlined that throughout the project, **EU and international treaties and rules that protect human rights, ensure peace or enhance environmental protection** are regarded **as part of the constitutional achievements**. Indeed, especially the ECHR has a constitutional or semi-constitutional status in the internal legal order of a large number of the countries studied. However, the material synthesised would seem to indicate a need for **a more differentiated and nuanced approach** in discussions on the domestic constitutional reception, on the one hand, of the above type of treaties and, on the other hand, of **treaties and instruments that may have adverse effects on rights and constitutional values** or that significantly curtail democracy beyond the constitutionally entrenched values. Some examples of such adverse effects from EU law were brought earlier in this section (e.g. the European Arrest Warrant and the Data Retention Directive). Regarding some constitutionally problematic examples from international and global law, the reader is invited to take a look at the following accounts in the national reports: the cases regarding IMF and/or European Commission instruments whereby already subsistence-level pensions and social benefits were drastically cut and social rights were curtailed along with the principle of legitimate expectations (reports on Latvia, Portugal, Greece and Romania; see also more generally the report on Spain); the adjudication of international extradition treaties (reports on Poland, the UK, Cyprus, Portugal, France); issues around access to judicial review regarding measures implementing targeted sanctions against individuals under the UN anti-terrorist resolutions and blacklists (reports on Belgium, Switzerland and the UK); the question whether parliamentary ratification and/or implementation by parliamentary law is needed for international instruments such as extradition treaties, UN sanctions targeting individuals, and IMF memorandums of understanding and loan agreements (reports on Latvia, Finland, Ireland and Belgium); the role of private actors in global governance, including their unpublished but binding technical standards (reports on the Netherlands, Estonia and Austria); transparency and access to documents in the context of international co-operation (the reports on Sweden and Finland); and constitutional issues regarding the effects of international investment arbitration treaties (reports on Romania and the UK).

Regarding the material in the national reports, in addition to outlining the domestic case law and legal discussion, we also **invited the constitutional law experts to express their own views on how some of the older and more recent points of debate in the EU constitutional and judicial dialogues could be addressed**. For example, we asked for the experts' assessments relating to the provision of higher standards of protection, if hitherto so provided under the national constitution, in the context of the ongoing debate regarding Art. 53 of the EU Charter. What role do the experts see for the common constitutional traditions? Would there be value in bringing national constitutional concerns to the CJEU and other European institutions and, if so, what avenues ought to be used? And, ultimately, how do the constitutional scholars see the role of national constitutions in

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European and global governance? The editors are immensely grateful to the project experts for joining us in constructively thinking about the new challenges to constitutional law posed by transnational governance. Their key observations are summarised in the Comparative Study, along with some specific policy recommendations.

The Comparative Study concludes with broader observations about an ongoing, gradual **process of transition from the paradigm of (comparative) constitutional and public law to the paradigm of governance that prevails in EU law and large parts of transnational law**.[64] The governance paradigm is predicated on a different underlying logic, which in the main seems to have emanated from the neofunctionalist thinking that underlies much of the European integration and transnationalisation processes and discourses. Other underlying theoretical constructs of the governance paradigm include e.g. the '[c]ontemporary delegation theory, with its emphasis on principal, agents, and dilemmas of agency control', which 'is an adaptation of concepts of contract law to the political world', including concepts from fiduciary constitutionalism, the law of trusts and other private law concepts.[65] It is not easy to reconcile these theories and classic constitutionalism. For example, the core tenets of neofunctionalism that drive supranational governance are integration-through-law, spillover, 'never let a good crisis go to waste', and the mobilisation of and instrumental use of law, of courts, institutions, political, bureaucratic and business elites, scholarship, as well as individuals and their rights towards a gradual shift of law, authority and loyalty from the national to the supranational level.[66] Whilst this has led to many progressive developments with lasting, beneficial changes, **there is a structural flaw in neofunctionalist constitutionalism**, in that it views national constitutional law as inherently inferior for the simple reason that it is national and based on a sovereign state. There has been a blind spot to and fading understanding of the comparative European constitutional achievements, which in many respects may quite possibly be the most advanced in

[64] Some aspects of such a paradigm change from constitutional and public law to governance have been identified by the following scholars: Joana Mendes (with regard to transnational technical regulatory regimes with norms that acquire the status of EU legal acts and also acquire supremacy through incorporation into EU law without traditional avenues for participation (Mendes 2014, p. 371)); Alexander Somek (in EU governance, constraints on public power have become economic (Somek 2014, pp. 23–24; see also above n. 13 and the accompanying text)) and Agustín Menéndez (conceptual innovation in legal research (Menéndez 2014, p. 140; see below n. 85 and the accompanying text)).

[65] Cf. e.g. Sweet and Brunell 2013, p. 67, with further references, including the influential writings of Giandomenico Majone.

[66] For an overview of the core tenets of neofunctionalism, see e.g. De Búrca 2005, pp. 316 et seq. and Sweet 2012. The Principal Investigator would like to acknowledge that the draft chapters of Maris Moks' Ph.D thesis 'Guardianship of the Constitution versus the Expectations of the European Integration: Judicial Review of the Euro-crisis Management' (Hertie School of Governance in Berlin), which contained an extensive literature review, greatly helped her to formulate the broader observation about a change from the constitutional law mindset to a neofunctionalist mindset, especially as regards the changing role of courts towards agents of integration in the neofunctionalist theory.

the world, as noted above. A good example to illustrate the difference between the neofunctionalist and the comparative European constitutional thinking is the commentary on the *Pupino* case.[67] Lawyers specialising in EU law widely regard it as a milestone 'constitutional' case, as it extended indirect effect, effectiveness and loyal co-operation to the then third pillar. Lawyers specialising in the field of constitutional law and criminal law, however, point out that the case concerned application in the field of criminal trials of a framework decision that had not yet been implemented in national law and that had furthermore been adopted at the ministerial level by the EU Council. These aspects raise profound concerns from the point of view of the classic values protected in Europe's national constitutions, such as the principles of the rule of law, including maximum certainty in criminal law, clearly determined provisions and democratic legitimisation by parliamentary law.[68]

A tentative **list of foundational changes** in the transition from the classic constitutional law paradigm to the governance paradigm is compiled in the Comparative Study. Examples of such foundational changes include: a broader shift from constitutions to the Treaties as the normative point of reference and thereby to a market-oriented order or – in the euro crisis governance – to the exercise of public power simply on the basis of general economic exigencies; a shift from constitutional and rule of law requirements to the prioritisation of effectiveness, policy objectives and functionality; a changing understanding of the role of courts and constitutional courts in the neofunctionalist literature and in practice; a change away from the liberal separation of powers to a new autonomous system; an approach to fundamental rights whereby fundamental rights are treated as restrictions to economic freedoms and are ultimately subordinated to them as well as to the imperatives of uniformity and effectiveness; a changing understanding of the rule of law; the disappearance of constitutional law as higher law; and the manifold changes at the EU and national level towards executive governance, especially the gradual phasing out of national level democracy and the chain of legitimacy between public power and a territorial community of people. The severe curtailment of parliamentary democracy and control over the budget due to the very large financial liabilities undertaken by virtue of the ESM Treaty have been subject to particularly acute constitutional debates and challenges in Germany, Estonia, Ireland, Austria, Poland and to some extent in Lithuania, as documented in the respective national reports. In addition, the issue of parliamentary control over large-scale state guarantees was also at stake in the EFSF (European Financial Stability Facility) case before the Slovenian Constitutional Court.

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[67] Case C-105/03 *Pupino* [2005] ECR I-05285.

[68] For a critical assessment of the constitutional significance of *Pupino* for EU law, see Herlin-Karnell 2007, pp. 1151 and 1154. More generally on the uneasy fit between EU criminal law and classic values in European criminal law and constitutional law, see the concerns of fourteen scholars in the 'Manifesto on the European Criminal Policy' (2009) *Zeitschrift für Internationale Strafrechtsdogmatik*, Issue 12, 70–716, at 715, available online at http://www.crimpol.eu/; Schünemann 2007, p. 227; Walsh 2009, pp. 5–34.

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A more general foundational change may be, as a number of leading political scientists have observed, that the governance model is 'post-political' or 'unpolitical', and in fact oriented towards constraining dissent.[69] The picture that emerges from the national reports does little to alleviate this concern. For one, there is a near-absence of formal structures for invoking national constitutional grounds at the EU level, at least beyond the subsidiarity and proportionality arguments for national parliaments and for the national constitutional identity ground in judicial proceedings. Indeed, the Maltese expert makes the very commendable suggestion to extend the *ex ante* yellow card mechanism of national parliaments to a fuller monitoring procedure, which would include essential constitutional concerns beyond subsidiarity and proportionality.[70] The severely constrained scope for national level democratic protest or even for constitutional review by constitutional courts is perhaps most compellingly evident in the proceedings in which the European Commission threatened or imposed fines on Sweden and Germany for delays in implementing the Data Retention Directive, explored in the respective national reports. The scope for demonstrations and protest has been further reduced in different ways by CJEU rulings in cases such as *Schmidberger*, *Viking Line* and *Laval*,[71] as well as by the European Commission and IMF economic conditionality measures that require the curtailing of trade union rights.[72] In general, we observed a **near-absence of debate in a considerable number of countries**[73] regarding EU measures that in many other Member States had raised heightened concerns and extensive discussion about deficiencies in rights protection.

The Comparative Study further explores the corresponding **changes in constitutional thinking and constitutional vocabulary,** which have increasingly become the default, new baseline for constitutionalism, especially for the younger generations of scholars and lawyers. Indeed, one point of added value of the national reports is that many of them contain detailed documentation of the clashes between the classic constitutional thinking and the governance-oriented mindset.

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[69] For references to literature, see Bouza Garcia 2017, pp. 348, 349, 340.

[70] The report on Malta by Xuereb in this book [The Constitution of Malta: Reflections on New Mechanisms for Synchrony of Values in Different Levels of Governance], Sects. 2.12.3 and 2.13.4.

[71] Case C-112/00 *Schmidberger* [2003] ECR I-05659; Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

[72] On the latter, see especially report on Spain by Solanes Mullor and Torres Pérez [The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance], and the report on Greece by Contiades, Papacharalambous and Papastylianos [The Constitution of Greece: EU Membership Perspectives], in this book.

[73] The absence of debate is in particular mentioned in the report on Lithuania by Jarukaitis and Švedas [The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges], the report on Slovakia by Vikarská and Bobek [Slovakia: Between Euro-Optimism and Euro-Concerns], and the report on Bulgaria by Tanchev and Belov [The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance] in this book.

A careful reader may well observe that the former tends to remain on the dissenting or losing side (e.g. the grounds and arguments used by dissenting judges, traditional constitutional litigants such as ombudspersons, defence lawyers' associations and minority groups of MPs). Different aspects of the changes in the constitutional language in the transnational context are more specifically explored in the reports on Italy, Romania and Germany.[74] On a more general level, the fact that **the language of constitutionalism in transnational law has little in common with the world of comparative constitutional law** has perceptively been explained on the basis of an extensive literature review by Peer Zumbansen.[75] Transnational constitutionalisation depicts the dynamic forces of constantly newly emerging functional and specialised fora of law-making.[76] The risk, according to Zumbansen, is that the focus on limiting or placing constraints on governmental power, which is the central tenet of 'traditional constitutionalism', has been displaced.[77] The focus is on the autonomy of the emerging global legal order from claims from the nation state, and there has been 'erosion of institutionalized, accountable exercises' of political power.[78]

Whilst scholarly research has hitherto predominantly focused on the benefits of EU and transnational constitutionalism, the present study looks at the risks arising from the way these ongoing processes have changed the application of the classic European understanding of constitutionalism and of the concept of the rule of law. It seeks to invite discussion on the shift to the governance paradigm, along with the merits and demerits of the gradual transition to autonomous EU constitutional law, and on the optimal balance between striving toward uniformisation and retaining the diversity of the national constitutional cultures. Discussion on the profound changes would also seem particularly timely, as the EU is moving towards the mutualisation of debt and ultimately to the EU raising its own revenue that would in the last resort be backed by the Member States,[79] and whereby individual Member

[74] See the report on Italy by Martinico, Guastaferro and Pollicino [The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?], the report on Romania by Iancu [Romania – The Vagaries of International Grafts on Unsettled Constitutions], and the report on Germany by Grimm, Wendel and Reinbacher [European Constitutionalism and the German Basic Law], in this book. See also notes 5 and 92 and the accompanying text. The report on Romania [Romania – The Vagaries of International Grafts on Unsettled Constitutions], additionally, makes perceptive observations about the change of the constitutional language in the quasi-constitutionalisation of the EU anti-corruption conditionality in Romania.

[75] Zumbansen 2012, p. 47, see also pp. 31 and 38.

[76] Ibid., p. 47, with further references.

[77] Zumbansen 2012, p. 38, with further references.

[78] Ibid., p. 47.

[79] The European Commission sees 'a step-by-step, policy-by-policy basis' advancement towards the latter as the ultimate goal according to its Communication 'A blueprint for a deep and genuine monetary union. Launching a European Debate' (COM 2012 777 final/2 30.11.2012, http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf). According to the Commission Blueprint, if the guarantee is claimed by creditors, accountability through national parliaments is no longer relevant and shifts to the European Parliament.

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States and their parliaments would no longer be in control of their financial liabilities. This may well mark a significant transformative turning point – and one of no return – for classic European constitutionalism.

8 The Broader Importance of the Project for the Future Direction of Travel for National, Comparative European, EU and Global Constitutionalism

We hope that the readers will come to agree that such thinking and discussion about the future direction of travel for European constitutionalism is of real and pressing importance. In the past, EU law has been developed primarily in a top-down, autonomous, self-referential manner from the perspective of the needs and priorities of the EU legal order. On the one hand, European integration has brought **important, lasting benefits, which include peace and stability, relative prosperity, freedom of movement** and the **broadening of important opportunities for individuals** for greater self-realisation and enriched horizons. Indeed, **all of the national reports in the present book strongly emphasise the beneficial changes and impacts resulting from EU law**, as well as the importance of Euro-friendly interpretation of EU law by courts and of the (now predominantly extensive) national constitutional provisions that ensure openness to European and international law. European integration also entails valuable external mechanisms of control vis-à-vis national institutions, the need for which has been illustrated clearly e.g. by the developments towards an illiberal regime in Hungary and, since autumn 2015, in Poland. On the other hand, the increasing concerns with regard to governance at the EU level as well as the maturing of the EU legal order in general, make it the right time to consider a greater inclusion of perspectives that are more accommodating of national and comparative constitutional values and concerns, in a two-way[80] or multi-directional, pluralist process. The national reports in the present book are an essential precondition for such a multi-directional process, as they provide a wider audience with an overview of national case law and constitutional debates, of which there has typically been little awareness in the mainstream English language European constitutional discourse. Indeed, a recent BBC article raised the question '[a]re we "losing knowledge" because of the growing dominance of English as the language of higher education and research?'[81]

One could add that indirect mutualisation of debt liabilities through asset purchases by the European Central Bank programme and the need for a continued chain of democratic legitimacy between the people and the exercise of public power were also the underlying issues in the *OMT* case from the German Constitutional Court, BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366.

[80] Mutanen 2015, pp. 387, 392–393.

[81] Pickles, M. (20 January 2016) Could the dominance of English harm global scholarship? BBC News. http://www.bbc.co.uk/news/business-35282235.

Upon reading the national reports, the editors developed a sense that this concern is of direct relevance to constitutional law in terms of losing constitutional knowledge more generally. We even had a sense that perhaps national constitutions and national constitutional law are being displaced and written out of mainstream English language European constitutional narratives. Historical accounts have documented the considerable investment by the European Commission in founding specialised EU law journals and university centres, with the aim of shifting EU studies away from a comparative analysis of national laws (which would aim to identify common principles) to the study of the 'specificity' of EU law, focusing on the relationships between EU law (and the CJEU) and national law (and courts).[82] On a broader level, Anne Lise Kjaer has raised a concern about the far-reaching impact of the changes in the discourse:

> [W]hat will happen to the mutually divergent national languages and cultures of law when independency and autonomy of a common European law are presumed by an increasing number of European lawyers; when they accept the European Courts as legitimate interpreters of a supranational and transnational European law and involve themselves in an increasingly self-referential European legal discourse with lawyers from other European countries; and when communicating about law and speaking the law are no longer conducted in divergent national legal languages, but ***in a Europeanized legal language with no reference to the domestic laws of the Member States*** [emphasis added].[83]

Sharing the broader concern expressed by Kjaer with regard to the disappearance of comparative law, the editors more specifically have a sense that in the quest for new epistemic communities to build the autonomous, self-referential and new constitutional order of the European Union,[84] there is a substantial risk that some of the distinctively and uniquely valuable comparative European achievements in constitutionalism are being left behind and lost. Whilst this general impression had been based on reading mainstream English language European constitutional law literature, the Principal Investigator, since having started to write and present papers on the above topics, has been struck by the significant and growing number of researchers, doctoral students and even eminent, agenda-setting EU law scholars who have informally mentioned that they have never heard of what Pinelli above described as a continental European constitutional tradition that is predicated on post-totalitarian constitutional safeguards.

Thus, when taking a look at the national reports, the reader is invited to consider the broader question of **what ought to be the direction of travel for national, comparative European, EU and global constitutionalism**. Whilst 'EU', 'global' and 'post-national' constitutionalism may sound inherently more progressive, advanced and appealing, on a closer look they also entail an element of vagueness and even hollowness if compared e.g. to the post-totalitarian constitutional tradition

[82] Vauchez 2009, pp. 20–21.

[83] Kjaer 2015, p. 98.

[84] The shift from comparative European constitutional law to the autonomous EU constitutional law in the mainstream discourse has been explored and documented in greater detail in Albi 2015b, Sect. VIII.

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in continental Europe noted above, at the essence of which are extensive, precise, constitutionally codified and judicially protected fundamental rights and rule of law safeguards. There is a danger of conflating European constitutional law with EU constitutional law, which is in fact very different. The distinction, however, has increasingly become muddled and blurred. Indeed, in the large volume of books and articles written in this field, one can discern that the expression 'European Constitutional Law' has already predominantly come to denote EU constitutional law, often with no mention of Europe's national constitutions. Similarly, the term 'Europeanisation' has predominantly come to denote transition to autonomous EU law and to the EU governance model, rather than referring to the classic comparative European constitutional values.

The difference between EU constitutional law and continental European constitutional law has also been observed by a growing number of scholars. For example, Agustín Menéndez has pointed out that 'European legal studies have been very keen … on conceptual innovation', which includes a switch to 'governance' amongst other concepts. He finds that it may be a suitable time to 'reconstruct European constitutional law with the help of "classical" democratic constitutional theory, as developed for decades in national Social and Democratic *Rechtsstaats*'.[85] Menéndez regards '**the collective of national democratic constitutions**' in Europe as '**[t]he deep constitution of the European Union**, the ultimate normative foundation of the whole edifice of the Union', rather than the EU Treaties. He finds that '[w]hen integration starts going against the key normative content of the national constitutions, it is time to start using such constitutions … as the ultimate source of the yardstick of European constitutionality'.[86] Nicola Lupo and Giovanni Piccirilli note the 'progressive decline of the formal categories that dominated the public law literature in the past two centuries' in the context of CJEU as well as ECHR case law. They highlight the risks to democracy, fundamental rights and to the legality principle, and express concern that there has been a shift towards the 'lowest common denominator' of the legality principle.[87] Lupo and Piccirilli have put forward a plea that the parliamentary process in the first instance, and the ordinary and constitutional courts as a second step in the process, ought to promote and protect fundamental rights 'in order to restore the legality principle to its proper place'.[88] In a similar vein, the Principal Investigator has elsewhere outlined the procedural, formal, thin nature of EU constitutionalism where the keywords are supremacy, uniformity, direct effect, autonomy, effectiveness and trust. She has propounded the concept of 'substantive co-operative constitutionalism', in which the aim would be to uphold the established standard of protection of fundamental rights, the rule of law and other constitutional values, and also to retain the

[85] Menéndez 2014, p. 140.

[86] Menéndez 2013, pp. 525–526 (references omitted). Emphasis added.

[87] Lupo and Piccirilli 2015, pp. 55–56.

[88] Lupo and Piccirilli 2015, pp. 76–77.

diversity of national constitutional orders.[89] Jan Komárek has cautioned against transition to autonomous EU fundamental rights protection, especially in the Area of Freedom, Security and Justice, as EU constitutional law rests on the foundations of a market integration project and not on the post-war liberal constitutionalism that underlies Europe's national constitutions.[90] Susana Galera has written that 'Europeans share a well-defined doctrine about the European understanding of rule-of-law requirements, initiated in 1949 by the Council of Europe', whereas in the EU context, 'persistent gaps in the EU judicial review system and the different understanding of what judicial independence or division of powers means … represent a serious divergence affecting values and principles that have been applied for a long time on the European institutional scene'.[91] Amongst the national reports, the Italian report points out that the idea of constitutionalism propounded by leading international scholars 'does not readily correspond to what constitutional lawyers mean by the same word', and is 'conceived as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism'.[92] The report underlines the importance of parallelism and axiological continuity between the values inspiring the domestic activity of the Italian Republic and those inspiring the external dimension (cf. the title 'The Constitution of Italy: Axiological Continuity between the Domestic and International Levels of Governance?').

It should be noted that another extensive part of the discourse associates European constitutionalism with the **ECHR**. Although the ECHR is beyond the scope of the present study, it is important to underline that the ECHR is regarded here, as explained above, as **part of the well-established achievements of constitutionalism at the international level**. Indeed, it emerges from the reports that the ECHR (and other international human rights treaties) has a constitutional status in the internal legal order in a large number of the countries studied, it is extensively and routinely referred to by the constitutional courts and other national courts, and the judgments of the European Court of Human Rights in Strasbourg (ECtHR) have widely had extensive rights-advancing, transformative effects. However, what is often overlooked is that **the ECHR sets the minimum floor of protection** for forty-seven countries in the wider European area, and the ECtHR grants the states a considerable **margin of appreciation**. Whilst the ECHR is the main domestic instrument of fundamental rights protection especially in several political/historical and traditional legal constitutional systems, in many others – especially among the post-totalitarian constitutional systems – the text of the constitution and the constitutional court have provided a higher and more extensive level of protection, also simply to a much greater range of fundamental

[89] Albi 2015b, Sect. VIII ff.

[90] Komárek 2014, pp. 12–13, with references to further literature.

[91] Galera 2010, p. 302.

[92] The report on Italy by Martinico, Guastaferro and Pollicino in this book [The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?], Sect. 3.1.4, some references omitted. The changing vocabulary of constitutionalism is further explored in Martinico 2015. On this, see also references to national reports and literature supra in notes 5, 74 and 75. and the accompanying text.

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rights than those listed in the ECHR. By way of some typical examples, unlike most continental European systems, the ECHR does not require the adoption of a parliamentary statute for the limitation of fundamental rights, and it does not contain a list of social rights. Through EU law, however, the ECHR standard has in many areas become the maximum standard rather than the minimum floor.

In this context, the Comparative Study also seeks to draw attention to **the centre-periphery dimension** in the mainstream English language EU and transnational constitutional discourse. That is, the leading, influential, agenda-setting scholars and experts often come from what in terms of the scholarly discourse could be regarded as the 'centre' countries, many of which – especially the Netherlands, Belgium, the UK and Ireland – have a political/historical or traditional legal type of constitutional system, where fundamental rights protection is mainly based on the ECHR and the constitutional system is regarded as more pragmatic or 'efficacy'-oriented, as seen above. Additionally, considerable influence is held by US constitutional scholarship. Notably, in the euro crisis management, studies by economic actors have expressly called for political reform in '**political systems around the periphery**' – especially Portugal, Spain, Italy and Greece – where the 'shortcomings' of the political and constitutional legacy include 'weak executives', 'constitutional protection of labour rights' and 'the right to protest'.[93]

Whilst one limitation of the present book is its Euro-centric approach, the above questions are also more broadly relevant to what might be described as '**global constitutionalism**' and '**global rule of law reform**'. One of their elements is the above-mentioned **shift to autonomous transnational and global standards and rules**, with displacement of institutional accountability mechanisms as well as of standards of fundamental rights protection and constitutional review that have been established in traditional, state-based constitutionalism.

There is a further influence on the direction of travel that is relevant to global constitutionalism and global rule of law reform: **the constitutional law of and constitutional thinking in the United States**. The differences between the US and European (comparative) constitutionalism have been explored by leading comparative law scholars in a book edited by Georg Nolte under the auspices of the Venice Commission (the Council of Europe's Commission for Democracy through Law).[94] Nolte observes that while focus during the Cold War era was on the similarities between US and European constitutional thought, in the present-day processes of globalisation and European constitutionalism – in the meaning of EU integration – attention on their differences has gained in importance. EU constitutionalism, as Nolte notes, 'seems to embody something which is both **more removed from the "people"** and **more vague** than national constitutional law', with clear-cut differences starting to

[93] Mackie et al. 2013, pp. 12–13. Emphasis added.

[94] Nolte 2003a.

disappear and 'characteristic constitutionalisms' being transformed.[95] Some concrete, profound differences between US and continental European constitutionalism include the following: the minimalistic approach to the role of the state and to fundamental and social rights in the US; the continuing debate in the US over the legitimacy of judicial review of legislation, which is known as the 'counter-majoritarian difficulty'; and the different approach to separation of powers, e.g. as regards the extensive role of independent agencies.[96] Profound differences between the continental European tradition and US constitutionalism are found in the approach to courts and defence rights in criminal law and the understanding of human dignity, liberty, and the rule of law in this context. The continental European approach to constitutionalism and the rule of law places a strong emphasis on manifold safeguards for access to courts, and on the presumption of innocence and defence rights. By contrast, in the US, about 95% of criminal cases are resolved by the system of plea-bargaining, which entails out-of-court negotiations where there is no trial at all. This system has been explored in greater detail by Fair Trials International, which has expressed concern that the US has promoted the global spread of out-of-court plea-bargaining as part of the global rule of law reform.[97]

An understanding of the differences in the US constitutional system is crucial to the future direction of travel for European countries because the United States has become the main point of comparison for the EU constitutional order, and this has also impacted substantive European constitutional law. For example, in the Comparative Study, concern is expressed that through the EU mutual recognition system, the direction of travel has been towards removing judicial review in the country of residence in cross-border criminal as well as civil and administrative cases, and generally towards a more punitive and repressive criminal law. The Comparative Study also considers the influence of US thinking about state and social rights on the IMF and European Commission conditionality and austerity programmes. More broadly, we share the concern of Matej Avbelj that the dominant constitutional narrative, which equates the constitutionalisation of the EU with US-style federalism, has been transplanted in a misconceived way that is unsuited to the European constitutional landscape and may be a cause of the present malfunctioning of European integration. Hence, we support Avbelj's call that 'work must begin' on the EU's 'own, genuine and authentic constitutional theory' that would be oriented towards a pluralist legal entity with twenty-eight autonomous legal orders.[98] Some scholars have overtly noted that the point of reference in the quality of constitutionalism today ought to be the

[95] Nolte 2003b, p. 10. Emphasis added.

[96] Some of these are outlined in contributions by different scholars to Nolte 2003a (especially Bognetti 2003). On the 'counter-majoritarian difficulty', see Somek 2014, pp. 15 et seq.

[97] 'Fair Trials to document the use and abuse of plea bargaining worldwide', 8 February 2016, https://www.fairtrials.org/fair-trials-to-document-the-use-and-abuse-of-plea-bargaining-worldwide/; 'What is plea bargaining? A simple guide', 9 February 2016, https://www.fairtrials.org/what-is-plea-bargaining-a-simple-guide/.

[98] Avbelj 2008, pp. 4 et seq., 15 et seq., 23, 24.

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German system rather than the American model, as is discussed more in the Comparative Study, with reference to literature collated by Alexander Somek, who sees constitutionalism as a project of emancipation.[99] Further, Giovanni Bognetti, exploring human dignity, has noted a certain 'ruggedness' of the American system in comparison with the European systems, although he has observed that this ought to be balanced against other values, such as the greater individual initiative and competitiveness enabled by the US system.[100]

Against this background, **for countries beyond the European area in search of good models for developing constitutionalism, awareness about some of the main differences between the EU, the ECHR, Europe's political/historical, traditional legal and post-totalitarian constitutional cultures, and US constitutional law is of direct practical importance for shaping discussion about what models might be considered as optimal**. The present book, along with the Comparative Study, documents these differences in greater detail.

As a concluding note, we hope that the readers will appreciate the little known yet fascinating material in the national reports, which we consider to be of real practical importance, and that the edited volumes will make a contribution towards developing European constitutionalism in a way that would be better informed by comparative European constitutional law perspectives. We believe that the wealth of material, concerns and suggestions stemming from the national constitutional discourses in the Member States will prove to be a useful resource for national judges – as well as members of parliament, ombudspersons and other custodians of constitutional values – who might, in the light of the changes in the discourse described, be in doubt as to whether they should uphold the national constitution. In particular, we believe that in the dialogue with the European Court of Justice, national judges should not shy away from expounding a higher level of protection of fundamental rights or other constitutional values where these exist in national law. We hope that the wealth of bottom-up constitutionalism on display in these two volumes will give them the confidence to do so. It is our aspiration that scholars in constitutional and public law – who have a long and proud tradition in Europe as *custodes* over the exercise of public authority – will perceive this book as confirmation that their vigilance can and ought to continue when public power is transferred to new sites of authority and veiled in new legal orders. Recognition that colleagues in other Member States have similar fears about strains on constitutional values, and the solutions adopted, may provide new vigour for constitutionalism in Europe.

Last but not least, we believe that the present volumes will also be of interest to the judges of the European Court of Justice and the lawyers of the institutions of the EU. In fulfilling their mission to create, interpret and advance European Union law, we hope that they will find inspiration in this comprehensive study that brings together the research of over sixty experts from throughout the Union, highlighting

[99] Somek 2014, p. 10 (emancipation of constitutionalism) and pp. 85–86 footnotes 38 and 42 (summary of writings of authors comparing German and US constitutionalism).

[100] Bognetti 2003, p. 78.

the constitutional traditions common to these European states as well as important elements of diversity that derive from the historical evolution and unique equilibrium of the individual constitutional systems in Europe.

As the book is going to press, we have decided to add the following final observation. In the time after the material for the book was completed, there has been a widespread surge of illiberal and extremist, right-wing political forces across Europe and beyond, and thus the protection of the comparative European constitutional values and achievements has become more difficult. Regrettably, there is a risk that these values may be conflated with general protection of nationalism or populism and dismissed offhand. However, it is hoped that – when looking through the national reports – the reader will agree that there has been a structural oversight, in that advanced comparative European constitutional values and achievements have unduly been left out of the transnational discourse, and that it is important for this omission to be corrected by the mainstream scholarly, political and legal communities, in order to avoid it happening that the protection of these values will be misused by and/or associated with extremist movements.

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Questionnaire for the Constitutional Law Experts of the Research Project 'The Role and Future of National Constitutions in European and Global Governance'

Anneli Albi

Abstract The Questionnaire forms the basis for the twenty-nine national reports which were prepared as part of the research project 'The Role and Future of National Constitutions in European and Global Governance', funded by a five-year European Research Council grant. The Questionnaire contains three main parts, which address the following issues: (1) constitutional culture and constitutional amendments regarding EU membership; (2) constitutional/fundamental rights, the rule of law and constitutional adjudication regarding EU measures such as the Data Retention Directive, European Arrest Warrant and ESM Treaty; and (3) novel challenges that are increasingly highlighted in the wider context of global governance (i.e. beyond the classic international treaties that advance human rights, peace and environmental protection) in relation to democratic participation, judicial review and the rule of law. The different parts of the Questionnaire each start with a brief background outlining the specific constitutional issues or challenges encountered in some Member States, and subsequently invite the national constitutional law experts to explore these in relation to their respective countries. Whilst the mainstream English language European constitutional discourse has typically focused on autonomous EU constitutional law, the Questionnaire seeks to make

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All websites accessed 9 March 2016. The Questionnaire was prepared in January 2014, with some updates indicated in the text of the Questionnaire, along with some general editorial adjustments.

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available case law, doctrine and constitutional debates from the perspective of a multitude of national constitutional systems. It should be noted that the Questionnaire was prepared in 2013-14 when critical scholarly and public discussion about EU and transnational governance was generally rare; the Questionnaire does not address the recent illiberal trends.

Project Summary and Main Objectives

The European Research Council funded project 'The Role and Future of National Constitutions in European and Global Governance' revisits the role of national constitutions at a time when decision-making has increasingly shifted to the transnational level. The project has three objectives. First, it aims to carry out a comparative analysis on how constitutions reflect the transfer of powers from domestic to European and global institutions, and thus to what extent they provide legitimacy to the shift of the exercise of power to the transnational level and retain their social relevance. Secondly, while the discourse has come to associate national constitutions primarily with the protection of sovereignty, the project revisits constitutional values that have a continued importance in the contemporary globalising and pluralist legal setting, such as the protection of constitutional rights, the rule of law, legitimacy and democratic participation. The project explores constitutional court judgments from different Member States that tackle the protection of these rights and values in transnational judicial dialogues, e.g. in the field of data retention, arrest warrants and the Treaty Establishing the European Stability Mechanism (ESM Treaty). The project also assesses the responsiveness of the European Court of Justice (CJEU) with regard to the above rights and values, along with the standard of protection at supranational level. The third objective is to explore challenges that are increasingly highlighted in the context of global governance in relation to legitimacy, democratic control, accountability and the rule of law.

The Questionnaire that follows invited constitutional law experts[1] to reflect on what has increasingly been described as the 'erosion' of constitutionalism,[2] 'twilight of constitutionalism',[3] 'de-constitutionalisation' at the domestic level[4] or the 'hollowing out' of national constitutions[5] and 'waning constitutionalism'.[6] Others have noted a trend towards a thin, weak, procedural version of the rule of law, democratic control and judicial review[7] in the context of Europeanisation and globalisation processes. Are such developments inevitable? If not, are the solutions primarily to be found in the

[1] For the constitutional law experts as well as the countries covered in the project, see the Introduction and the Preface in this edited volume.

[2] Grimm 2010, p. 4.

[3] Dobner and Loughlin 2010, p. xi.

[4] Peters 2006, p. 580.

[5] Peters 2005, p. 41; see further Introduction to Part 3 of the Questionnaire below.

[6] Rasmussen 2006, pp. 149–156.

[7] Harlow 2006, p. 195; Galera 2010b, p. 302.

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gradual constitutionalisation processes at the European and global level, as is the prevailing expectation in the discourse on European constitutional law and global constitutionalism? Might there also be a case for a more proactive engagement in upholding and enhancing constitutionalism at the national level? While the 'national' dimension has come to be somewhat tainted and neglected given its connotations of sovereignty, it warrants closer scrutiny, as the national courts, parliaments and other institutions provide the closest and, in practice, the most accessible means for individuals to shape and contest legal measures and hold public power accountable.

Whilst the Questionnaire is of a considerable length, a significant part of it provides an introductory context for the questions that follow, with a summary of a selection of relevant cases and commentary in different Member States. Experts were not expected to answer all questions at equal level of detail; they were invited to focus on issues that have been of particular relevance for the Member State in question. The reports form the basis for the Comparative Study that accompanies the present book with an analysis and synthesis of the research findings, as explained in the introductory chapter of this book.

It should be noted that the Questionnaire was prepared in 2013–14 when critical scholarly and public discussion about EU and transnational governance was, in general, rare and limited. The Questionnaire does not address the recent illiberal trends in different parts of Europe and beyond.

1 Constitutional Amendments Regarding EU Membership

Introduction The first objective is concerned with the role of constitutions *internally* within the state, and explores to what extent the content of the constitutions under examination remains credible and relevant given the realities of European governance. One key function of a constitution is to lay down the mechanisms governing the distribution and exercise of powers, and mutual checks and balances between the legislative, executive and judicial branches of power. In the context of European integration, the national mechanisms of decision-making have seen considerable alteration, given that more than half of the Member States' legislation today has its origins in EU law. Against this background, the key objective of the project will be to provide a comprehensive, comparative overview and analysis of EU-related amendments to national constitutions.

Additionally, the project has sought to test some of the hypotheses explored in the literature surrounding the question of why constitutions are/are not amended. On the one hand, among the benefits of amending constitutions in view of European integration, Bruno De Witte has noted the need to address the 'European deficit' in the national constitutions, due to the fact that the constitutions might be gradually becoming somewhat obsolete with regard to the realities in the exercise of powers.[8]

[8] De Witte 2001, p. 73.

Based on a similar line of thought, Monica Claes and Anneli Albi have in separate writings called on states to take their own constitutions seriously.[9] In Hjalte Rasmussen's view, the absence of EU-amendments in the Danish Constitution has resulted in a process of 'waning constitutionalism'.[10] András Sajó has noted that the silence of a constitution on important issues 'will lessen the constitution's functionality and undermine its social relevance'.[11] On the other hand, the choice not to amend may be due to reasons linked to constitutional culture, the degree of rigidity of the amendment procedures or other factors.

1.1 Constitutional Culture

Q 1.1.1 Constitutions have broadly been divided into two types. The first tend to have a legal character, with detailed rules and enforceability in courts; they have typically been adopted after the fall of an authoritarian regime or other cataclysmic event. The second type of constitutions tend to be more incrementally evolving, evolutionary, historical and political in nature.[12] Is such a categorisation relevant to the Member State in question? If so, in which category does the national constitution fall? Has the national constitutional culture been influenced to a notable extent by constitutional traditions in another country or region?

Q 1.1.2 What is regarded as the rationale and role of the Constitution in the relevant Member State? Do the key elements of the rationale of the Constitution include (a) sovereignty and the organisation of the state; (b) limits to power through the protection of constitutional rights and liberties, the rule of law and the separation of powers with due checks and balances? If the Constitution is concerned with both of these areas and/or further areas, does the centre of gravity fall more into one area in particular?

1.2 The Amendment of the Constitution in Relation to the European Union

Q 1.2.1 How has the national constitution been adjusted in relation to EU membership? Please provide the timeline of the amendments (both in relation to initial membership as well as any subsequent amendments regarding the ratification of the Treaties or any other EU matters) along with the wording of the relevant provisions.

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[9] Claes 2005, p. 124; Albi 2005, pp. 206–210.

[10] Rasmussen 2006, pp. 149–156.

[11] Sajó 2004, p. 427.

[12] For the two categories of constitutions, see e.g. Besselink 2006, pp. 113 et seq., and Albi 2005, pp. 22 et seq.

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Please include amendments where the EU was not explicitly mentioned but which implicitly concerned EU law.

Q 1.2.2 Please outline the constitutional amendment procedure. If different procedural options were available, please indicate which option was used for each EU-related amendment.

Q 1.2.3 If an amendment has been more recent (e.g. from 1995 onwards), please provide some further background on the aims of the amendment, the amendment process and the conceptual background behind the choice of wording. What drove the reform, which obstacles were encountered in the process and which key factors influenced the decisions on the scope and content of the amendment? To what extent was the advice of legal scholars and experts followed by political decision-makers?

Q 1.2.4 Have there been EU-related amendment proposals or related constitutional reform packages which have not materialised in practice? If so, please outline the aims and rationale of the proposals and the reasons why the amendments did not succeed. Are there currently any provisions which have been highlighted as in need of amendment in view of EU membership, or which the Expert considers to be in need of amendment?

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

Q 1.3.1 Regardless of whether the Constitution contains specific amendments, please summarise the rules that govern:

- the transfer or delegation of powers to the European Union;
- the supremacy and direct effect of EU law.

Q 1.3.2 How are the clauses on the transfer or delegation of sovereignty conceptualised in the relevant judgments of the constitutional court and the legal commentary? Would it be fair to say that an older interpretation of absolute sovereignty has been replaced by a modern, revised approach? For example, the Estonian Supreme Court recently made an explicit statement to this effect in the *ESM* case, stating that

> … the Constitution does not require, despite the strict wording of the sovereignty clause, observation of absolute sovereignty. … [M]embership of the EU and in international organisations has become a natural part of sovereignty in this day and age.[13]

[13] Supreme Court of Estonia, Case No. 3-4-1-6-12 on the ESM Treaty, English translation available at http://www.riigikohus.ee/?id=1347, para. 130.

Q 1.3.3 Are there nonetheless limits in the text of the Constitution, case law and/or constitutional commentary to the extent to which powers can be delegated to the EU? Have such limits changed over time? Can such limits be surpassed by recourse to a referendum?

Q 1.3.4 To what extent has the constitutional court or supreme court accepted the supremacy of EU law over the national constitution? Does the Constitution directly or indirectly proclaim the supremacy of the Constitution? If so, how have such provisions been interpreted in view of EU law? Would it be fair to say that the relevant court emphasises EU-friendly interpretation and generally seeks to avoid undermining EU law in practice?

1.4 Democratic Control – National Parliaments and Referendums

Q 1.4.1 Regardless of whether the Constitution contains specific amendments, please provide a summary of the rules that govern the participation of the national parliament in the EU decision-making processes. Are there any aspects in the parliamentary control in the relevant Member State that could be regarded as a best practice and which could be recommended more widely?

Q 1.4.2 Please provide a brief summary on referendums[14] related to EU-amendments, ratification of EU treaties or other EU-related matters in the relevant Member State. Do the referendums on EU matters stand out, in any aspect, when one thinks of the role that direct democracy otherwise plays in the constitutional system of the Member State?

1.5 The Reasons for, and the Role of, EU Amendments

Q 1.5.1 If the Constitution has been amended to a considerable extent in relation to the EU, what was the rationale or the reasoning behind such amendment? Did any of the following considerations play a role: following best practices that have emerged in other countries; comparative influence of specific countries; constitutional culture; judicial decision(s), e.g. a finding by the constitutional court that the ratification of a Treaty was not possible without a constitutional amendment; following academic or expert advice; the quest to enhance the legitimacy of EU

[14] A linguistic remark should be made here: we will use the plural 'referendums' instead of 'referenda' throughout the book, as recommended by a number of leading publications in the field. Although the word 'referendum' can be derived from the Latin word '*referre*', the word 'referendum' itself does not appear in the Latin language as a noun, and thus there is no need to use the Latin plural ending 'a'. See e.g. Suksi 1993, p. 10.

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membership; the need to take the Constitution seriously and to reflect the shift of power to the supranational level; public support; relative ease of the amendment procedure; anything else?

Q 1.5.2 If the Constitution has no EU-amendments or the EU-amendments are limited in their scope, please answer the following questions:

(a) What are the reasons behind such a disposition? Have any of the following considerations played a role: the degree of difficulty of the amendment procedure, possibly involving a referendum; constitutional culture; level of public support for the EU; anything else?
(b) As noted earlier, scholars have regarded constitutions that do not contain (significant) EU-amendments as being in the process of becoming somewhat obsolete with regard to the realities in the exercise of powers, and that such constitutions are experiencing reduced functionality and social relevance, or are not being taken seriously. The trend of 'waning constitutionalism' for example has been noted in Denmark. Have similar concerns been expressed in the relevant Member State? What is the Expert's view on this matter?

Q 1.5.3 How does the Expert see the role of national constitutions in the context where power is increasingly exercised at supranational and global level? Would it be important to amend the constitutions with regard to the impact of EU and international organisations on the exercise of powers and/or constitutional values? Please provide reasons. Experts are welcome to identify areas where amendment may be beneficial and/or to formulate tentative suggestions for amending the constitution(s).

2 Constitutional Rights, the Rule of Law and EU Law

Introduction The second objective is to explore the role of constitutions *externally* vis-à-vis European governance, in particular as regards upholding constitutional rights and substantive constitutional values in the supranational context.

It is common ground that in a wide range of areas, the EU has made a pioneering and far-reaching contribution to the advancement of rights, especially as regards the CJEU's case law on free movement rights, the rights of EU citizens and students, the right to non-discrimination, gender equality and the prohibition of age discrimination. Additionally, the EU Charter of Fundamental Rights (Charter) plays an important role, e.g. by introducing a range of modern rights. Inspired by advances in these rights as well as the important contribution that the EU has made to peace, security and relative prosperity, the scholarly narrative has traditionally focused on assessing the national constitutional and supreme courts from the perspective of whether they are co-operative, Euro-friendly and accept the supremacy of EU law, or whether they remain Eurosceptic and reluctant to relinquish power. This appears to stem from an implicit assumption that national constitutions primarily symbolise nationally-oriented and somewhat old-fashioned values such as sovereignty.

However, in an increasing number of other areas, concerns have emerged about the standard of protection of constitutional rights, in particular in the Area of Freedom, Security and Justice. For example, a recent systematic analysis of the FIDE 2012 Congress Volume 3 reports on the national implementation of EU measures demonstrated that '[t]he uncritical focus on security has … led … to significant concerns regarding the impact of EU AFSJ law on the protection of fundamental rights'.[15] Another author has noted that 'important values once recognised within the nation state are lost in the transition to the European level', and that especially pre-Lisbon, 'in the pursuit of substantive changes at the EU level even basic concepts such as fair trial and legality, which traditionally are recognised in national criminal law, seem to be forgotten'.[16] In a recent paper, the Principal Investigator of the present project explored a range of cases where the Grand Chamber of the European Court of Justice has prioritised loyal co-operation and effectiveness of EU law over constitutional rights.[17] The paper went on to argue that constitutional rights have seen a degree of erosion as a result of the supremacy of EU law, and called for a recalibration of the law and discourse towards 'substantive co-operative constitutionalism' in the EU.

The present project seeks to carry out a more systematic research on the substantive constitutional concerns identified by constitutional courts and in constitutional commentary. The European constitutional law discourse has predominantly come to focus on the constitutional law of the European Union, with research focusing on the autonomous, self-referential rules developed by the CJEU rather than comparative constitutional standards. This Questionnaire seeks to bring together constitutional concerns which seem to have arisen in several Member States, but which may be scattered in commentary in national languages and thus may not always receive sufficient attention in the mainstream European discourse. It ought to be recalled that by invoking constitutional values, constitutional courts have historically served as catalysts for improvements in the EU's constitutional order, in particular the German Constitutional Court by virtue of its *Solange I* decision[18] that prompted the CJEU to introduce fundamental rights protection. It is hoped that by clearly articulating substantive concerns that have emerged in several Member States with regard to constitutional rights and values, the project will make a contribution towards enhancing substantive constitutionalism in the European Union, with greater responsiveness on the part of the European Court of Justice, European and national institutions involved in EU decision-making processes as well as the scholarly discourse.

It may be worthy to note that while the above research perspective may enter into territory that many may regard as controversial, it is of real importance, since in practice only the CJEU can act as the final arbiter and, by virtue of the supremacy of EU law, it sets the standard for twenty-eight Member States. As Stephen Weatherill has famously noted, 'even the most minor piece of technical Community legislation

[15] Mitsilegas 2012, p. 141.

[16] Herlin-Karnell 2010, pp. 238 and 240.

[17] Albi 2015a, pp. 151–185, and Albi 2015b, pp. 291–343. The two-part article includes most of the material and case studies contained in Part 2 of this Questionnaire.

[18] German Federal Constitutional Court, *Internationale Handelsgesellschaft (Solange I)* (1974) 2 CMLR, p. 549.

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ranks above the most cherished constitutional norm'.[19] This is of considerable significance, as EU law is no longer restricted to primarily governing the single market, but extends post-Lisbon to wide-ranging areas of law.

The sections that follow will in most cases start with a brief background outlining the concerns about specific (constitutional) rights that have arisen in one or more Member States, and will then invite the Experts to consider whether these are isolated occurrences or whether similar concerns have emerged in their respective countries.

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

Q 2.1.1 Please briefly outline to what extent (a) fundamental rights and (b) general principles of law (e.g. legal certainty and legitimate expectations, non-retroactivity, proportionality) are codified in the Constitution or have a constitutional rank. If there is a chapter on fundamental rights, is it comprehensive and detailed or relatively brief? To what extent are constitutional rights and general principles enforceable in courts?

Q 2.1.2 Is there a constitutional provision or a judicial ruling stipulating the conditions under which restrictions can be imposed on rights? For example, Art. 31(3) of the Polish Constitution provides as follows:

> Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.[20]

Q 2.1.3 Is there a constitutional category equivalent or similar to the rule of law (or *Rechtsstaat; État de droit*) mentioned in the text of the Constitution of the relevant Member State? How is the concept of the rule of law conceptualised in the case law and legal commentary? What are the key elements of the concept? To what extent is the principle of the rule of law justiciable? Is the rule of law frequently used as an argument by applicants (in contesting legal acts) and courts (in exercising judicial review)?

It has been noted that access to courts, a right that has come to be explicitly recognised in the national constitutions, is of particular importance to the rule of law in the convergent principles of constitutional law in Europe.[21] Please comment on the extent to which access to courts and the right to judicial review are

[19] Weatherill 1995, p. 106.

[20] Translations from the unofficial translation of the Polish Constitution, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[21] Galera 2010a, p. 277, referring to Storskrubb and Ziller 2007, pp. 180 et seq.

constitutionally entrenched and/or regarded as a core element of the rule of law in the relevant Member State.

To what extent are the following principles regarded as core elements of the rule of law in the relevant Member State:

- The rule that only published laws can be valid;
- Legal certainty and non-retroactivity;
- The rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute, and that sanctions cannot be applied retroactively, through inference from objectives by virtue of teleological reasoning or by analogy.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

Prior to the *Omega*[22] and *Schmidberger*[23] judgments in 2003–2004, the European Court of Justice by and large gave priority to the fundamental freedoms, i.e. economic free movement rights, in cases where these clashed with more classic constitutional and/or fundamental rights. Although in *Omega* and *Schmidberger* priority was given to the right to human dignity and the freedom of expression respectively, concerns continue to be expressed that classic fundamental rights have in the context of EU law become 'restrictions' to economic free movement rights, with the canon of interpretation being that exceptions to free movement rights must be interpreted strictly.

In the FIDE 2012 Congress Volume 1 reports on the protection of fundamental rights post-Lisbon, the national reports of Cyprus, Bulgaria, the Czech Republic, Ireland and Germany note that the national courts typically prioritise classic fundamental rights over economic freedoms, and that such an approach has changed, or is likely to change, in matters that fall within the scope of EU law, given the CJEU's different approach to balancing.[24] The Irish Report in particular notes that during the referendums on the Lisbon Treaty, cases such as *Laval* and *Viking*[25] prompted concerns that the EU prioritised economic liberties over traditional human rights, and that the CJEU imposed significant limitations on the right of workers to take collective action where the exercise of that right interfered with the

[22] Case C-36/02 *Omega* [2004] ECR I-09609.

[23] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[24] See the relevant reports in Laffranque 2012a; see also 'Questionnaire' by Besselink 2012, pp. 8–9 in the same volume.

[25] Case C-341/05 *Laval* [2007] ECR I-11767 and Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

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freedom of establishment and freedom to provide services.[26] The issues raised by this line of cases regarding collective action have also led to significant scholarly and political concern elsewhere.

Q 2.2.1 Does the balancing of fundamental rights and economic free movement rights raise constitutional issues in the relevant Member State and in the Expert's view? Have the national courts adjusted their balancing to match the CJEU's approach? If so, what has been seen as the objective of, or justification for, the relevant change?

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

Whereas in the past the balancing of rights primarily concerned the sphere of the single market, more recent developments in the Area of Freedom, Security and Justice mean that classic personal liberties have increasingly been affected by EU rules. The following sections will focus in particular on constitutional rights in the context of the European Arrest Warrant (EAW). Between 2005–2011, EU Member States issued a total of 78,785 EAW requests, with 19,841 requests resulting in the effective surrender of the person, according to data compiled by a report by the Centre for European Policy Studies (CEPS).[27]

2.3.1 The Presumption of Innocence

By virtue of the EAW Framework Decision,[28] extradition has been rendered speedy and near-automatic in the EU Member States. A court that receives an extradition request from another Member State must automatically authorise extradition, with minimum formality and no consideration of evidence.

The impact of the above rule on the presumption of innocence and on the principles of the rule of law and proportionality has been queried by Judge Broß in his dissenting opinion to the German Constitutional Court's *European Arrest Warrant* judgment.[29] He notes that the presumption of innocence protects the person charged from the disadvantages that are equivalent to a verdict of guilty, where such disadvantages have not been preceded by proceedings where evidence

[26] Kiernan et al. 2012, p. 539.

[27] Carrera et al. 2013, p. 16.

[28] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[29] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273, 304 et seq. http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html, paras. 144–153.

of guilt has been provided in compliance with the code of procedure. He holds that in the EAW system, which does not allow for examination of the circumstances pertaining to the alleged offence or crime, prosecuted persons are treated as guilty in the context of the extradition proceedings, which is contrary to the rule of law.

Q 2.3.1.1 Have concerns with regard to the presumption of innocence arisen in the relevant Member State in this context? How have the courts and legal commentary approached the presumption of innocence in the context of the European Arrest Warrant? Please indicate the constitutional provisions which have been affected, as articulated by the courts, legal commentary and/or in the Expert's view. On the basis of national case law and in the Expert's view, can a conclusion be drawn that the principle of presumption of innocence can no longer fully be granted the same level of protection as prior to the entry into force of the EAW Framework Decision? If so, what is regarded as the objective of, or justification for, limiting this right?

Q 2.3.1.2 Is the prevailing practice for judges in the relevant Member State to rubber-stamp extradition requests, or to grant a hearing and/or carry out some form of preliminary judicial review? Do the courts review evidence prior to extradition where the person claims his or her innocence? If so, on how many occasions has extradition been refused on this ground?

2.3.2 *Nullum Crimen, Nulla Poena Sine Lege*

A central element of the EAW Framework Decision is that the rule of double criminality is abolished for 32 crimes, and thus a person must be extradited regardless of whether the act in question constitutes a crime in domestic law. Concerns have been expressed that each Member State is effectively accepting the criminal laws of all other Member States of the EU, without a clear picture of what those laws might be.[30] A further issue that has provided grounds for concern is the wide, open-ended wording in the list of '32 types of offences'; it has been commented that these are merely 'types' and not well-defined offences (e.g. 'racism and xenophobia'), and that some offences are susceptible to politicisation (e.g. 'terrorism', 'participation in a criminal organisation' and 'racism and xenophobia').[31] There have also been concerns about different penalties for the same crime in different Member States.

The *nulla poena sine lege* rule led the Belgian Constitutional Court to request a preliminary ruling from the CJEU on the legality of the European Arrest Warrant Framework Decision.[32] This was prompted by a concern from an association of defence lawyers that the abolition of double criminality was in breach of the principle of legality in criminal matters. Under national constitutions, criminal

[30] Alegre and Leaf 2004, p. 208.

[31] Sanger 2010, pp. 21–22.

[32] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633.

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legislation must satisfy the conditions of precision, clarity and predictability, allowing each person to know whether an act constitutes an offence.

The concern about *nulla poena sine lege* was echoed in a more limited way by the German Constitutional Court,[33] which found that the issue of retroactive amendment of substantive criminal law would arise in cases where an individual is extradited to another Member State for an act that does not have a significant connecting factor to the requesting state and that was not punishable in Germany when the act was committed. The Court explained the threat to the rule of law as follows:

> The principle according to which an offence may only be punished if punishability was legally determined before the offence was committed is a special guarantee under the rule of law of the confidence in the reliability of the legal system, which is to provide clear orientation on what is punishable and what is not. Without such reliable orientation, individual freedom cannot develop: Whoever must expect an unpredictable retroactive amendment of criminal-law provisions will no longer be able to exercise his or her freedom of action with the necessary security, and will lose his or her position as an autonomous individual in one of the areas that are most sensitive as concerns fundamental rights.

According to the FIDE 2012 Congress Volume 3 reports, the legality of the abolition of dual criminality has also been contested in Greece, Spain, Finland and Denmark, especially in relation to offences that have not been harmonised in the EU.[34] In the view of the Portuguese rapporteurs, abolition of dual criminality may foster a repressive 'European criminal space'.[35] In the Czech Republic, the breach of the legality principle has also been contested with regard to other mutual recognition instruments, such as confiscation and freezing orders.

Q 2.3.2.1 How have the above constitutional issues been approached in the relevant Member State's case law and legal commentary? Please outline the constitutional provisions affected, either as articulated by the courts, legal commentary and/or in the Expert's view. On the basis of national case law and in the Expert's view, can a conclusion be drawn that the principle of *nullum crimen sine lege, nulla poena sine lege* can no longer fully be granted the same level of protection as prior to the entry into force of the EAW Framework Decision? If so, what is regarded as the objective of, or justification for, limiting this principle?

2.3.3 Fair Trial and *In Absentia* Judgments

The EAW rules on *in absentia* judgments, as amended in 2009, prompted a preliminary ruling request by the Spanish Constitutional Court in *Melloni*.[36] In the past, the Spanish Constitutional Court had on numerous occasions prohibited

[33] Judgment of 18.7.2005, 2 BvR 2236/04, supra n. 29, para. 99.

[34] See Mitsilegas 2012 and country reports in the same volume (Laffranque 2012b).

[35] Vitorino and Leandro Vasconcelos 2012, p. 540.

[36] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

extradition to serve a severe sentence imposed in the absence of the requested person, where no possibility of a retrial was available. This included circumstances where the person had been represented in another Member State by a lawyer, without being present at the proceedings.

In the Spanish Constitutional Court's view, changing the above practice so as to allow extradition in such circumstances would breach the constitutional right to a fair trial and the rights of defence. The first paragraph of Art. 24 of the Spanish Constitution provides that '[e]veryone has the right to obtain effective protection from judges and the courts in the exercise of his rights and legitimate interests, and in no case may there be a denial of defence'. The Court noted that in its case law,

> the right to participate in the oral procedure and to mount one's own defence forms part of the nucleus of the rights of defence which must be regarded as essential under Article 24 of the Constitution. … Only by means of physical presence at the trial can rejection of or acquiescence to the accusation be manifested, and the declaration by the accused can become part of his defence, witnesses can be questioned and examined, the defence conducted with specialised assistance from a lawyer can be coordinated and, finally, the right to the last word can be exercised… .[37]

According to the Spanish Constitutional Court, extradition without respect for the above 'undermines the essence of due process in a way which affects human dignity'. In the preliminary ruling question, the Constitutional Court asked the European Court of Justice whether it could no longer refuse the execution of an arrest warrant in the above circumstances. The Grand Chamber of the CJEU confirmed that the previous level of protection granted to Art. 24 of the Spanish Constitution was no longer available.

Q 2.3.3.1 Have *in absentia* judgments raised constitutional issues in the relevant Member State? Please outline the relevant constitutional provisions. Do *in absentia* judgments raise constitutional issues in the Expert's opinion? Have the national courts had to revisit the standard of protection in cases involving *in absentia* judgments in the context of the EAW Framework Decision? If so, what is regarded as the objective or justification?

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

The German Constitutional Court has explained the importance of the state's responsibility for its own citizens and why citizens ought not to be removed against their will from the legal system with which they are familiar. According to the Court, '[t]o the extent that they reside in the state territory, all citizens are supposed to be protected from the insecurities connected with being sentenced in a legal

[37] C-399/11-1, Order of 9 June 2011 of the Spanish Constitutional Tribunal (Plenary Formation), in the matter of Recurso de Amparo (petition for constitutional protection) lodged by Stefano Melloni, on file with the author.

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system that is unknown to them under circumstances that are inscrutable to them'.[38] The Court further noted that for the prosecuted person,

> transfer to another Member State's legal system, even though it has been brought closer by European integration, not only means discrimination under procedural law, which can consist in language obstacles, cultural differences and different procedural law and possibilities of defence. Such transfer ultimately ties the prosecuted person to a substantive criminal law in respect of which no democratic means had existed for him or her to participate in its creation, which he or she – unlike German criminal law – does not need to know and which in many cases due to a lack of familiarity with the respective national context, does not permit him or her as a layperson a sufficiently secure comparative evaluation.[39]

Fair Trials International has noted the following: 'Too often we encounter people imprisoned for months or years before their trial even starts, who have no idea of their rights, no comprehension of the local legal system and no legal aid to help them pay for a lawyer or interpreter.'[40] In his dissenting opinion to a decision of the Czech Constitutional Court, Judge Balik has expressed concern about the feasibility of defending oneself in a language other than one's mother tongue, in addition to other difficulties which may arise, such as the high cost of flights for family members, which may be more than the average monthly salary in some countries.[41]

Q 2.3.4.1 Does the relevant Member State provide assistance to its extradited citizens or residents, e.g. by way of travel expenses, assistance with quality translation and legal aid? (Note that this question does not concern the recently adopted EU Directives regarding the respect of the relevant rights by the state to which the person has been extradited, but by the state of citizenship/main residence). In the United Kingdom, a parliamentary hearing was granted to individuals who had been extradited but were subsequently found innocent. Please outline any similar practices by public institutions in the relevant Member State.

Is there a public or non-governmental organisation that provides assistance to persons extradited from the relevant Member State? If so, what assistance do they provide? In the case of a non-governmental body, how are the activities of the NGO (predominantly) funded?

Would the Expert support a recommendation to introduce a publicly funded state or non-governmental body to provide assistance to residents who are involved in trials abroad?

Q 2.3.4.2 With reference to the statistical data on extraditions in 2005–2011, based on the CEPS report mentioned in Sect. 2.3 above, it would be helpful if the Experts could seek to determine how many of the extradited individuals were subsequently found innocent. How does the percentage compare to those found innocent in the course of domestic trials? If an individual was subsequently found innocent, what

[38] Judgment of 18.7.2005, 2 BvR 2236/04, supra n. 29, para. 66.

[39] Judgment of 18.7.2005, 2 BvR 2236/04, supra n. 29, para. 86.

[40] http://www.fairtrials.net/get-involved/.

[41] Dissenting opinion by Judge Balík to Case No. Pl. ÚS 66/04, http://www.concourt.cz.

compensation was provided, especially given the cost of travel and the stay abroad for the suspect and his or her family?

If possible, please provide examples of individuals who have been extradited but have subsequently been found innocent, e.g. from media coverage.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

One of the Czech rapporteurs for the FIDE 2012 Congress has commented as follows:

> The EU mutual recognition instruments, be it European arrest warrant, European evidence warrant, freezing order, confiscation order, mutual recognition of financial penalties or sentencing judgments or probations, present great challenges for the legal systems of Member States, including the Czech Republic. … One of the most significant challenges is the shift of paradigm, whereby executing authorities are supposed to recognise and execute foreign judgments and other judicial decisions (in case of financial penalties, the respective decisions might also come from administrative authorities) almost automatically, while trusting that underlying foreign procedures and decisions observed fundamental rights and fulfilled particularly fair trial requirements. The mutual recognition instruments help to expand the operation of national law throughout the EU and might clash with domestic constitutional requirements as regards the substantive legality principle, principle of legal certainty or prerogatives of its own citizens or fundamental rights requirements generally.[42]

In Estonia, an attorney has called for a parliamentary debate on constitutional rights with regard to the abolition of the exequatur in civil matters in the aftermath of the following case. Mr. Piirsoo, a truck driver, discovered in 2009 that his bank account was 430,000 EUR in debt, with a further 192,000 EUR added at a later stage by way of interest accrued. The Estonian customs authorities had automatically executed a customs tax demand notice issued by the German authorities.[43] Earning 700 EUR a month, the driver had little choice but to declare bankruptcy. He had been acquitted nine years earlier in Germany of cigarette smuggling charges, but Germany nonetheless demanded payment of customs tax. When his attorney sought to contest the demand notice in Germany, it emerged that the deadline for submitting the application had passed in 2000, when Mr. Piirsoo was detained in a German prison.

The attorney in the case, Mr. Siim Roode, called for a parliamentary debate to highlight the need for Estonian state authorities to provide assistance to citizens. He posed the question of whether it is compatible with the Constitution to enforce foreign administrative acts without the possibility of judicial review in a local court,

[42] Švarc 2012, p. 269.

[43] Henno, E. (2009, November 4) *Saksamaa nõuab eestlaselt miljoneid kroone* (Germany demands millions of kroons from an Estonian). Postimees. http://www.postimees.ee/183910/saksamaa-nouab-eestlaselt-miljoneid-kroone.

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a practice that is required by the relevant EU measures under the principle of mutual recognition.[44] The attorney recalled that the right to judicial protection is a fundamental right, which must be exercisable in a manner that is not overly onerous for the individual.[45] The right to judicial protection must be accessible within a reasonable time and at a reasonable cost. According to the attorney, the possibility to request judicial review of an act of a foreign authority in a foreign country does not meet these criteria, and is not within the reach of natural persons, i.e. individuals.[46]

Q 2.3.5.1 Have similar constitutional issues arisen with regard to mutual recognition in the relevant Member State? How has the move to mutual recognition been reconciled with the requirements of the rule of law and the right to effective judicial protection in the case law and legal commentary? On the basis of case law and in the Expert's view, can a conclusion be drawn that the principle of effective judicial protection and the rule of law can no longer fully be granted the same level of protection as prior to the introduction of the mutual recognition rule in criminal law and the abolition of the exequatur in civil and commercial matters? What is regarded as the objective of, or justification for, limiting the rights related to judicial protection?

Q 2.3.5.2 Has there been debate about the suitability of transposing mutual recognition from internal market matters, such as alcohol content in blackcurrant liqueurs as in *Cassis de Dijon*,[47] to criminal law and civil and commercial disputes? What is the Expert's view?

Q 2.3.5.3 Has any concern been expressed in the relevant Member State about a change in the role of courts, from providing judicial protection against unwarranted measures by the authorities, to becoming actors of loyal co-operation, efficiency and trust? What is the Expert's view on this matter? Is there reason to be concerned?

Q 2.3.5.4 In the United Kingdom, NGOs have called for the introduction of a proportionality test prior to extradition, due to extradition requests for a wide range of 'trivial' offences.[48] In the relevant Member State, have there been any calls for reintroducing some form of judicial review in the country of residence of the individual affected?

Would the Expert support a recommendation to reinstate some form of judicial review in the context of extradition, e.g. to ensure that there is sufficient evidence against the individual, that the offence is sufficiently serious, and that there is a sufficient link between the offence and the country to which the individual is

[44] Ibid.

[45] Further comment by S. Roode on the case by e-mail, on file with the author.

[46] Ibid.

[47] Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649.

[48] See (2008, October 20) Door Thief, Piglet Rustler, Pudding Snatcher: British Courts Despair at Extradition Requests. The Guardian; Wade, A. (2009, August 13) Extradited for 'stealing' a mobile phone. Times Online. http://www.thetimes.co.uk/tto/law/article2214808.ece.

extradited? Would the Expert support reinstatement of judicial review by a local court in civil and commercial matters?

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

Please use this section if any further constitutional issues have arisen in the case law and/or legal commentary, and/or in the Expert's view, in relation to European Union criminal law in the relevant Member State.

German Government's pleading in the *EAW* case to revise the concept of the rule of law (addition to the Questionnaire on 8 July 2014) Given the project's focus on the rule of law, the Experts may find it of interest to note the German Government's pleading in the EAW case to move from national requirements for the principles of the rule of law to a 'constitutional tradition that connects Europe and North America'. In para. 39 of the German Constitutional Court's EAW case, the Government's submission is summarised as follows:

> The protection of German citizens from extradition can be restricted by a formal Act of Parliament. The European Arrest Warrant Act is such an Act. Pursuant to this Act, extradition can only be ordered if the 'principles of the rule of law' are adhered to. It results from the wording as well as from the objective of the relevant provision in the constitution that these principles cannot be equated with the nationally applicable requirements that result from the Basic Law's principle of the rule of law. On the other hand, the provision makes reference to more than a minimum standard under public international law. Instead, it establishes a reference to a 'constitutional tradition that connects Europe and North America' with the core standards of due process in criminal proceedings that results from this tradition. The legislature can assume that these standards are complied with in the European Union and its Member States because they are already a prerequisite for Union membership. In the individual case, a prosecuted person can invoke the *ordre public* in § 73 sentence 2 of the Law on International Judicial Assistance in Criminal Matters, which corresponds to the all-European *ordre public* under Article 6 of the Treaty on European Union.

In the sections regarding the rule of law, it might be of interest to report on whether there have been similar calls to change the concept of the rule of law in other Member States, and whether the Experts have views on the desirability of such a change.

2.4 The EU Data Retention Directive

The EU Data Retention Directive 2006/24[49] has seen constitutional challenges in a number of Member States. While the Grand Chamber of the CJEU had previously

[49] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available

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confirmed the legality of the Directive,[50] two new cases, from Austria and Ireland, were pending at the CJEU at the time of preparing this Questionnaire and eventually led to the annulment of the Directive.[51]

In Germany, an action was brought before the Constitutional Court by more than 34,000 citizens. The German Constitutional Court found that the national implementing law contravened Germany's Constitution, and especially the right to privacy and proportionality.[52] The Court noted that the storage of data envisioned constitutes a particularly serious encroachment with an effect broader than anything in the legal system to date. It allows third persons to obtain detailed information on a person's social or political affiliations and personal preferences, inclinations and weaknesses, making it possible to create personality profiles of virtually all citizens and to track their movements. According to the Court, it is part of Germany's constitutional identity that the citizens' enjoyment of freedom may not be totally recorded and registered.

The Romanian Constitutional Court has noted the national implementing act's 'large applicability – practically to all physical and legal persons'.[53] According to the Romanian Constitutional Court, this is likely to overturn the presumption of innocence, transforming *a priori* all users of electronic communication services into suspects, and to breach the right to private life, secrecy of correspondence and freedom of expression.

Q 2.4.1 In April 2014, the Court of Justice annulled the Data Retention Directive. The annulment was based on the disproportionality of the interference as regards the lack of safeguards on access and time limits; however, the Court found the underlying requirement of blanket data retention justified in view of the overriding objective of general interest (security). Advocate General Cruz Villalon had recommended suspension of the invalidity until the Directive was revised. We would welcome the Expert's reflection on the following matters:

- Did the implementation of the Data Retention Directive raise constitutional issues in the relevant Member State? Please outline the constitutional provisions affected. How did the courts or other bodies reconcile the Directive's requirements with constitutional rights during the period of 2006–2014 prior to annulment?

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electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[50] Case C-301/06 *Ireland v. Parliament and Council* [2009] ECR I-00593.

[51] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[52] German Federal Constitutional Court, Judgment of 02.03.2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08. For an English summary, see www.bundesverfassungsgericht.de/en/press/bvg10-011en.html.

[53] Romanian Constitutional Court, Decision No. 12581 of 08.10.2009, English translation available at www.legi-internet.ro/fileadmin/editor_folder/pdf/decision-constitutional-court-romania-data-retention.pdf.

- If the national implementing act was adjudicated by the national constitutional or supreme court without a preliminary reference to the CJEU, was the CJEU's finding of the legality in the 2009 *Ireland v. Council* case regarded as having settled the matter of the legality of the Directive (and thus a reason why no further challenge to the validity was sent to the CJEU)?
- On the basis of previous case law and in the Expert's view, can a conclusion be drawn that in the domestic context, without the constraints of the EU legal order, there would have been a high degree of probability that a measure equivalent to the Data Retention Directive would not have been found compatible with the Constitution by the constitutional court? Would the national constitutional court or supreme court, in the context of national constitutional law without the constraints of the EU legal order, likely have found the underlying rule of blanket data retention compatible with the Constitution (rather than focusing on the proportionality of the rules on safeguards for access and time limits)?
- What was the consequence of the annulment by the CJEU for the relevant national implementing act? Has it been invalidated or will it continue to exist? Can it be said that the Directive may have established a new baseline for the national system in terms of the acceptability of blanket data retention?

2.5 *Unpublished or Secret Legislation*

In the *Heinrich* case,[54] an Austrian court queried the legality of the adoption of secret legislation by EU institutions. The Austrian court noted that keeping secret the rules of conduct with which individuals are required to comply constituted such a severe impairment of the most elementary principles of the rule of law that such regulations were legally non-existent and hence could not be binding. The Grand Chamber of the Court of Justice of the European Union decided that the secret EU regulation, while it could not impose obligations on individuals, remained valid law.

The CJEU's approach followed its earlier case law in relation to EU measures that had not been translated into and published in the languages of the new Member States in time for accession. In that context, the Polish, Czech and Estonian courts revisited their previous, more stringent approach whereby unpublished measures had been declared invalid, noting that the CJEU's approach in the *Skoma-Lux* case[55] had been more lenient.[56]

Q 2.5.1 Has the question of the constitutionality of unpublished or secret measures arisen in the relevant Member State? How do the *Heinrich* and *Skoma-Lux* rulings compare to the national case law on the validity of such measures? If there has been

[54] Case C-345/06 *Heinrich* [2009] ECR I-01659.

[55] C-161/06 *Skoma-Lux* [2007] ECR I-10841, para. 37.

[56] See in more detail Bobek 2009, pp. 43 et seq., and Albi 2011, Sect. 3.1.

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no national case law dealing with similar issues, we would welcome the Expert's view on whether the existence of unpublished or secret measures would be deemed valid under the Constitution of the relevant Member State.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

In the context of the single market, German judges expressed concern during the so-called 'Banana Saga' in the 1990s that the CJEU was giving the EU institutions 'a *carte blanche*' and reducing judicial control to a minimum.[57] British scholars have noted the hands-off approach in matters of economic regulation, where the EU Courts allow the EU institutions to enjoy considerable discretion, resulting in 'the threshold of illegality being placed very high'.[58]

This section seeks to explore the impact of EU law on the national standard of protection of property rights, legal certainty, non-retroactivity and proportionality in the adjudication of the validity of EU measures or measures implementing EU law in the field of market regulation.

This section has been prompted by a recent series of cases, described as the 'Sugar Saga' in several new Member States.[59] By way of a brief summary, courts in several new Member States reduced the level of protection of a range of constitutional rights in order to ensure the supremacy of EU law in the context of adjusting the quantities of agricultural products held by undertakings in view of the transition to the Common Agricultural Policy. These rights included the protection of private property and the rule that expropriation of property is only allowed in exceptional cases for public purposes, on the basis of a specific parliamentary statute and in return for compensation. The protection of property is accompanied by the constitutional rule that taxes, fines or pecuniary obligations can only be imposed under a parliamentary statute, with any grounds being interpreted narrowly and no retroactivity allowed. This is further protected by the principles of legal certainty and legitimate expectations. In the process, the Polish and Cypriot governments brought actions to the EU General Court, arguing that implementation of the EU requirement to impose fines on undertakings that had purchased sugar before EU accession was not possible without breaching the above rights in a disproportionate manner.

All of the challenges were rejected by the EU Courts as part of the practice of interpreting the general principles of EU law in a way that gives a wide margin of

[57] Everling 1996, p. 419.

[58] For relevant case law, see Chalmers et al. 2006, pp. 436–437.

[59] See Albi 2010, pp. 791–829.

discretion to the EU institutions. As regards the right to property, the EU Courts had previously found no violations by EU measures until *Kadi*,[60] which pertained to UN measures.[61] Indeed, a judge from the European Court of Human Rights (ECtHR) had expressed concern as to whether the protection granted by the EU Courts to property rights under Art. 1 of Protocol 1 of the European Convention on Human Rights (ECHR) corresponded to that granted by the ECtHR.[62] As regards the principle of legitimate expectations, the overwhelming majority of claims have been rejected by the Court of Justice: one can rely on this principle only if specific assurances have been given by the EU institutions.[63] In the case of undertakings, the EU Courts expect a prudent and well-informed trader to foresee changes in the law. This interpretation is narrower than that used by Central and Eastern European constitutional courts before the 'Sugar Saga': in their previous case law, it was held that the imposition of obligations required a lead-in period, and laws that retroactively established obligations or pecuniary charges on individuals were prohibited and declared unconstitutional.

The 'Sugar Saga' additionally involved a case where both EU Courts upheld the legality of a 45 million EUR fine that had been imposed by the European Commission on Estonia for sugar that had been held by households, i.e. private individuals. The fine had been imposed on the basis of a requirement that was first written down in the same instrument that imposed the 45 million EUR fine, adopted one year after EU accession.[64] The fine was upheld despite the General Court's acknowledgement that there had been no textual basis in EU law for the alleged requirement to eliminate private household sugar and, furthermore, despite the Court's recognition that, in practice, it would have been impossible to require private households to dispose of their sugar. The fine was upheld on the basis of teleological interpretation and the principle of effectiveness of EU law.

The Czech Constitutional Court carried out a comparison of domestic and EU standards of protection of the principles of legitimate expectations, legal certainty, non-retroactivity and non-discrimination, the right to undisturbed engagement in economic activity and property rights, in a decision concerning sugar production quotas delivered on 8 March 2006.[65] It noted with regard to each right the high margin of discretion left by the CJEU to the Member States when implementing the Common Agricultural Policy. Indeed, as regards the principle of proportionality, it noted the 'highly deferential standard', and that fundamental rights 'may be subject

[60] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-06351.

[61] Tridimas 2006, p. 315.

[62] Concurring Opinion of Judge Ress in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

[63] For a detailed analysis, see Tridimas 2006, Chap. 6 and Groussot 2006, pp. 202–212.

[64] Case T-324/05 *Estonia v. Commission* [2009] ECR II-03681; Case C-535/09 P *Estonia v. Commission* [2011] ECLI:EU:C:2011:171.

[65] Czech Constitutional Court, Pl. ÚS 50/04 *(Sugar Quotas III)*, 08.03.2006, English translation available at http://www.usoud.cz.

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even to significant limitation'. The Court concluded that its own previous judgments had been 'excessive' and emphasised the need for the Court itself to apply 'constitutional self-restraint'.

In the Netherlands, with regard to legitimate expectations in the field of state aid, it has been commented that the CJEU has adopted 'a much more restrictive approach than is considered reasonable and acceptable by Dutch lawyers and scholars'.[66] However, Dutch case law and practice have been adjusted to EU rules after the CJEU, in response to preliminary ruling questions, clarified that the Dutch version of legitimate expectations should not prevail.

Q 2.6.1 Have the above issues with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity and proportionality arisen in the relevant Member State in relation to EU measures? (Note that this question does not concern areas where Member States' measures may have interfered with economic freedoms or other rights arising from EU law. In this area it is well established that the EU Courts apply a stricter test to proportionality as well as to the other general principles of law, and frequently find national measures to be disproportionately restrictive.)[67]

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

Under the ESM Treaty, Member States may be required to contribute funds to the ESM that in several countries potentially amount to a third of the annual state budget (e.g. in Estonia and Ireland). The use of such funds is not subject to democratic control or judicial review, and the 85% majority rule means that smaller states have no say over the use of the funds. These issues have prompted constitutional challenges in several Member States, but have been found to be compatible with the Treaties by the CJEU.[68]

Q 2.7.1 Has the issue of the constitutionality of the ESM Treaty been raised in the relevant Member State? In particular, the Experts are invited to comment on the following issues:

(a) If the maximum capital calls allowed under the ESM Treaty were to be made, what would be the percentage of the annual state budget and the annual GDP that the calls would represent? In Estonia, in his legal challenge to the Estonian Supreme Court, the Chancellor of Justice pointed out that the unprecedented magnitude of the financial commitment has the potential to seriously limit the very ability of the

[66] Claes and Gerards 2012, p. 643, with references to relevant legal commentary.

[67] Chalmers et al. 2006, pp. 450–451. See also Coppel and O'Neill 1992, p. 670 et seq.

[68] Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

state to ensure the functioning of state institutions, including the judicial system, and the protection of the rights and social welfare benefits envisaged under the Constitution.[69] Has the constitutionality of a budgetary commitment of such magnitude been raised as an issue in the relevant Member State?

(b) In Germany, the applicants to the Constitutional Court in the ESM case in that country were concerned about the state taking 'incalculable risks', with Parliament no longer being able to exercise overall budgetary responsibility.[70] The uncertainty about the existence of a maximum limit was also raised in the Estonian case. The German Constitutional Court noted the ambiguities in the Treaty's wording regarding whether a maximum limit exists, and thus requested that the *Bundestag* address this issue in the ratification process. Has the issue of uncertainty about a maximum limit arisen in the relevant Member State? If so, have the courts or Parliament clarified this issue, e.g. in the process of ratification?

(c) Under Arts. 8(4) and 9(3) of the ESM Treaty, the capital calls have to be met 'irrevocably and unconditionally' within seven days. How has this type of unconditional and irreversible commitment been interpreted from the point of view of the Constitution?

Q 2.7.2 Has there been discussion about the constitutionality of other proposed measures, such as Eurobonds and the Banking Union, from the point of view of the potential of exposing the country's citizens and residents to unlimited liability for bank failures in other European countries?

Q 2.7.3 If the Member State has been subject to an EU bailout and a subsequent austerity programme, have constitutional issues arisen with regard to democratic control, the rule of law, transparency, the balancing of the rights of citizens/residents with those of the international creditor community or other aspects of the bailout programme?

For example, in Portugal, the state budget for the year 2012, which was prepared by the Government to reflect the requirements of the Financial Assistance Programme agreed between Portugal, the European Commission and the IMF, suspended certain benefits for employees of the public sector. The relevant provisions were contested by a group of parliamentarians before the Constitutional Court, invoking the protection of legitimate expectations, the principles of equality and proportionality and the constitutional right to social security. The Constitutional Court declared the relevant provisions unconstitutional,[71] ruling that the need to tackle the extremely serious economic situation cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and key

[69] Supreme Court of Estonia, Case No. 3-4-1-6-12 on the ESM Treaty, Judgment of 12.07.2012, English translation available at http://www.riigikohus.ee/?id=1347.

[70] German Federal Constitutional Court, Judgment of 12.9.2012, 2 BvR 1390/12, http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

[71] See the summary of the judgment in case No. 353/12 in English on the website of the Constitutional Tribunal (http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html).

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structural principles of a state based on the rule of law, including the principle of proportional equality. While the Constitution cannot distance itself from economic and financial reality, it does possess, according to the Court, a specific normative autonomy that prevents economic or financial objectives from prevailing in an unlimited way over constitutional rights such as equality.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

It is widely acknowledged that direct access to the EU Courts to challenge the validity of EU measures is very limited, with the expectation of the CJEU being that private parties can make recourse to indirect judicial review via the national courts.

Q 2.8.1 In order to gauge the availability of indirect judicial review in practice, please provide statistical data on the following:

(a) In how many cases in the relevant Member State have applicants requested a preliminary ruling with regard to the validity of an EU measure since 2001? Please provide a brief summary of the type of EU measure contested and the grounds for the alleged invalidity.
(b) In how many of such cases since 2006 did the national court send a preliminary ruling request to the CJEU with regard to the validity of an EU measure? What type of measure was contested and on what grounds? Please note that while data from 2001–2005 on preliminary references regarding validity is available in a study by Takis Tridimas and Gabriel Gari,[72] Experts are welcome to comment on the constitutional issues raised by the relevant cases.
(c) How many preliminary ruling references since 2006 have led to a partial or full annulment of the relevant EU measure? Please specify whether the measure challenged was a decision, directive or regulation, and the grounds for annulment.

Q 2.8.2 Turning to the standard of review, British scholars have pointed to a 'notable' contrast between proceedings before the domestic courts against national authorities and in proceedings before the European Courts against EU institutions in matters of economic regulation.[73] One judge of the ECtHR has questioned the neutrality of the EU Courts, pointing out that the public interest of the European Union makes it 'rather difficult for the ECJ to find violations' of the general principles of law.[74] Six other ECtHR judges have cautioned against the emergence of 'double standards', noting that in the case law of the ECtHR, EU Member States

[72] Tridimas and Gari 2010, p. 166 et seq.

[73] For relevant case law, see Chalmers et al. 2006, pp. 436–437.

[74] European Court of Human Rights, Concurring Opinion of Judge Ress in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

'live under a … more lenient system' as regards the protection of ECHR rights in areas where they implement EU law.[75]

A statistical study regarding annulments by EU courts in 2001–2005[76] shows that approximately 6.4% of challenges against measures of general application (directives and regulations) led to annulment in the General Court. It is likely that the success rate in the Court of Justice of challenges brought by the Member States and private parties is broadly at a similar level: the higher overall success rate of 16.1% in the Court of Justice includes the high rate of success (75%) of actions initiated by the EU institutions, compared to the 26.4% success rate of actions initiated by the Member States. The success rate was approximately 35% against decisions of the European Commission in both Courts. The annulment in most cases resulted from non-compliance with the parent EU legislation (review of administrative rule-making rather than review of constitutionality). In most cases the annulment occurred on procedural grounds (especially exceeding delegated powers), with some cases leading to success on the basis of general principles such as proportionality and legitimate expectations. The study notes that fundamental rights grounds did not feature prominently and did not bring success in cases against Union institutions. Note that *Kadi*[77] and *Schecke*[78] were decided after the time period studied.

Is the standard of judicial review by the EU Courts considered lower than that in the relevant Member State? What is the Expert's view on this matter? If the standard is deemed lower, is this regarded as justified in view of the objectives sought? Is the standard of review tenable in the long term, given the expansion of EU powers beyond the single market? Given that the CJEU is setting the standards for 28 Member States through the supremacy of EU law, might a case be made for a stricter standard of judicial review of EU measures?[79]

Q 2.8.3 Do the constitutional court, the supreme court and/or other courts overall take a vigorous or a deferential approach to the review of constitutionality/legality of legislation, regulatory acts of the executive branch and administrative action? In systems where the national parliament or its bodies (e.g. the Constitutional Law Committee of the Finnish Parliament) play an important role in ensuring the conformity of legislation with the Constitution, please include them in the account accordingly. If possible, please corroborate the description with a brief summary of statistical data on the proportion of validity challenges concerning domestic (non-EU-related) acts leading to annulment and the main grounds for annulment.

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[75] European Court of Human Rights, Concurring Opinion of Judge Ress, and Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

[76] Tridimas and Gari 2010, summary of conclusions at p. 170 et seq.

[77] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, supra n. 60.

[78] Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063.

[79] For this argument, see Albi 2015b, p. 334.

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Q 2.8.4 To what extent does the national constitutional court or supreme court review measures that implement EU legislation (a) in terms of its doctrinal statement; (b) in practice in actual judgments? Has the constitutional court or supreme court adopted a position similar to the German Constitutional Court's *Solange II* judgment[80] or the ECtHR's *Bosphorus* judgment,[81] which assumes that the EU standard of protection of rights is equivalent to the national or ECtHR standard, unless the applicant proves a manifest deficiency?

Q 2.8.5 If the standard of review by the CJEU is regarded as lower than in the relevant Member State and the national constitutional court or supreme court does not, in practice, review measures implementing EU law or assumes the equivalence of the standards of protection, has any concern been expressed about a resulting gap in judicial review? What is the Expert's view on this matter? In the context of EU accession to the ECHR, a concern about a potential gap has been noted in the General Report of the FIDE 2012 Congress Reports Volume 1, which points out that the *Bosphorus* doctrine

> effectively shields governments acting within the EU framework from scrutiny. This effect of shielding is even stronger, if it is not only the ECtHR that presumes EU compliance with the ECHR, but also national courts refrain from scrutinising acts under EU law from compatibility with the ECHR on such a presumption.[82]

Q 2.8.6 In the *Advocaten voor de Wereld* case, the question of equal treatment of citizens falling under the scope of EU law and falling under the scope of domestic law as regards the interpretation of *nulla poena sine lege* was raised. Has the broader issue of equal treatment of individuals falling within the scope of EU law and individuals falling within the scope of domestic protection of constitutional rights arisen in the relevant Member State and in the Expert's view?

2.9 Other Constitutional Rights and Principles

Q 2.9.1 Please comment on any other significant issues that have arisen with regard to constitutional rights or the rule of law in the relevant Member State in relation to EU law.

For example, in some countries, there has been pressure to implement EU requirements that affect individual rights or impose obligations on individuals by a governmental regulation, rather than by a parliamentary statute that requires democratic deliberation, as has traditionally been required by constitutional courts. Implementation by governmental regulation may be seen as a way to increase the

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[80] German Federal Constitutional Court, *Wünsche Handelsgesellschaft (Solange II)*, (1987) CMLR 225.

[81] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

[82] Besselink 2012, p. 120, references omitted.

speed of implementation, as well as the state's ranking on the European Commission's scoreboard. This issue also arose in the *Hungarian Sugar* case,[83] where the relevant national Act had delegated the adoption of the rules defining the subjects liable to pay a charge and the method of determining the charge to the executive. This was found to be in breach of the constitutional requirement that fundamental rights and duties be exclusively determined by a parliamentary statute.

In Ireland, the introduction of indictable offences by a governmental instrument was prohibited; however, this rule was abolished in order to facilitate implementation of obligations necessitated by EU membership.[84] Have the above issues arisen in the relevant Member State?

2.10 Common Constitutional Traditions

While 'common constitutional traditions' have formally provided a source of inspiration for the CJEU in identifying the rights protected by EU law, the General Report of the FIDE 2012 Congress Reports Volume 1 on fundamental rights notes that they have not functioned as an important direct source of protection in the case law of the CJEU.[85] The General Report goes on to remark:

> The accent has not been on national traditions but on the European fundamental rights sources. National constitutional traditions are hardly ever referred to except in a most perfunctory manner. They do not play a role that is comparable to that of legal and social developments in the framework of the 'common ground' or 'consensual' approach of the ECtHR. … In a sense, there has been a shift away from the national to the European context.[86]

Q 2.10.1 The questionnaire for Volume 1 of the FIDE 2012 Congress Reports posed a question to the national rapporteurs on the role of the common and individual constitutional traditions at present and in future.[87] While this did not lead to significant reflection by the Volume's respondents, the present Questionnaire invites the Experts to further consider this area. What is the Expert's view on which rights and values might form part of the 'common constitutional traditions'?

Could any of the constitutional rights and principles addressed in this Questionnaire be regarded as part of the 'common constitutional traditions', e.g. the principle of *nulla poena sine lege*, the right to judicial protection, etc.? The German Constitutional Court has noted in the *Data Retention* case cited in Sect. 2.4 that it is part of Germany's constitutional identity that the citizens' enjoyment of freedom may not be totally recorded and registered. Is this something that could perhaps be

[83] Decision 17/2004 (V. 25) AB.

[84] See for relevant case law Barrett 2013, pp. 154–155.

[85] Besselink 2012, question 14 at p. 16.

[86] Besselink 2012, pp. 137–138.

[87] Besselink 2012, question 14 at p. 16.

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regarded as a 'common constitutional tradition', rather than as an idiosyncratic element of German constitutional identity?

Q 2.10.2 The Experts are also invited to reflect on whether there might be practical mechanisms for rendering the 'common constitutional traditions' a more direct and relevant source in EU law. For example, at present, when national courts send preliminary ruling references to the European Court of Justice, the courts typically refer to the relevant EU and ECHR provisions. Might there be merit in also highlighting the long-standing constitutional rights or safeguards for the rule of law in the national constitution, along with comparative case law on the established standards in different Member States?[88]

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

Article 53 of the EU Charter of Fundamental Rights (Charter) provides: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by … the Member States' constitutions.'

A question on the permissibility of using this provision to retain a higher level of protection under the national constitution was posed to the CJEU by the Spanish Constitutional Court in the above-mentioned *Melloni* case. The Spanish Constitutional Court noted in its preliminary ruling request that the protection of rights in EU law is autonomous, and that Arts. 47 and 48 of the EU Charter of Fundamental Rights protect a fair, public hearing and the right to be defended and represented. The Constitutional Court referred to the Explanations to the Charter,[89] according to which Arts. 47 and 48 are based upon Art. 6 ECHR on fair trial. To this end, the Spanish Constitutional Court noted that the ECHR only provides a minimum floor of protection, while states may grant more extensive protection (Art. 53 ECHR). It went on to note that the level of protection given by the Spanish Constitution, according to the Constitutional Court's interpretation, is higher than the protection afforded by the ECHR and the EAW Framework Decision. Based on the above, the Spanish Constitutional Court asked whether it could invoke Art. 53 of the Charter to provide a higher level of protection under the national constitution, should the CJEU not find Art. 4a of EAW Framework Decision to be invalid. The CJEU upheld the legality of the measure, and rejected the possibility of granting a higher level of protection under the Constitution, on the grounds that

> casting doubt on the uniformity of the standard of protection of fundamental rights as defined in … [the EAW] framework decision, would undermine the principles of mutual

[88] For a call to this end, see e.g. Torres Pérez 2009, p. 134 et seq., and Albi 2015b, pp. 330–331.

[89] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17.

trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.[90]

Prior to the *Melloni* judgment, the national rapporteurs of Germany, Austria, Hungary, Italy, Portugal, Spain and Bulgaria for the FIDE 2012 Congress Reports, Volume 1, assumed that under Art. 53 of the Charter, the national standard of protection would prevail if higher.[91] Aida Torres Pérez has developed a compelling and comprehensively researched argument in support of allowing a stricter standard of protection under national constitutions based on Art. 53 of the EU Charter, along with a greater degree of deference to national constitutional courts.[92]

Q 2.11.1 It is common ground that in a significant range of areas and cases, the ECHR has played an important role in increasing the standard of protection of rights in the Member States. However, at the same time, the ECHR sets the minimum floor of protection for 47 countries, and thus at times the national constitutional standard may be higher. Has there been a discussion in the relevant Member State on whether it is justified for the Court of Justice to set the standard of protection for Charter rights at the level of the ECHR, or whether there are areas where there may be a case for increasing the standard to match the level provided under the national constitutions by constitutional courts and/or supreme courts? Additionally, might there be a case for allowing higher standards at national level, along with greater deference to national constitutional courts/supreme courts? What is the Expert's view on this matter?

2.12 Democratic Debate on Constitutional Rights and Values

Q 2.12.1 Fair Trials International has noted that the adoption of the European Arrest Warrant Framework Decision was marked by 'the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject'.[93] In the Expert's observation, was there a public deliberation on constitutional rights in the relevant Member State, *at the time of the adoption* (or, if not, at the time of the national implementation) of (a) the European Arrest Warrant Framework Decision; and (b) the EU Data Retention Directive?

Q 2.12.2 The European Court of Justice ordered Sweden to pay a fine of 3 million EUR for delays in the national implementation of the Data Retention Directive. The CJEU dismissed Sweden's argument that the delays were due to the need

[90] Case C-399/11 *Melloni*, supra n. 36, paras. 59 and 63.

[91] Besselink 2012, p. 133 and footnote 177.

[92] See Torres Pérez 2009, pp. 62 et seq., 92, 162.

[93] Fair Trials International submission to the EU Justice and Home Affairs Council Working Group, 9 July 2009, http://www.fairtrials.net/campaigns, p. 4.

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> to respond to an extensive political debate concerning the transposition of Directive 2006/24 into domestic law and that the implementation of the measures required to effect that transposition has led to problems at the legislative procedural level and to difficult choices involving weighing the protection of privacy against the need to combat crime effectively… .[94]

The European Commission brought a further enforcement action against Germany, with a fine of 300,000 EUR per day.[95] The Commission rejected the German Government's argument that the delay had resulted from the Constitutional Court's judgment declaring the transposition measures unconstitutional and void.

In the Expert's analysis, when important constitutional issues have arisen and have been referred to the constitutional court at the stage of implementing EU law, does the present system allow sufficient space for democratic deliberation, constitutional review and accommodation of important constitutional issues? Please also note the restricted standing of private parties to request judicial review of EU legislative measures and the low level of annulment of legislative measures by the CJEU (see Sect. 2.8).

Q 2.12.3 Would the Expert support a recommendation to suspend the application and carry out a review of EU measures, where important constitutional issues have been identified by a number of constitutional courts?

Would the Expert support a recommendation to recognise as a legitimate defence on the part of a Member State in an infringement proceeding that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality?[96]

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

Q 2.13.1 Does the Expert share the concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law (except in the areas where the rights arise from EU law, such as free movement, non-discrimination, gender equality and other areas noted in the Introduction to Part 2, or where the rights are enforced vis-à-vis the Member States rather than the EU institutions)?

Q 2.13.2 If the answer to the previous question is 'yes', please answer the following questions.

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[94] Case C-270/11 *Commission v. Sweden* [2013] ECLI:EU:C:2013:339.

[95] Case C-329/12 *Commission v. Germany* [2014] ECLI:EU:C:2014:2034; see European Commission Press Release, Data retention: Commission takes Germany to Court requesting that fines be imposed, IP/12/530 (31 May 2012), http://europa.eu/rapid/press-release_IP-12-530_en.htm.

[96] The Principal Investigator is grateful to Samo Bardutzky for this question regarding recognition of constitutional defences.

Has the reduction in the standard of protection of constitutional rights been significant or limited in extent in the Expert's view? Has the reduction been justified and proportionate in view of the overall objectives sought?

Is such reduction inevitable given the objectives of European integration, or has it rather resulted from a lack of wider awareness and debate given issues such as the complexity of multilevel governance? If the reduction of standards is deemed inevitable for the time being given the objectives sought, should the standard be restored in the future when such objectives are achieved, or should such standard remain in place on a continuous basis?

If the reduction is not considered inevitable, what does the Expert consider to be the main ways for upholding and enhancing the protection of constitutional rights? For example,

- EU accession to the ECHR (however, please comment how issues such as increased complexity and the ECHR providing a minimum floor of protection would be addressed);
- A revised approach and enhanced responsiveness by the EU Courts (see question 2.13.3);
- A more proactive role for national constitutional courts and/or supreme courts in highlighting the issues surrounding the standard of protection of constitutional rights in European judicial dialogues;[97]
- A more proactive role for other national institutions, such as national parliaments and ombudsmen, in highlighting constitutional issues in European governance;
- Allowing a stricter standard of protection under national constitutions on the basis of Art. 53 of the EU Charter of Fundamental Rights, and a greater degree of deference to national constitutional courts (see Sect. 2.11);
- Creation of a new independent judicial body, e.g. the European Constitutional Tribunal (with *ex ante* or *ex post* review);[98]
- Comments and other solutions.

Q 2.13.3 With regard to the *Advocaten voor de Wereld* case regarding *nulla poena sine lege*, concern has been expressed that the European Court of Justice 'refused to make any comment on much-contested issues' and made 'little effort to engage with …[its] national counterparts'.[99] Other authors have called upon the Court to 'abandon the cryptic, Cartesian style', which is 'not conducive to a good conversation with national courts',[100] and have noted that 'it is crucial that the Court display in its judgments that national sensibilities were fully considered and taken into account'.[101]

[97] For a call to this end, see e.g. Torres Pérez 2009, p. 134 et seq., and Albi 2015b, pp. 330–331.

[98] Calls to this effect have been put forward by J.H.H. Weiler, R. Herzog and others.

[99] Sarmiento 2008, pp. 177–178.

[100] Weiler 2001, p. 225.

[101] Ibid.

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What is the Expert's assessment on the responsiveness of the European Court of Justice with regard to national constitutional concerns? Have constitutional issues been raised by a national court in the relevant Member State in a preliminary ruling request to the CJEU? If so, has the CJEU's judgment been seen as adequately responding to the issue and/or taking the concern sufficiently into account?

If the Expert regards a revised approach by the CJEU as a key solution, please comment on specific potential changes. For example, scholars have recommended revising the autonomous, self-referential interpretation of rights on the part of the CJEU by making systematic use of comparative method in determining the protection of constitutional rights;[102] making the arguments of the parties and of the intervening governments fully available on the Court's website;[103] a stricter standard of judicial review of EU measures (see Sect. 2.8); and allowing dissenting opinions.

Q 2.13.4 If the Expert sees solutions in a more proactive contribution at the national level, the Expert is welcome to formulate potential constitutional amendment proposals or other regulatory changes that would e.g. mandate a more proactive approach to upholding and shaping constitutional rights, the rule of law, democracy and other substantive constitutional values on the part of national parliaments, courts and other institutions in the context of European governance.

3 Constitutional Issues in Global Governance

Introduction The third section of the Questionnaire explores the more recent phenomenon of global governance, which, besides the extensive shift of powers to a multiplicity of international organisations and global institutions, involves a number of important structural changes. These include the rise of global regulatory networks,[104] the shift of global law-making outside the conventional formats of public international law to include a significant amount of rule-making by private and professional bodies,[105] and the wide-spread use of non-binding and non-justiciable yet highly effective soft law. Additionally, the distinction between domestic and international law has increasingly become blurred, as regulators come together in global institutions and set standards that they then implement in their domestic capacity. Indeed, a leading school of scholars regards global governance essentially as 'global administrative law', as regulatory functions are now performed in a global rather than national context.[106] The consequence of such

[102] For a compelling and extensively researched argument to this end, see Torres Pérez, supra n. 88, pp. 144 et seq.

[103] The author is grateful to Giuseppe Martinico for this point.

[104] Slaughter 2004.

[105] Teubner 1996, p. 3 et seq.

[106] Krisch and Kingsbury 2006, pp. 1–3 and 11.

developments, as Nico Krisch notes, is that 'the role of treaties as "transmission belts", ensuring accountability to states and through the ratification process also to the public within states, has become weaker and weaker'.[107]

While global governance institutions and networks play a vital role in advancing peaceful co-operation, human rights and democracy, the literature in the field increasingly also highlights important challenges to constitutionalism.[108] Central among them has been the erosion of democratic oversight. Foreign affairs have traditionally formed the prerogative of the executive, and hence countries are typically represented in transnational institutions and networks by their governments. There is also the broader problem of the legitimacy of the power exercised by global governance institutions. Among further challenges are a lack of accountability, deficiencies in legal protection, the capture of regulatory networks by narrow interest groups and a lack of transparency, as decision-makers are not clearly identifiable.[109] Regarding the rule of law as the primary constitutional principle, Anne Peters has shown how the downsides of globalisation affect all the key elements constituting the rule of law, including the requirement that government action must be bound by the law and has to be transparent, the separation of powers with checks and balances, fundamental rights protection, due process and judicial review of governmental action.[110] Indeed, Peters concludes that in addition to positive effects, state constitutions have also been invisibly 'globalised' 'in a rather negative way',[111] and there has been a 'hollowing out' of national constitutions or 'de-constitutionalisation' at the domestic level.[112]

In order to respond to these problems, the global governance discourse is predominantly looking for solutions to enhance democracy and accountability at the transnational level. However, while global solutions are essential, this project invites the Experts to consider whether the above challenges could also be addressed at the national level, with corresponding adjustments in the national constitutional frameworks.

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

Q 3.1.1 Please briefly outline the constitutional or other provisions that regulate the transfer of powers to international organisations and the ratification of treaties. Do

[107] Krisch 2006, p. 277.

[108] Grimm 2005, p. 458; Peters 2007, p. 260 et seq.; Kiiver 2009.

[109] For different aspects see e.g. Alston 1997, p. 441; Krisch 2006, pp. 247–278; Slaughter 2004; Peters 2007, p. 260 et seq.

[110] Peters 2007, p. 271.

[111] Peters 2007, pp. 254 and 273 et seq. See also Grimm 2005.

[112] See also Peters 2005 and 2006.

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the relevant provisions contain references to the objectives sought by international co-operation, limits to the delegation of powers and/or values and principles that ought to be upheld by the state when participating in international co-operation? Are there constitutional provisions with regard to specific international organisations or institutions, such as NATO or the International Criminal Court?

Q 3.1.2 If any of the relevant provisions have been introduced since 1990, please outline the aims of the amendment, the amendment process and the conceptual background to the choice of wording. What drove the reform, which obstacles were encountered, which key factors influenced the decisions on the scope and content of the amendment? To what extent was the advice of scholars and experts followed by political decision-makers?

Q 3.1.3 Have any provisions been highlighted as being in need of amendment (e.g. in court decisions, by parliamentary or governmental bodies or in legal commentary), with regard to international law and global governance, especially as regards the question of how constitutional texts could better respond to the transfer of powers to transnational level and more effectively uphold constitutional values in international co-operation? Please also include any attempts at constitutional reform in this field that have not materialised in practice.

Q 3.1.4 Further to Question 1.5.3 in Part 1, please add any additional observations or recommendations regarding the role of the national constitution in the context of international law and global governance, and whether there is a need for amendments in this context. Please outline the potential areas and tentative content of the amendments.

If the Expert sees a solution in a more proactive contribution at the national level, the Expert is welcome to formulate potential amendment proposals or other regulatory changes, which would e.g. mandate a more proactive approach to upholding and shaping democracy, the rule of law, constitutional rights and substantive constitutional values, on the part of national parliaments, courts and other institutions in the context of global governance.

3.2 The Position of International Law in National Law

Q 3.2.1 Please briefly outline the constitutional or other rules governing the application of treaties and their position in domestic law.

Q 3.2.2 It has been commented that neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalisation.[113] Please outline the legal commentary on the applicability of monism and dualism in the relevant Member State. What is the Expert's view on the continued relevance of the above concepts?

[113] Nollkaemper 2007, p. 11; Von Bogdandy 2008, pp. 399–400.

3.3 Democratic Control

Existing constitutional provisions typically concern the initial formal ratification by parliaments of international agreements or of accession to international organisations. Some scholars have noted the need for extended parliamentary participation in the international negotiation process and prior to the conclusion of a treaty.[114] Others have called for continued involvement of national parliaments or their networks with regard to the international organisations beyond the initial conclusion of a treaty, especially in the case of the World Trade Organisation.[115] Yet in Europe, the Swiss Parliament is the only legislature to systematically oversee WTO and transnational rules that affect national legislation. The Swiss Constitution was amended to this end in 1992 and further in 1999, to provide that the Federal Assembly shall participate in the shaping of foreign policy and supervise foreign relations (Art. 166).

More effective involvement of parliaments may also be necessary at the stage of implementing international commitments, as shown by a case in Latvia's Constitutional Court, where 9,000 pensioners challenged the constitutionality of a law that reduced their pensions by up to 70% in order to implement an IMF package. The Court noted that the measure had been adopted in a rush, without consultations, and that the IMF package had been very hard for the Court to access. To balance the social impact of the measures in a fairer way, the Latvian Constitutional Court ruled that the contested law was in breach of legitimate expectations, and that the Government must repay the pension reductions in later years when the economy improves.[116]

Q 3.3.1 Please briefly outline the constitutional and other rules on parliamentary involvement with regard to (a) the initial negotiation and ratification of an accession treaty; and (b) subsequent involvement in scrutinising an international organisation beyond initial ratification of the membership treaty. Are there any aspects in the parliamentary involvement in the relevant Member State that could be regarded as a best practice and could be recommended more widely? If relevant studies are available, please include a summary indicating to what extent the national parliament typically holds a debate on substantive matters arising from international obligations, beyond a formal reference to the requirement to transpose international commitments.

Q 3.3.2 Have any international organisations or treaties been subject to a referendum? If so, what has been the rationale for this procedure, e.g. to enhance legitimacy? Some constitutions contain a ban on referendums on treaties. Please indicate whether this rule applies in the relevant Member State.

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[114] Peters 2007, p. 283, citing Harrington 2006, pp. 121–160.

[115] E.g. Maurer et al. 2005, p. 6 et seq. On the need to ensure parliamentary participation in supranational bargaining, see also Grimm 2005, p. 9.

[116] Latvian Constitutional Court, Case No. 2009-43-01, English translation available at: http://www.satv.tiesa.gov.lv/upload/Judgment%202009-43.htm.

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3.4 Judicial Review

Under the classic rule of *pacta sunt servanda*, it has come to be a standard expectation that national courts ought not to undermine the commitments of the state under international treaties. The acts of international organisations themselves are normally not challengeable in courts and tribunals. However, given the sheer scope of issues for which decision-making has shifted to the global level, views are increasingly expressed that under certain circumstances there should be a right of review of acts of global institutions, especially if they directly affect individuals.[117] The need for such review was particularly propelled into the spotlight by the widely debated *Kadi* case.[118] This concerned UN Security Council resolutions under which the assets of terrorist suspects were frozen without any reasons provided to them or any avenues available for judicial review. The severity of the breach of fundamental rights led to the annulment of the relevant EU measures by the European Court of Justice.

The experience with the *Kadi* case led Armin von Bogdandy to comment that '[t]here should always be the possibility … to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts …'.[119]

Q 3.4.1 What are the relevant rules in the Member State in question? To what extent do courts review, in doctrine and in practice, treaties and measures adopted under international law? Please include case law and constitutional issues arising from parliamentary debates or scholarly commentary. How has judicial review been reconciled with the classic rule of *pacta sunt servanda*? What is the Expert's view on this matter?

3.5 The Social Welfare Dimension of the Constitution

The global governance discourse contains a significant volume of literature that is critical of the erosion of the social state and the ever-increasing wealth gap. This is often attributed to the agenda of global economic institutions, which have pushed for liberalisation, deregulation, privatisation of public utilities and other policies representing a belief in the efficiency of unfettered markets.[120] Serious questions

[117] Peters 2007, p. 273, referring to other publications including Cottier and Hertig 2003, pp. 326–327. See also Krisch and Kingsbury 2006, p. 11 and Kiiver 2009, p. 9.

[118] Court of Justice, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, supra n. 60.

[119] Von Bogdandy 2008, p. 412.

[120] See e.g. Stiglitz 2002, pp. 442–443.

have also been asked about the mode of rule-making in these organisations. A former Chief Economist at the World Bank, Joseph Stiglitz, has described the IMF as 'the least transparent' institution that he has encountered in public life.[121] In any event, the policies of international financial institutions, as Alston notes, have resulted in a dramatically reduced ability for a state to carry out the role of counter-balance, watchdog, regulator and the guarantor of the proverbial fair playing field.[122] In the context of national constitutions, the erosion of the social element, which has been regarded as traditional to European constitutionalism, has been explored by Anne Peters.[123]

Q 3.5.1 If the above issues have been of significance in the case law or the constitutional discourse in the relevant Member State, or raise issues in the Expert's view, please include a summary in this section.

Q 3.5.2 If the country has been subject to a bailout and austerity programme (which has not already been covered in Sect. 2.7.3), please include in this section any issues that may have arisen with regard to IMF/World Bank conditionality in terms of democratic control, transparency, accountability and/or balancing the constitutional rights and social welfare of the citizens and residents against the interests of the international creditor community.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

Q 3.6.1 Please report in this section on any further cases, parliamentary debates and scholarly commentary in areas where constitutional rights, the rule of law, judicial review, democratic control or accountability may have been affected to a significant degree in the context of global governance in the relevant Member State. Some examples may include inclusion in terrorist blacklists, freezing of bank accounts, arrests under anti-terrorist legislation; cases regarding arrest warrants under international agreements and arrest warrants by Interpol; rendition flights and secret prisons. [Editor's note: we did not initially include concerns about the Transatlantic Trade and Investment Partnership (TTIP), due the extensive scope of the Questionnaire. However, given that the TTIP subsequently received heightened public attention, which included a European Citizens' Initiative with 3 million signatures, we informally asked the Experts to report national debates on the TTIP where relevant.] We would also welcome the Expert's analysis of constitutional issues arising in the context of constitutional rights and values in global governance.

[121] Stiglitz 2002, p. xii.

[122] Alston 1997, pp. 442–443.

[123] Peters 2007, p. 285 et seq.

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Part II
Political or Historical Constitutions: The Predominance of Parliament with the Absence of or a Weak Role for a Constitutional Court, and a Generic or ECHR-Based Bill of Rights

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Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification

Alison L. Young, Patrick Birkinshaw, Valsamis Mitsilegas and Theodora A. Christou

Abstract The United Kingdom constitution is the only uncodified constitution in Europe, and is described in the report as evolutionary, historical and predominantly political, responding piecemeal to developments through pragmatic solutions. A central concept is parliamentary sovereignty. The Supreme Court, replacing the Appellate Committee of the House of Lords, started its work in 2009; it can make a declaration of incompatibility with the ECHR, but has no power to annul legislation (although prior to Brexit, the courts were willing to disapply legislation which contravened directly effective provisions of EU law). Fundamental rights are predominantly protected by the Human Rights Act 1998, which incorporates the

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ECHR into UK law and the common law. A proactive role in raising fundamental rights issues, also in relation to EU law, is played by parliamentary scrutiny committees, NGOs and other institutions. These have contributed e.g. to the subsequent introduction of rights-based safeguards to European Arrest Warrant legislation and of a forum bar with regard to international extradition treaties. In terms of the main comparative influences, UK law is more likely to refer to the principles found in the common law of the US, Australia, Canada and New Zealand. Although European influences are present and have increased, it is unclear how far these influences will remain post Brexit. The report observes that membership of the EU and of the ECHR has helped to subject the UK constitution to juridification. In general, EU law has in many areas enhanced rights protection, e.g. as regards the right to privacy and the general principles of law; indeed, the latter were introduced into the UK through EU and ECHR law. The report does not address the Brexit process, although a brief post scriptum note has been added.

Keywords United Kingdom constitution · Parliamentary sovereignty
Political constitutionalism · European Communities Act · Human Rights Act 1998
Supreme Court · Judicial review · Declaration of incompatibility
European Arrest Warrant, extraditions and proportionality · *Symeou* case, the presumption of innocence and review of evidence · Data Retention Directive and the Data Retention and Investigatory Powers Act (DRIPA and the Investigatory Powers Act 2016) · Fundamental rights and the rule of law · General principles of law · Juridification of the constitution · Forum bar for international extradition treaties · TTIP · Brexit referendum · *Miller*

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The United Kingdom constitution is evolutionary, historical and predominantly political. Parliamentary sovereignty, as interpreted by Dicey, states that Parliament can legislate on any subject matter that it wishes; that the courts cannot question duly enacted legislation of the Westminster Parliament and that Parliament is unable to bind its successors as to the content or the manner and form of legislation. Understood in this manner, parliamentary sovereignty prevents the enactment of a legally entrenched Constitution.

However, recent developments question the accuracy of this account of UK constitutional culture. The UK's membership of the EU is one event influencing this change in attitude. First, the supremacy of directly effective EU law questions the accuracy of Dicey's conception of parliamentary sovereignty. Secondly, the way in which courts have modified English law to accommodate supremacy and direct effect may be evidence of a shift away from a political towards a legal

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constitution based on constitutional principles of the common law – referred to as 'common law constitutionalism'. This is reinforced by the Human Rights Act 1998 which incorporated the European Convention on Human Rights (ECHR) into English law. Thirdly, there are legal dicta supporting the claim that courts could, in exceptional circumstances, refuse to enforce legislation.

The constitution remains evolutionary in nature, responding piecemeal to developments through a series of pragmatic solutions to specific problems. Concerns over the role of Europe in the UK constitution may have prompted the 'in-out' referendum on Brexit, but to see the result as being solely due to these concerns, and the need for more control, fails to give a full account of the motives of those who voted to leave and the motives of those campaigning on the side of leave. It is probably not too far-fetched to claim even a few days after the result of the Referendum held on 23rd June, that the decision to leave (17,410,742 votes, 51.9%) as opposed to remain (16,141,241 votes, 48.1%) will have huge constitutional implications for the UK and for the rest of the EU.[1]

1.1.2 Given its evolutionary nature, it is hard to pinpoint the key rationale of the constitution. Although it is often argued that parliamentary sovereignty is its key principle, the UK constitution also recognises the rule of law, human rights and civil liberties. All of these have importance in the UK constitution and the balance between them constantly evolves.

The principle of the separation of powers has played a much smaller role as regards the organisation of the UK constitution. A further key feature of the UK constitution is the partial fusion, in terms of personnel, of the executive and the legislature. The executive is formed from the political party, or parties, with the majority of seats in the House of Commons and governmental ministers are simultaneously members of the executive and members of the legislature. However, this does not mean that there are no checks and balances. The executive is held to account by the legislature through parliamentary debates, parliamentary questions and departmental select committees. Moreover, there is a firm regard for the principle of the independence of the judiciary[2] and an ever-growing role of the courts in holding the executive to account for its actions through judicial review.

[1] Given the timing of the referendum and the writing of the report, the potential impact will be dealt with in a postscript, written by A.L. Young and P. Birkinshaw. The main text was submitted on 30 June 2016, with the postscript added on 10 July 2016 and further additions inserted on 17 March 2017 and on 10 February 2018.

[2] See, in particular, the Constitutional Reform Act 2005.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The lack of a specific procedure for constitutional amendment makes it difficult to pinpoint a clear amendment of the UK constitution in relation to EU membership. Nevertheless, the UK has enacted legislation in relation to EU membership which has later been regarded by the UK courts as 'constitutional'. See, for example, *Thoburn v. Sunderland City Council* (*Thoburn*)[3] and *R (HS2) v. Secretary of State for Transport* (*HS2*).[4] It is also now clearly recognised that leaving the European Union is a 'fundamental change in the constitutional arrangements of the United Kingdom', implying in turn that the UK's membership of the European Union was also a fundamental constitutional change.[5]

The European Communities Act 1972 incorporates European Union law into UK law. Its key provisions are as follows:

> Section 2
>
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies.
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision
>
> (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> And in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.
> In this subsection 'designated Minister or department' means such Ministers of the Crown or government department as may be specified by Order in Council.
>
> …
>
> (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained

[3] *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin).

[4] *R (HS2) v. Secretary of State for Transport* [2014] UKSC 3.

[5] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 78.

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> in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes.

1.2.2 The UK has no specific constitutional amendment procedure. Constitutional amendment occurs through ordinary Acts of Parliament, the common law and constitutional conventions. In 2011, the Constitutional Committee of the House of Lords recommended that a different legislative procedure be used for constitutional legislation, including, by implication, legislation amending constitutional provisions.[6] This was rejected by the Government.[7] *Miller* recognised as a fundamental principle of the UK constitution that 'far-reaching change to the UK constitutional arrangements' cannot be 'brought about by ministerial decision or ministerial action alone'.[8]

1.2.3 The European Union Act 2011 could be considered as a recent reform of the UK constitution. This was not prompted by a change in EU law, but rather by a change in politics, recognising a shift towards greater Euro-scepticism. The Act, discussed in more detail below, governs future transfers of sovereignty from the UK to the EU.

1.2.4 There have been no constitutional reform packages in the light of EU membership that did not come to fruition.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Originally, there were no specific rules relating to the transfer or delegation of power to the EU. Nevertheless, the practice was to enact an Act of Parliament approving of the delegation or transfer of powers to the EU following Treaty revision or amendment. This emerging constitutional convention was placed on a statutory basis by Sect. 5 of the European Union (Amendment) Act 2008, requiring all amendments to the Treaty enacted through the EU's ordinary revision procedure to be approved by an Act of Parliament.

The mere requirement of legislation has now been replaced by a complex series of measures found in the European Union Act 2011 (EUA 2011). This Act now includes three possible forms of procedure for the transfer or delegation of powers to the EU. First, they may require approval by an Act of Parliament and a

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[6] Constitutional Committee of the House of Lords, The Process of Constitutional Change, 15th Report, 2010–2012 Session, HL 177.

[7] The Government Response to the House of Lords Constitutional Committee Report 'The Process of Constitutional Change' CM 8181, September 2011.

[8] Supra n. 5, para. 81.

referendum. Secondly, they may be required to be approved by an Act of Parliament. Thirdly, only parliamentary approval may be required, where a motion is passed in both the House of Commons and the House of Lords approving the transfer of power. The type of procedure required depends upon the subject matter and nature of the measure. However, given the principle of parliamentary sovereignty it is still possible to only use an Act of Parliament to transfer powers to the EU, this later Act impliedly repealing a referendum requirement in the EUA 2011. Whether this implied repeal would succeed or not may depend upon whether the EUA 2011 is classed as a constitutional statute. If so, clear and specific words will be required to repeal the referendum requirement. The European Union (Withdrawal) Act 2018 expressly repeals the European Communities Act 1972, in section 1, and the European Union Act 2011, in Schedule 9, these repeals taking effect on exit day.

A referendum and an Act of Parliament would normally be required to replace the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU) or to amend either of these Treaties through the ordinary revision procedure set out in Arts. 48(2) and 48(5) TFEU. Section 2 of the EUA 2011 provides a precise list of amendments which would require approval by referendum, its main theme being areas which extend the competences of the European Union or which remove limits on the current competences of the Union. Where Treaty amendment or replacement does not increase the competences of the European Union, the referendum requirement is removed. In a similar manner, Sect. 3 of the Act requires any amendment of the Treaties by the simplified revision procedure under 48(6) TFEU to be approved by a referendum and an Act of Parliament, where this would expand the competences of the EU. There is the possibility that the referendum requirement could be avoided, where the expansion of powers of the European Union requires the ability of the EU to impose new obligations on the UK, or to impose sanctions on the UK, where these obligations or sanctions are 'not significant' (Sect. 3(4)). A referendum and an Act of Parliament would also be required, were the UK to sign up to the European Public Prosecutor's Office, to adopt the euro or to remove border controls (Sect. 6). In addition, a referendum and an Act of Parliament would be required to ratify the use of some passarelle clauses (Sect. 6), and certain measures of enhanced co-operation (Sect. 6), whilst their use in less contentious areas would only require an Act of Parliament. An Act of Parliament is required to expand citizenship rights (Sect. 7).

Section 2 of the European Communities Act 1972 and Sect. 18 of the EUA 2011 govern the supremacy and direct effect of EU law. Sects. 2(2) and 2(4) of the European Communities Act 1972 require that all legislation, passed or to be passed, is to be read and given effect subject to the directly effective provisions of EU law. Section 18 EUA 2011 states that

> [d]irectly applicable or directly effective EU law (that is the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the

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> European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

UK law accepts that executive decisions are overridden by directly effective EU law. It is also clear that directly effective EU law overrides legislation enacted by the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly.[9] The more difficult issue concerns the extent to which directly effective provisions of EU law override Acts of the Westminster Parliament. *Factortame II* granted an interim injunction suspending the application of the Merchant Shipping Act 1988 the provisions of which contravened directly effective EU law.[10] The principle that directly effective provisions of EU law can disapply primary legislation of the Westminster Parliament was confirmed in *Thoburn*[11] and more recently in *HS2*.[12] In addition, the High Court and Court of Appeal have recently ordered that legislative provisions be disapplied in situations where they conflict with rights found in the EU Charter of Fundamental Rights (Charter). In *Benkharbouche v. Embassy of the Republic of Sudan*[13] the Court of Appeal concluded that the State Immunity Act 1978, which granted immunity from legal regulation of the employment regulations of some embassy staff, effectively meant that an applicant could not plead the applicability of provisions of EU law to any employment law dispute. This was seen to be contrary to Art. 47 of the EU Charter. Consequently, the Court of Appeal issued a court order to disapply sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978. Similarly, the Court of Appeal issued a court order disapplying provisions of the Data Protection Act 1998 which restricted the recovery of damages for breach of data protection provisions to pecuniary loss. The Court of Appeal concluded that Arts. 7 and 8 of the Charter, read in combination with Art. 47 of the Charter, required the ability for individuals to also obtain damage for distress caused by breaches of data protection provisions. Therefore, the provisions of the 1998 statute could be disapplied.[14] In *Davis* the High Court issued an order, the effect of which was suspended until 1 April 2016, to disapply provisions of the Data Retention and Investigatory Powers Act 2014.[15] The Court of Appeal initiated a preliminary reference under Article 267 in order to determine the extent to which EU law contradicted section 1 of the Act.[16]

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[9] Scotland Act 1998, Sect. 29(2)(d); Governance of Wales Act 2006, Sect. 81; Northern Ireland Act 1998, Sect. 6(2)(c).

[10] *R v. Secretary of State for Transport ex parte Factortame II* [1991] 1 AC 603.

[11] Supra n. 3.

[12] Supra n. 4.

[13] *Benkharbouche v. Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

[14] *Google v. Vidal-Hall* [2015] EWCA Civ 311.

[15] *R (Davis) v. Secretary of State for the Home Department* [2015] EWHC 2092 (Admin). Discussed in Sect. 2.4.1 below.

[16] *Secretary of State for the Home Department v. Davis* [2015] EWCA Civ 1185.

There are, arguably, limits on the extent to which the supremacy of directly effective EU law over legislation has been accepted in UK law. First, the decision in *Factortame II* concerned a conflict between directly effective EU law and a later Act that only repealed the European Communities Act 1972 (ECA 1972) by implication and not expressly – i.e. there was no provision in the later Act expressly repealing the ECA 1972 or stating that the provisions of the later Act were to take effect regardless of the provisions of directly effective EU law or of the ECA 1972. As such, it is arguable that, were legislation to be enacted that expressly repealed or specifically contradicted the ECA 1972, whilst the UK remained a member of the European Union, UK courts would apply the provisions of this Act of Parliament as opposed to the directly effective provisions of EU law.[17] Paul Craig would argue against this conclusion. He argues that the ECA 1972, as interpreted in *Factortame II*, shifted the rule of recognition defining UK law, such that UK law is not 'law' unless it is compatible with directly effective provisions of EU law. Craig would argue that directly effective EU law would prevail even if an Act of Parliament expressly repealed the provisions of the ECA 1972.[18]

Secondly, *HS2* makes it clear that *Factortame II* only applies to conflicts between substantive provisions of directly effective EU law and UK legislation and not necessarily to situations where directly effective EU law requires certain procedures to be adhered to by decision-makers. Thirdly, *HS2* makes it clear that UK law may not accept that directly effective provisions of EU law override constitutional instruments, constitutional statutes or constitutional principles of the common law.

There have been no cases applying the provisions of the EUA 2011. Commentary on the Act has focused on an assessment of its provisions or on its impact on parliamentary legislative supremacy.[19]

1.3.2 There is evidence of a shift in the conceptualisation of sovereignty in UK law. *Factortame II* accepted that any transfer of sovereignty occurred through an Act of the UK Parliament, namely the ECA 1972. This interpretation is confirmed by Sect. 18 of the EUA 2011. This appeared to accept an absolute conception of sovereignty, with the legislature determining the extent to which sovereignty had been delegated to the EU and the UK retaining its political sovereignty over the EU. *Thoburn* can be seen as marking a shift towards the argument that it is the UK courts which determine the extent to which sovereignty has been transferred, albeit whilst paying attention to the intention of the legislature, as the sovereignty of Parliament is a principle of the common law. This interpretation is confirmed by the approach of the Supreme Court in *HS2*. *HS2* can be seen as reconceptualising sovereignty in terms of constitutional pluralism, not only confirming that it is for UK law to determine the extent to which the sovereignty of directly effective EU law is recognised in UK law, but also suggesting that supremacy of EU law may

[17] See Wade 1996.

[18] See Craig 2011a.

[19] See Craig 2011b; Gordan and Dougan 2012, and Peers 2013.

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reach its limit where directly effective provisions of EU law override constitutional principles.

1.3.3–1.3.4 There are no express or implied statutory restrictions on the extent to which sovereignty can be transferred or delegated to the EU. The extent to which the UK Supreme Court, formerly the House of Lords, has accepted the supremacy of directly effective EU law over the national constitution is a matter of academic discussion. The leading case on this issue is the recent Supreme Court decision in *HS2*. It could be argued that by accepting the principle of the supremacy of directly effective EU law at all, UK law has already accepted the supremacy of EU law over the national constitution, as this acceptance required a modification to the constitutional principle of parliamentary sovereignty. This is reinforced by the fact that *Factortame II* required the court to grant an injunction against an officer of the Crown, suspending the application of an Act of Parliament. This was a clear change of constitutional principle.

However, the *HS2* case injects a note of caution into this assessment. Statements in the case suggest that although UK law generally accepts that statutory provisions that cannot be interpreted to comply with directly effective EU law can be disapplied, this may not be the case with regard to constitutional statutes, constitutional principles or constitutional instruments. See in particular the statement in the joint judgment of Lord Neuberger and Lord Mance:

> It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine), that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act of 1972 did not either contemplate or authorise the abrogation.[20]

In particular, it may not be the case that directly effective EU law could override Art. 9 of the Bill of Rights 1689 which protects parliamentary privilege, preventing the courts from questioning proceedings in Parliament. Similarly, in the recent *Miller* case, the Supreme Court suggested that directly effective provisions of EU law would not override the requirements of parliamentary sovereignty.[21]

Lord Neuberger's and Lord Mance's statement is clearly dicta. However, it is extremely influential. No conclusive list was provided of the measures deemed to be 'constitutional', although mention was made of the Magna Carta 1215, the Petition of Rights 1628, the Bill of Rights Act 1689 (Claim of Rights Act 1689 in Scotland), the Act of Settlement 1701, the Act of Union 1707, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005.

The *HS2* judgment also appears to confirm a shift in attitude of the UK courts towards the adoption of constitutional pluralism. As was the case with the judgment of Laws LJ in *Thoburn*, the Supreme Court is clear to point out that it is for UK law, enacted through valid legislation at Westminster and decisions of the UK courts, to

[20] [2014] UKSC 3, para. 207.

[21] *Miller*, supra n. 5, paras. 60 to 62 and para. 67.

determine the extent to which supremacy is granted to directly effective EU law. Despite this, it is also clear that UK courts, generally, favour EU-friendly interpretations of legislation. However, this friendliness cuts both ways. As *HS2* also illustrates, where there are conflicting interpretations of EU law, one of which would be compatible with the constitution and the other not, UK courts will prefer the interpretation that complies with the national constitution.[22]

1.4 Democratic Control

1.4.1 There are two sources of rules concerning the participation of the Westminster Parliament in the EU decision-making process. First, there are statutory provisions found in the EUA 2011 that require specific participation of the national Parliament before a Minister is able to approve an EU decision. Secondly, there are internal rules of Parliament designed to facilitate the participation of Parliament in the EU decision-making process.

Requirements of the European Union Act 2011 Some decisions cannot be adopted without an Act of Parliament, either on its own or in addition to a referendum. In particular, an Act of Parliament and a referendum are required before a Minister can adopt decisions on common EU defence or adopt decisions under Art. 4 of Protocol 21 on freedom, security and justice (Sect. 6). An Act of Parliament is required to approve of decisions modifying the election of Members of the European Parliament (MEPs); conferring more jurisdiction to the European Court of Justice (CJEU); changing the EU's system of own resources; changing the number of EU Commissioners; restricting the free flow of capital and to replace Protocol 12 (Sect. 7).

The Act also requires an Act of Parliament to approve decisions made under Art. 352 TFEU. This requirement is subject to two exceptions. First, with regard to a matter of urgency, where the measure, and the urgent nature of the measure, have been approved by a resolution of both Houses of Parliament, then the measure need only be laid before Parliament (Sect. 8). Secondly, where the measure taken under Art. 352 is equivalent to a previous measure taken under Art. 352; or prolongs or renews a measure already taken under Art. 352; or extends a measure taken under Art. 352 to another Member State or third country; or consolidates previous measures taken under Art. 352 with no change of substance, then the measure need only be laid before Parliament (Sect. 8).

The Act also requires parliamentary approval of both Houses for measures relating to other areas, including, inter alia, the enhancement of judicial co-operation in civil matters (Sect. 9), the free movement of services and social security provisions (Sect. 10).

[22] See the recent lecture by Lord Reed recognising the shift in approach of the Supreme Court: http://www.lincolnsinn.org.uk/images/word/education/euro/EU_Law_and_the_Supreme_Court.pdf.

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Requirements of the parliamentary rules The European Scrutiny Committee of the House of Commons scrutinises proposals for legislation, white and green papers from the Commission and also other documents that are laid before Parliament on an ad hoc basis from the Government. The House of Lords European Union Committee scrutinises draft legislation, documents submitted by one institution of the European Union to another, and draft decisions made under Title V and Title VI TFEU.

The Government decides whether an EU document should be presented for scrutiny. This is carried out by the Cabinet Office, assisted by the Foreign and Commonwealth Office for Title V and Title VI TFEU issues, and the Treasury with regard to the EU budget. Each document laid before Parliament is accompanied by an Explanatory Memorandum, written by civil servants, which includes a summary of the EU document, the legal policy, the financial implications, the view of the Government on the measure and also the relevant timetable for the measure before the Council of Ministers.

The European Scrutiny Committee of the House of Commons meets weekly to examine documents and reports to the House of Commons as to whether there is a need for further reconsideration of the document in the Committee, or for further debate on the floor of the House. The Committee cannot require that a debate be held. The Government has to find time to hold such a debate. The Committee can also write reports and frequently questions Ministers on EU issues. In the parliamentary session for 2011–2013, the Committee scrutinised 980 documents, of which 506 were reported as legally or politically important. It held only 38 debates in Committee and 12 debates on the floor of the House.

The European Union Committee of the House of Lords also meets weekly, supplemented by a series of Sub-Committees dedicated to specific areas of EU law, with the Committee also making arrangements to sift documents during the parliamentary recess. The Committee Chair sifts through the documents to determine whether they should be cleared or considered for further debate either in one of the Sub-Committees or on the floor of the House of Lords. If the European Union Committee recommends debate on the floor of the House of Lords, time must be found for this debate. Most documents are either cleared or debated in one of the European Union Sub-Committees.

The House of Commons Scrutiny Reserve Resolution of 17 November 1998 and the House of Lords Scrutiny Reserve Resolution of 16 March 2010 require that a Minister not agree to a decision unless scrutiny has been completed, or that this requirement be waived. For scrutiny to be completed for the House of Commons, the document must either be cleared through Committee, or a debate on the floor of the House must be held and the House of Commons must pass a resolution approving the measure. For scrutiny to be completed by the House of Lords, the measure must either be cleared at the sifting stage, or cleared by a Sub-Committee of the European Union Committee, or a debate on the matter must be held in the House of Lords. However, this requirement is only politically and not legally binding. There is criticism that Ministers often abstain or acquiesce on a measure that has not been cleared, considering this to adhere to the rules, as they have not 'agreed' to the measure.

1.4.2 There have been two referendums in the UK relating to the European Union – the referendum in 1975 on continuing membership and the referendum on 23 June 2016 voting to leave the EU. The 1975 referendum was the first major UK-wide referendum. In addition to referendums concerning EU membership, the UK has held a series of referendums on devolution issues, most recently on Scottish independence, and one referendum on the modification of the voting process to proportional representation.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 There have been no EU-specific amendments. The lack of a clear set of EU-related constitutional amendments is due to the ease with which the UK constitution can evolve. This flexibility can be advantageous. However, it means that there can sometimes be little public debate surrounding the relationship between the EU and the national parliaments. A debate on these issues would be welcomed to ensure greater awareness of the role of Europe and to provide greater legitimacy and democratic accountability of the European law-making process.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Fundamental rights are predominantly protected in UK law by the Human Rights Act 1998 (HRA 1998), which incorporates the European Convention on Human Rights into English law. However, the Conservative Government had planned to 'scrap' the Human Rights Act and replace this with a British Bill of Rights.[23] Courts do not have the power to strike down legislation enacted by the Westminster Parliament. However, courts must interpret legislation in a manner compatible with Convention rights, so far as it is possible to do so (HRA 1998 Sect. 3). Courts may read words into legislation, as well as read down broad words, to achieve Convention-compatibility.[24] Where this is not possible, courts of the level of the high court or above may issue a declaration of incompatibility. This declaration of incompatibility does not affect the legal effect, validity or force of the legislation declared incompatible with Convention rights (HRA 1998 Sect. 4).

[23] Queen's Speech 2015, https://www.gov.uk/government/speeches/queens-speech-2015. Following the snap general election, the current minority Conservative Government has delayed plans to replace the Human Rights Act until after Brexit.

[24] See *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 and *Home Department v. AF (No 3)* [2009] UKHL 28.

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Legislation declared incompatible may be modified by secondary or primary legislation (HRA 1998 Sect. 10). It is also unlawful for a public authority to act in a manner incompatible with Convention rights (HRA 1998 Sect. 6). The devolved legislatures do not have the power to enact primary or secondary legislation that is contrary to Convention rights (Scotland Act 1998, Sect. 29(2)(d); Governance of Wales Act 2006, Sect. 81; Northern Ireland Act 1998, Sect. 6(2)(c)).

In addition, UK law recognises fundamental/constitutional principles of the common law. These principles extend beyond human rights to incorporate aspects of the rule of law, including legal certainty and non-retroactivity. Constitutional principles are used when interpreting the common law, administrative acts and primary and secondary legislation. In particular, UK courts have developed the principle of legality whereby legislation will only be interpreted in a manner contrary to constitutional principles of the common law where there are clear and precise words to indicate that Parliament specifically intended to legislate contrary to these principles.[25] Constitutional principles of the common law are also used to develop specific heads of judicial review. For example, the principle of legal certainty has been used to develop a doctrine of substantive legitimate expectations.[26] The principle of proportionality is recognised, but it is not currently a general standard of judicial review in UK law.[27] However, there are dicta in recent judgments of the UK Supreme Court which suggest that English law may be on the verge of accepting proportionality as a general standard of review. In *Kennedy*,[28] Lord Mance recognised that both proportionality and the traditional test of *Wednesbury*[29] unreasonableness require the courts to consider issues of weight and balance when determining whether the outcome of an exercise of discretionary power is unlawful. Moreover, both proportionality and unreasonableness can be applied more or less stringently, depending on the circumstances of the case. Consequently, the real distinction between the two tests is not that a test of proportionality is necessarily more stringent than a test of unreasonableness, but rather that proportionality brings the advantage of structure to the judicial review of discretionality power. Similar dicta is found in *Pham*,[30] where Lord Mance repeated his observations in *Kennedy*, with similar statements found in the judgment of Lord Carnwath. In *Keyu* arguments were specifically put to the Supreme Court for the adoption of proportionality as a general test of review.[31] Nevertheless, the Supreme

[25] See *R v. Home Secretary ex parte Pierson* [1998] AC 539, *R v. Lord Chancellor, ex parte Witham* [1998] QB 575, *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

[26] *R v. North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

[27] *R (ABCIFER) v. Defence Secretary* [2003] EWCA Civ 473.

[28] *Kennedy v. Charity Commission* [2014] UKSC 20.

[29] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

[30] *Pham v. Secretary of State for the Home Department* [2015] UKSC 19.

[31] *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

Court declined the opportunity to adopt proportionality as a general standard of review in English law.[32] Lord Neuberger concluded that such a large constitutional change should be made by a court composed of nine as opposed to five Justices of the Supreme Court. Although the judgments in *Keyu* contain references to the dicta found in *Kennedy* and *Pham*, they also contain statements which suggest that the test of proportionality may only be suitable for cases involving rights.[33]

It is clear that the test of proportionality is applied by UK courts when applying EU law, when required by Convention rights through an application of the HRA 1998, in applying common law fundamental rights and when determining whether public policy reasons can justify reneging on a substantive legitimate expectation.[34] The UK courts apply a four stage test of proportionality: (i) whether the objective is sufficiently important to justify restricting a fundamental right; (ii) whether there is a rational connection between the restriction placed on the right and this objective; (iii) whether a less intrusive restriction could have been used to achieve this objective and (iv) whether a fair balance was struck between the right and the objective.[35] The UK courts use deference when applying the test of proportionality, modifying the stringency with which it is applied according to subject matter, focusing on the relative constitutional and institutional features of the courts, the legislature and the executive. The nature of the proportionality test has been influenced by EU law, the case law of the ECHR and provisions found in other common law countries, particularly Canada.

2.1.2 There is currently no general provision in UK law establishing the extent to which all fundamental rights can be restricted. When applying Convention rights, UK law adopts the proportionality test used to determine the extent to which certain Convention rights may be limited to achieve a legitimate aim.

2.1.3 The rule of law is recognised as a constitutional principle of the common law. Section 1 of the Constitutional Reform Act 2005 states that nothing in the Act affects 'the existing constitutional principle of the rule of law'. The rule of law is both formal and substantive.[36] To date, 'breach of the rule of law' is not a head of judicial review in and of itself. Nevertheless, the rule of law is justiciable. The various heads of judicial review exemplify the rule of law, by ensuring that administrative actions are controlled by the judiciary.[37] The rule of law is used to interpret the scope of heads of judicial review, to ensure that legal principles prevent arbitrary decision-making by the executive. It is also used as a justification

[32] Ibid.

[33] This approach is confirmed in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, paras. 55–56.

[34] *R (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[35] *Bank Mellat v. Her Majesty's Treasury (No. 2)* [2013] UKSC 38, [2013] UKSC 39.

[36] *R v. Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 591 (Lord Steyn).

[37] *R (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, para. 37 (Lady Hale).

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for the creation of new heads of judicial review and of the principle of legality.[38] However, given the competing principle of parliamentary legislative supremacy, when courts strike down executive measures, it is possible for Parliament to re-enact these measures, even retrospectively.[39]

Courts will also ensure that administrative bodies take into account possible implications for the rule of law as a relevant consideration. A failure to take into account a relevant consideration may mean that a decision of the administration will be quashed.[40] However, courts may defer to the executive as regards the extent to which rule of law considerations are to be balanced with other interests, particularly the balance between upholding the rule of law and maintaining national security.[41] The rule of law may also require the administration to produce guidelines explaining how it will exercise its discretion, where discretion is used to mediate the impact of a blanket provision restricting a fundamental right.[42] Courts may also scrutinise these guidelines to ensure their compatibility with Convention rights.[43]

The rule of law also underpins the constitutional principle of open justice. This principle requires judicial cases to be heard in public, unless private hearings are strictly necessary to ensure justice between the parties and the requirements of privacy are kept to an absolute minimum.[44] It also requires disclosure to newspapers of information placed before the court where this is required for serious journalistic purposes.[45] The principle of open justice can be restricted where there are good reasons, or where its restriction is required by clearly-expressed wording in legislation. It is for courts to determine the scope of the constitutional principle of open justice.[46]

The right to judicial review is regarded as a constitutional principle of the common law. It is a long-standing principle of the common law that courts will require extremely clear words in legislation to oust judicial review of a specific decision.[47] Although it is possible for legislation to be enacted that does oust

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[38] See *R v. Home Secretary ex parte Pierson* [1997] UKHL 37; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575, *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

[39] *Ahmed v. Her Majesty's Treasury* [2010] UKSC 2, where the courts used the principle of legality to strike down the Terrorism (United Nations Measures) Order 2006. The impact of this decision was reversed, retrospectively, by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, itself replaced by the Terrorist Asset-Freezing etc. Act 2010 which effectively replicated the executive orders, placing them on a legislative footing and thereby immune from judicial review.

[40] *R v. Coventry Airport, ex parte Phoenix Aviation* [1995] 3 All ER 37 and *R (Cornerhouse) v. Director of Serious Fraud Office* [2008] UKHL 60.

[41] *R (Cornerhouse) v. Director of Serious Fraud Office* [2008] UKHL 60.

[42] *R (Purdy) v. DPP* [2009] UKHL 45.

[43] *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

[44] *Bank Mellat v. Her Majesty's Treasury* (No. 2)[2013] UKSC 38, [2013] UKSC 39.

[45] *R (Guardian) v. City of Westminster Magistrates Court* [2010] EWCA Civ 420.

[46] *Kennedy v. Charity Commission* [2014] UKSC 20, and *A v. British Broadcasting Corporation* [2014] UKSC 25.

[47] *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 and *R (Cart) v. Upper Tribunal* [2011] UKSC 28.

judicial review, such clauses are strongly criticised by the judiciary and academic commentary.[48] There are also judicial dicta which state that, were legislation to be enacted that abolished judicial review, courts would not recognise such legislation as a valid Act of Parliament.[49] The Court of Appeal has also recognised access to the court as a fundamental right. This prevents individuals from being impeded in their access to courts, but does not extend to a positive obligation to provide information on legal rights.[50] The principle may, however, provide a means of challenging restrictions on the provision of legal aid, were this to prevent effective access to the courts.[51] The principle was recently used to prevent the setting of fees that made it practically impossible for individuals to bring a case before a tribunal.[52]

There is no specific constitutional principle that non-published laws are invalid. However, there is a requirement to publish primary legislation, as well as national statutory instruments. Circulars and policy documents need not be published. However, where a policy has been published, an individual has a right to have his case determined according to the published policy and not according to a secret, unpublished policy that contradicts the requirements of the published policy.[53] Also, if a policy informs discretionary decision-making, where those affected by that discretion would expect to have a right to make representations to the public body as to how the public body's discretion should be exercised, then the policy must be made available.[54] However, it may not be the case that non-publication renders the measure invalid.[55] UK law has also developed a principle of notice. Notice of an individual decision is required before it can have the character of a determination with legal effect.[56]

Legal certainty is also recognised as a constitutional principle of the common law. There is no specific legal principle of non-retroactivity and it is possible, though rare, for legislation to be enacted with retrospective effect, even if this adversely affects an individual's rights previously upheld by the courts.[57] However,

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[48] See for example the strongly-worded comments of Lord Woolf, reacting to the proposal to oust judicial review for immigration decisions. http://www.law.cam.ac.uk/faculty-resources/download/lord-woolf-squire-centenary-lecture-the-rule-of-law-and-a-change-in-constitution-transcript/1415/pdf. The clause was eventually removed from the Bill.

[49] *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para. 102 (Lord Steyn) and at para. 107 (Lord Hope); *AXA General Insurance v. Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, at para. 51 (Lord Hope).

[50] *R (Children's Rights Alliance) v. Secretary of State for Justice* [2013] EWCA Civ 34.

[51] *R (Public Law Project) v. Secretary of State for Justice* [2014] EWHC 2365 (Admin).

[52] *R (Unison) v. Lord Chancellor* [2017] UKSC 51.

[53] *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12.

[54] *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12; *R (Reilly) v. Secretary of State for Work and Pensions* [2013] UKSC 68.

[55] *R (Reilly) v. Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453, para. 65.

[56] *Anufrijeva v. Immigration Appeal Tribunal* [2002] EWCA Civ 1628.

[57] Recent examples include the War Damages Act 1965, the War Crimes Act 1991, the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and the Jobseekers (Back to Work Scheme) Act

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recently the High Court, and later the Court of Appeal, declared retrospective legislation incompatible with Art. 6 ECHR in the specific situation where the retrospective legislation enacted had interfered with the outcome of a legal case concurrently being determined by the court.[58] There is also no specific prevention of the creation of executive actions with retroactive effect, though the existence of retroactivity may be regarded as evidence of an unreasonable exercise of discretionary power.[59] There is a protection of both procedural and substantive legitimate expectations.[60] There is a stronger protection of individual substantive representations than of general policy decisions, and it is easier to require public bodies to adhere to a procedural as opposed to a substantive legitimate expectation. Public authorities may renege on an individual representation or a published policy where to do so is for the public good and is a proportionate response. The principle can also be used to ensure that published policies are applied to individuals, again subject to the proviso that the policy may not be applied where this is a proportionate response for good public policy reasons.[61]

The Bill of Rights requires parliamentary authority for the imposition of taxation.[62] This does not extend to the imposition of administrative charges, penalties or obligations. There is also a residual ability of the courts to use the common law to create new criminal offences which have not been established by statute, where this is required to prevent offences that are prejudicial to the public welfare.[63]

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 The balancing of fundamental rights and economic freedoms in EU law has not raised constitutional issues in the UK. There has, however, been considerable academic criticism of *Viking Line*[64] and *Laval*.[65]

2013. All of these examples, apart from the War Crimes Act 1991, are retrospective legislative provisions designed to overturn court decisions quashing executive action.

[58] *R (Reilly) v. Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin) and [2016] EWCA Civ 413. It is believed that the Government will appeal this decision. For commentary see Harlow C, 'Judging Parliament: the Jobseekers case' UK Const. L. Blog (3rd October 2014) http://ukconstitutionallaw.org.

[59] *Congreve v. Home Office* [1976] QB 629.

[60] *R v. Devon Health Authority ex parte Coughlan* [2001] QB 213.

[61] *R (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363 and *R (Rashid) v. Secretary of State for the Home Department* [2005] EWCA Civ 744.

[62] Article 4, Bill of Rights Act 1688.

[63] *R v. R* [1992] 1 AC 599.

[64] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

[65] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The Presumption of Innocence

2.3.1.1 The presumption of innocence Article 6(2) of the ECHR provides the presumption of innocence guarantee;[66] it has been held to be applicable to extradition proceedings where they are a direct consequence, and the concomitant, of the criminal investigation pending against an individual.[67] At the EU level, the presumption of innocence is clearly set out in Art. 48(1) of the Charter of Fundamental Rights. It is also listed amongst the rights of which individuals must be informed in the letter of rights introduced under the Stockholm Roadmap.[68]

The Framework Decision on the European Supervision Order[69] (ESO) is an example of how 'flanking measures' are assisting in making the operation of the European Arrest Warrant (EAW) increasingly compliant with human rights. The ESO reinforces the presumption of innocence by minimising the risk that non-residents will be remanded for many months in custody pending trial.

The *Nikolics* case was an EAW case on appeal from the District Court, where reliance on the presumption of innocence was unsuccessful. There 'was a suggestion that the presumption of innocence is not in fact applied to them in the same way as non-Roma defendants'.[70] The Court found that there was insufficient evidence of discrimination; the argument was not that the issuance of the arrest warrant was for extraneous grounds, but rather the threat of discrimination upon return to Hungary, which could mean an increased likelihood of being held in remand.

2.3.1.2 Preliminary judicial review and review of evidence In England and Wales, a preliminary judicial review takes place; this is essentially an administrative review to ensure that the procedural requirements have been met. However, in its implementing laws the UK has introduced a number of grounds upon which

[66] *Geerings v. the Netherlands,* no. 30810/03, 1 March 2007. The confiscation order imposed on the applicant was based on a presumption of guilt. 'It amounts to a determination of the applicant's guilt without the applicant having been "found guilty according to law"' (§50). The Court reiterated that this applies to both judicial decisions and statements by public officials. See *Daktaras v. Lithuania*, no. 42095/98, ECHR 2000-X.

[67] *Ismoilov and Others v. Russia,* no. 2947/06, 24 April 2008. See also *Gaforov v. Russia*, no. 25404/09, § 208, 21 October 2010 referring to *Ismoilov*.

[68] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2009] OJ C 295/01 (Stockholm Roadmap). Specifically, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1.

[69] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, [2009] OJ L 294/20.

[70] *Laszlo Nikolics v. The City Court of Szekszard* (A Judicial Authority in Hungary) [2013] EWHC 2377 (Admin) 2013.

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surrender can be resisted. These include dual criminality (where required); extraneous considerations; passage of time; human rights; or where the physical or mental condition of a wanted person would make surrender unjust or oppressive.

Even prior to the Framework Decision on the European Arrest Warrant (EAWFD),[71] requesting states did not have to show a *prima facie* case before extradition could be granted. As such, it continues to be the case that a review of the evidence is not undertaken. This is in line with the EAWFD and the principle of mutual recognition, and thus courts do not review the evidence prior to surrendering a person;[72] it is left for the issuing Member State to be satisfied that sufficient evidence exists for prosecution before they issue an EAW.

In England and Wales, prior to an arrest being made pursuant to an EAW, the National Crime Agency[73] conducts an administrative assessment whereby it reviews the form and content of the EAW. The conditions to be satisfied are set out under Sect. 2 Extradition Act 2003 (EA); these are procedural requirements relating primarily to the contents of the EAW, which must contain: either a statement stating that the person in question is accused in the issuing Member State of the commission of a specified offence or a statement that the warrant has been issued for the purposes of arrest and prosecution, including particulars of the person's identity, any other warrant in respect of the offence, the circumstances under which it is alleged the offence was committed or the sentence imposed. If satisfied, the EAW is 'certified' and passed onto the Police who undertake to locate and arrest the requested person. This process looks only at the validity of an EAW and whether the correct boxes have been ticked and completed, but not whether the information contained is correct.[74]

The administrative check does not consider substantive issues which may question the lawfulness of the issuing Member State warrant and could merit the non-execution of the EAW. Pre-arrest, such issues are not considered by a judge, since there is no check similar to that under Sect. 71 EA.[75] The initial hearing is

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[71] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[72] *Symeou v. Greece* [2009] EWHC 897 (Admin).

[73] The Serious Organized Crime Agency (SOCA) came into force on 1st April 2006 and was replaced by the NCA on 7 October 2013. The NCA and previously SOCA act as the UK point of contact for Interpol, Europol and as the UK Central Authority for all EAWs.

[74] See *Zakrzewski v. The Regional Court in Lodz, Poland* [2013] UKSC 2, para. 8.

[75] Section 71A EA (arrest warrant following extradition request) reads:

(1) This section applies if the Secretary of State sends documents to the appropriate judge under Sect. 70.

(2) The judge may issue a warrant for the arrest of the person whose extradition is requested if the judge has reasonable grounds for believing that –

(a) the offence in respect of which extradition is requested is an extradition offence, and

(b) there is evidence falling within subsection (3).

(3) The evidence is – (a) evidence that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction, if the person whose extradition is requested is accused of the commission of the offence;

also administrative in nature (confirming the identity, setting the date for the hearing, asking if the person consents to surrender and determining if the person is to be remanded in custody or bailed). The first opportunity at which a court can consider whether the issuing Member State's arrest warrant is lawful is during the extradition hearing, at which point the individual will have already been deprived of liberty if held on remand.

Arguments relating to the lawfulness and arbitrariness of an arrest are normally dealt with together with arguments against surrender. Arbitrariness[76] includes for example where an issuing Member State requests an individual for prosecution, when in reality they are requesting the individual for further investigation or questioning; here they are not using the EAWFD for the intended purposes. English courts have an inherent right to ensure that the process is not abused for a 'collateral and improper purpose'[77] and in some circumstances 'to question statements made in the EAW'.[78] According to Lord Sumption in *Zakrzewski*, this is exceptional and subject to four observations, which include looking only at administrative inaccuracies concerning material errors and not factual or evidential challenges of the alleged offence, which is reserved for the issuing Member State.[79]

The English courts have made it clear that 'under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW',[80] and what they receive in an EAW will be taken at face value. This has been confirmed by the Supreme Court, which has stated that there are two safeguards: first 'the mutual trust between states party to the Framework Decision that informs the entire scheme',[81] trusting that the issuing Member State has submitted the truth and, secondly, the restricted abuse of power check discussed above.

(b) evidence that would justify the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence within the judge's jurisdiction, if the person whose extradition is requested is alleged to be unlawfully at large after conviction of the offence.

[76] *Bozano v. France,* 18 December 1986, Series A no. 111; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I.

[77] *Zakrzewski v. The Regional Court in Lodz, Poland*, [2013] UKSC 2.

[78] Per Lord Bingham in *Caldarelli v. Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] 1 WLR 1724 *Criminal Court at the National High Court, First Division v. Murua* [2010] EWHC 2609 (Admin), *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 AC 31 and *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 WLR 325.

[79] *Zakrzewski v. The Regional Court in Lodz, Poland*, [2013] UKSC 2, para. 13: '[I]n considering whether to refuse extradition on the ground of abuse of process, the materiality of the error in the warrant will be of critical importance, whereas if the error goes to the validity of the warrant, no question of materiality can arise. An invalid warrant is incapable of initiating extradition proceedings. I do not think that it is consistent with the scheme of the Framework Decision to refuse to act on a warrant in which the prescribed particulars were included, merely because those particulars contain immaterial errors.'

[80] Per Lord Philips in *Assange v. Swedish Prosecution Authority* [2012] UKSC 22, para. 79.

[81] *Zakrzewski v. The Regional Court in Lodz, Poland* [2013] UKSC 2, para. 10.

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Perhaps the most difficult to reconcile with the executing Member State obligations are judgments such as Mr. Symeou's. Mr. Symeou provided evidence that the two key witnesses against him had been held incommunicado and subjected to intimidation before agreeing to sign identical statements in a language they did not understand; statements which were immediately revoked upon return to the UK. The UK courts held that these matters were for the trial judge in the issuing Member State to consider and not factors which could displace the obligation of the UK courts to surrender him under the EAWFD.[82] Mr. Symeou spent two years in Greece awaiting trial, including almost a year in the notorious Korydallos prison on remand having been denied bail on questionable grounds. The grounds upon which he was refused bail included the fact that he was not a resident of Greece and also that he had not shown any signs of remorse for the crime. Once the trial eventually began the case was dismissed on the basis that there was insufficient evidence, and Mr. Symeou was allowed to return to the UK.

To a certain extent the amendment to the EA attempts to address this issue. According to Sect. 21A, surrender can be refused where no decision has been taken to charge the requested individual, although this section does not create a requirement that the case be ready for trial.[83]

2.3.2 *Nullum Crimen, Nulla Poena Sine Lege*

2.3.2.1 Double criminality and legality Dual criminality has been interpreted strictly by the courts. This is one example of the principle of mutual recognition applying automatically. Where the offence for which the EAW is issued falls under one of the 32 listed offences, complete trust is given to the issuing Member State that the offence for which request for surrender of a person is made falls within the stated category of offence. Quite a broad margin has been given to the issuing Member State, with courts accepting the 32 offences without review.[84]

What will be noted at first glance is that the list contains a varied spectrum of crimes. Whilst some, such as murder, are easily defined and comparable across the Member States, the definition and classification of others such as swindling and rape[85] differ across the Member States, and some offences are unique to one Member State.[86]

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[82] *Symeou v. Greece* [2009] EWHC 897 (Admin).

[83] A number of amendments to the Extradition Act 2003 were made by the Anti-Social Behaviour, Crime and Policing Act 2014 which came into force on 22 July 2014 (The Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No. 4 and Transitional Provisions) Order 2014, 2014/1916).

[84] *Julian Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

[85] See ibid.

[86] For example, in the Republic of Cyprus there is a fraud offence which concerns the sale of property in the areas under unlawful Turkish occupation. Whilst the UK has no equivalent offence to the Cyprus offence, this was not a bar to Garry Robb's surrender under the EAW. The reason for this was that the Cyprus offence relating to dealings with property in the territory of Cyprus under

Section 64 EA, which transposes Art. 2 EAWFD, does not require the courts to consider whether the alleged conduct would constitute an offence under the law of the issuing state.[87] Nor does it require that an EAW be accompanied by a separate document certifying it.[88]

The judgment in the *Assange* case[89] before the High Court is a good example of the courts' approach to submissions on double criminality. The defence stated that the fourth allegation would not equate to rape under the law of England and Wales, had it been fairly and accurately described. Thomas LJ first ascertained that it is only in exceptional circumstances appropriate for a court to have regard to extraneous material in order to determine the accuracy of the description of the conduct,[90] the purpose of which was solely to ensure the fairness and accuracy of the described facts and not an enquiry into the decision to prosecute a certain offence. Exceptional circumstances would arise where there has been a fundamental error, unfairness or bad faith by the issuing Member State authorities. No exceptional circumstances were found to exist in the *Assange* case. Nevertheless, having had the material placed before it, the court did express its view as to whether it would have made any difference had it taken the material into account. For Offence 4 the Court held that the description was fair and accurate but that in any case, it is the law of the issuing Member State which governs the classification of rape. Under the EAWFD, dual criminality is abolished for 32 offences (including for rape) and as such an enquiry like this is not ordinarily part of the EAW process. The only question is whether the offence is classified as rape in the issuing Member State. This is not to say that a real issue does not exist and in fact the *Assange* case reignited criticism of the EAW, the use of mutual recognition in criminal matters and the potential abuse that is created with the abolition of dual criminality without any agreed definition of the 32 offences.[91]

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Trials *in absentia* Originally, Art. 5(1) EAWFD addressed the issue of trials *in absentia*, stating that where a person has been convicted having not been informed of the date and time of the hearing, his surrender may be subject to the

illegal Turkish military occupation fell within the 'fraud' category of offences. Fraud is one of the 32 listed offences in the EAWFD and so dual criminality was not required.

[87] *Boudhiba v. National Court of Justice, Madrid* [2006] EWHC 167 (Admin). See the judgment of Lord Bingham in *Office of the King's Prosecutor, Brussels v. Cando Armas and another* [2005] UKHL 67.

[88] *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6. Section 64(3)(b) imposes a double criminality requirement in respect of offences which are not listed in the EAWFD.

[89] *Julian Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), para. 41.

[90] The Court followed *The Criminal Court at the National Court, 1st Division (a Spanish Judicial Authority) v. Murua* [2010] EWHC 2609 (Admin).

[91] Amongst others see: O'Shea 2011; Marin 2014; Carrera 2014.

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issuing Member State giving an assurance that he will have the opportunity to apply for a re-trial of the case.

It is clear that the conditions required by Art. 5(1) EAWFD fell below the standards the European Court of Human Rights (ECtHR) demands. This provision has been deleted and the EAWFD amended by the Council Framework Decision relating to trials *in absentia*, which inserts Art. 4a.[92] This now sets out the grounds for non-recognition of decisions rendered following a trial *in absentia* and the conditions for its application.

The amended EAWFD requires the issuing Member State to confirm that the individual will be 'expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed'. However, the Executing Member State has no ability or opportunity to assess the realities which will be faced by the individual upon surrender. This assurance still has a narrower scope than envisaged by the ECHR; the Executing Member State has to trust the assurance given by the issuing Member State on the basis of a simple tick on the request form.

In its implementing law, the UK introduced additional guarantees in relation to trials *in absentia*, not envisaged in the EAWFD. Section 20(8) EA provides that if a person has been convicted *in absentia*, the person must be entitled not only to a re-trial but must also be guaranteed,

> (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
> (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

These guarantees have been considered by the House of Lords in *Caldarelli*[93] where the relevant provisions are summarised:

> 14. Section 20 … if the judge decides that the person had not been tried in his presence, and had not deliberately absented himself and would not be entitled to a retrial or (on appeal) a review amounting to a retrial, he must order the person's discharge.
>
> 15. Section 21 requires the judge to consider whether the person's extradition would be compatible with his Convention rights under the Human Rights Act 1998. The section is engaged if the person is accused of the commission of an extradition offence but is not alleged to be unlawfully at large after conviction of it, if the person was convicted in his presence, if the person had deliberately absented himself from his trial or if the person, not having absented himself deliberately from his trial, would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

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[92] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, [2009] OJ L 81/24.

[93] *Caldarelli (Appellant) v. Court Of Naples (Respondents)* [2008] UKHL 51.

In *Bicioc* it was held that according to the proper interpretation of Sect. 23 EA, as a minimum it is required that a trial process must have been initiated from which the appellant has deliberately absented himself. The defendant had not deliberately absented himself from the trial, although he had made it difficult for the authorities to serve him with notice. However, the key point was that,

> [i]f he had been entitled unequivocally to a right of retrial or to have his case reheard on the merits of the appeal his extradition could have been ordered. It is only because it is for the time being accepted that Romanian law does not give him that right that I must allow this appeal.[94]

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Assistance to citizens surrendered Public, non-governmental organisations providing assistance exist in the UK. These include Fair Trials International (FTI) which has been the most visible on the issue of the EAWFD. FTI provides legal assistance to individuals arrested abroad through their network of local lawyers. We would support the establishment of a public body providing assistance to residents who are involved in trials abroad, although concerns are already raised in particular in the light of recent cuts in legal aid at the domestic level in the UK. We would also recommend the establishment of EU funds for this purpose. Greater investment should be combined with more extensive use of the possibilities offered by the ESO and other mutual recognition and mutual legal assistance measures.

2.3.4.2 Statistics on outcomes The UK maintains detailed statistics on EAW requests, arrests and surrenders, which are available on the website of the National Crime Agency.[95]

In terms of the number of those surrendered and subsequently found innocent, the UK does not keep such statistics. The *Symeou* case mentioned earlier in the Chapter has been a high profile case concerning the deficiencies of the EAW process where it concerns assessing the strength of the case against the requested individual. However, as already stated above, in the UK this is not unique to the implementation of the EAWFD, since there was previously no requirement to show a *prima facie* case against a requested person.

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[94] *Gheorghe Bicioc v. Baia Mare Local Court Romania* [2014] EWHC 628 (Admin). See also *The Ministry of Justice (Romanian Judicial Authority) v. Ernest-Francisc Bohm* [2013] EWHC 1171 (Admin).

[95] National Crime Agency Statistics, http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics.

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2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 Mutual recognition and the rule of law Specific reference to the rule of law has been raised in different ways before the courts.

In *Villota*[96] it was submitted that where a state whose officials have deliberately tortured a person in their custody seeks to use the EAW system, this would be a 'tainted prosecution', which would offend the rule of law. This argument did not succeed, as the Court regarded the Spanish safeguards as sufficient.

Interestingly, in *Stawicki*[97] it was argued that, in the interests of the rule of law, a person convicted and sentenced should be surrendered irrespective of how much he had changed and turned his life around since conviction. A similar line of reasoning was applied in *Kolec* where the court held that the District Judge was correct 'on the facts of this case the United Kingdom's obligations under international treaties, whose purpose is to underpin the rule of law in Member States, must take priority over the right to respect for family life of the appellant, his partner and his daughter'.[98]

2.3.5.2 Suitability of mutual recognition in criminal matters The debate in the UK has focused more on the suitability of the application of mutual recognition in criminal matters, and whether sufficient mutual trust exists to enable such mutual recognition.[99] A number of reports and parliamentary inquiries on the extent to which mutual recognition can be applied to extradition have been conducted in the UK in recent years, including the Sir Scott Baker Review on the UK Extradition Arrangements in 2011,[100] the relevant inquiry by the Joint Committee on Human Rights[101] and the first inquiry by the ad hoc Parliamentary Committee on Extradition.[102] It is our view that the application of the principle of mutual recognition in criminal matters brings forward legal issues which are qualitatively different to those arising from the application of the principle in the internal market, in particular as regards the impact of mutual recognition on constitutional principles including human rights and the rule of law.

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[96] *Raul Angel Fuentes Villota v. The 2nd Section of the National High Court of Madrid, Spain* [2014] EWHC 2623 (Admin).

[97] *Stawicki v. Circuit Court of Torun, Poland* [2014] EWHC 3198 (Admin).

[98] *Dariusz Kolec v. Judicial Authority of Poland* [2014] EWHC 2230 (Admin).

[99] On the relationship between mutual recognition and mutual trust see Mitsilegas 2012, pp. 319–372 and Mitsilegas 2006, pp. 1277–1311.

[100] Home Office, Independent review of the United Kingdom's extradition arrangements, 18 October 2011.

[101] The Human Rights Implications of the UK Extradition Policy, 15th Report, session 2010–2011.

[102] Select Committee on Extradition Law – First Report, The European Arrest Warrant Opt-in, HL Paper 63, Published 10 November 2014.

2.3.5.3 Role of the judiciary Within the framework of the EAWFD, the role of the judiciary has shifted to an administrator whose hands, particularly at first instance, are largely tied by the principle of mutual recognition. However with time, judges have been gaining 'confidence' in questioning the presumptions created by mutual recognition.

Some may consider recent cases as a sign of the judiciary softening its stance in relation to human rights arguments resisting surrender. However, when considered in greater detail, this is not the case.[103] Despite the pilot judgment of the ECtHR in *Torreggiani and others v. Italy*,[104] which identified a systemic problem resulting from a chronic malfunction of the penitentiary system, Lord Justice McCombe has clearly stated that had the Italian authorities provided greater detail in their general letter of assurance, the outcome would have been different:

> For my part, I would have expected at least some information as to whether bail might be available to the Appellant in Italy and on what terms, and, if not available or if not likely to be granted, some information as to the specific institution or type of institution in which the Appellant would be confined and some information as to the prevalent conditions in that institution or those institutions.[105]

In the common law tradition, judges have been developing jurisprudence applicable to the EAW and mutual recognition in criminal matters more broadly, on a case by case basis. The evidence required to rebut the strong presumption remains high, and something 'approaching an international consensus is required'.

One of the questions in *Assange* was what was meant by a 'judicial authority'. In essence, both the Court of Appeal and the Supreme Court determined that it was for each Member State to designate their own judicial authority: 'It is therefore entirely consistent with the principles of mutual recognition and mutual confidence to recognise as valid an EAW issued by a prosecuting authority designated under Art. 6.'[106] Nevertheless, Thomas LJ also recognised the importance of maintaining public confidence and mutual confidence of citizens with judges and thus accepted the need for a 'more intense scrutiny … where a warrant is issued by a "judicial authority" who is not a judge'.[107] In the case of *Assange*, even though the EAW was issued by a prosecutor, Swedish courts had scrutinised the decision and this was sufficient to trust that due process had been followed. This again was an assertion that had already been dealt with by the courts of other Member States (i.e. Cyprus).[108]

In *Bucnys*,[109] the Supreme Court in applying *Assange* developed the reasoning to state that an EAW would be valid where issued by a Ministry of Justice, provided

[103] *Hayle Abdi Badre v. Court of Florence, Italy* [2014] EWHC 614 (Admin).

[104] *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013.

[105] *Badre v. Court of Florence, Italy* [2014] EWHC 614 (Admin).

[106] *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, para. 41.

[107] Ibid., para. 19

[108] Ibid., para. 44, citing Christou (2010).

[109] *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71.

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that it was at the request of a court or judicial authority which did not include a prison authority. In both *Assange* and *Bucnys*, the Supreme Court developed an autonomous concept of 'judicial authority' for the purposes of the Framework Decision. This approach is particularly noteworthy in the light of the limitations to the Court's powers to refer questions for interpretation under the preliminary ruling procedure before 1 December 2014.

2.3.5.4 Proportionality test In March 2014, Sect. 157 of the Anti-Social Behaviour, Crime and Policing Act 2014 introduced proportionality as a ground for refusing to surrender an individual. The Extradition Act 2003 now reads,

> Section 21A Person not convicted: human rights and proportionality
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D') –
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
> (3) These are the specified matters relating to proportionality –
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D … .

Section 157(4) of the Anti-Social Behaviour, Crime and Policing Act 2014 further states,

> In deciding any question whether section 21A of the Extradition Act 2003 is compatible with European Union law, regard must be had (in particular) to Article 1(3) of the framework decision of the Council of the European Union made on 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) (which provides that that decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union).

Section 17A of the Practice Directions[110] sets out a relatively prescriptive list of the offences for which surrender would be classified as disproportionate unless there are exceptional circumstances, which are listed as a vulnerable victim; a crime committed against someone because of their disability, gender identity, race, religion or belief, or sexual orientation; significant premeditation; multiple counts; extradition also sought for another offence; or previous offending history. Under 17A.5, a table sets out examples of offences:

[110] Criminal Practice Directions Amendment No. 2 [2014] EWCA Crim 1569.

Category of offence	Examples
Minor theft (not robbery/burglary or theft from a person)	Where the theft is of a low monetary value and there is a low impact on the victim or indirect harm to others, for example: (a) Theft of an item of food from a supermarket (b) Theft of a small amount of scrap metal from company premises (c) Theft of a very small sum of money
Minor financial offences (**forgery**, **fraud** and **tax** offences)	Where the sums involved are small and there is a low impact on the victim and/or low indirect harm to others, for example: (a) Failure to file a tax return or invoices on time (b) Making a false statement in a tax return (c) Dishonestly applying for a tax refund (d) Obtaining a bank loan using a forged or falsified document (e) Non-payment of child maintenance
Minor **road traffic, driving** and related offences	Where no injury, loss or damage was incurred to any person or property, for example: (a) Driving whilst using a mobile phone (b) Use of a bicycle whilst intoxicated
Minor **public order** offences	Where there is no suggestion the person started the trouble, and the offending behaviour was for example: (a) Non-threatening verbal abuse of a law enforcement officer or government official (b) Shouting or causing a disturbance, without threats (c) Quarrelling in the street, without threats
Minor **criminal damage** (other than by fire)	For example, breaking a window
Possession of controlled substance (other than one with a high capacity for harm such as heroin, cocaine, LSD or crystal meth)	Where it was possession of a very small quantity and intended for personal use

The introduction of this proportionality review was the result of a combination of NGO pressure and the Government's cost-cutting agenda. NGOs such as FTI led campaigns to highlight the injustices resulting from the misuse of the EAW for 'trivial' offences. FTI also drew attention to the intrinsic disadvantages involved in defending oneself in a foreign country:

> A single case often suffers multiple failures to respect basic rights, with for example the lack of access to a lawyer or legal aid being exacerbated by the lack of information on rights or on the prosecution case, or the lack of a quality interpreter or translations of important documents, or the inability of suspects to contact friends, family or consular officials as

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> quickly as possible to help them avail themselves of these other basic measures quickly enough not to have their position irrevocably prejudiced.[111]

To a large extent these shortcomings have been dealt with by the Procedural Guarantee measures adopted under the Stockholm Roadmap.[112] Perhaps the tables have turned: with the UK choosing to not opt into the Directive on access to a lawyer, concerns could now be raised about the treatment of individuals surrendered to the UK under an EAW.[113]

2.4 The EU Data Retention Directive

2.4.1 Our data protection law is based on EU law and is now the Data Protection Act 2018. The Information Commissioner oversees the law and regulates data holding. Our courts have been notably lukewarm in upholding data protection rights, although a recent decision of the Supreme Court has placed limits on the holding and processing of data.[114] Our law of privacy protection is common law- and Human Rights Act-based. Domestic law did not, until comparatively recently, give a high priority to privacy protection. Startling and scandalous abuse of privacy by the UK tabloid press led to the comprehensive Leveson inquiry into press ethics and culture, the major recommendation of which was rejected by Government.[115] For over a decade the law has improved under judicial rulings to give greater protection to privacy, very much under the influence of the ECHR.

The 2006 Directive[116] was implemented under delegated powers (SI 2009/859). Retention was initially regulated under the Regulation of Investigatory Powers Act 2000 (RIPA) and the Anti-terrorism, Crime and Security Act 2001. The UK

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[111] Fair Trials International (2010) Memorandum submitted to Justice Committee – Written Evidence, Justice Committee Seventh Report, Justice issues in Europe.

[112] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, [2010] OJ L 280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.

[113] On the implications of the UK opt-out from the Directive on access to a lawyer for the operation of the European Arrest Warrant, see Mitsilegas 2014.

[114] *R (T) v. Secretary of State for the Home Department* [2014] UKSC 35.

[115] Leveson Inquiry – Report into the culture, practices and ethics of the press, 29 November 2012, http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp.

[116] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

Government had been an avid supporter of the EU laws governing retention because retention was a policy it agreed with. The regulations allowed retention by network providers (PCOs) and transfer upon request by the authorities for 12 months. The Interception of Communications Commissioner has oversight of the process of access to data. He has announced (October 2014) an investigation to establish whether the police are using RIPA to circumvent press protection in the Police and Criminal Evidence Act 1984, following complaints that police have accessed electronic records to identify journalists' sources without authorisation by a court.[117] The Information Commissioner monitors the security of stored data.

The CJEU decision in *Digital Rights*[118] forced the Government's hand. In June 2014, the Home Secretary announced plans to present a Communications Data Bill because existing powers to combat terrorism and serious crime were 'inadequate'. It was criticised by privacy campaigners for being a 'snooper's charter'.

The result was emergency legislation based on domestic law, not EU law. This emerged in the Data Retention and Regulatory Powers Act 2014.[119] The 'emergency' action on this Bill was heavily criticised by scholars and backbench Members of Parliament (MPs). For example, fifteen senior UK scholars in technology law, in an open letter to the House of Commons, expressed concern that the Act would increase Government access to communications data and content, for example by expanding the UK's ability to mandate the interception of communications data across the world, which are some of the first powers of their kind globally. The open letter found that the Act 'is far more than an administrative necessity; it is a serious expansion of the British surveillance state', and expressed concern that it was unnecessarily rushed through Parliament.[120] However, overall the Act is carefully drafted in an attempt to ring all the correct human rights bells and we have no written constitutional guarantee of rights. Before second reading, the Home Secretary stated, as required under the HRA 1998, that in her view, the Bill was compatible with the ECHR. Retention is required for *up to* twelve months. The legislation is to be repealed by 31 December 2016.

Section 1 provides that the Secretary of State may by notice require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and proportionate for one or more specified purposes. The Act has extra-territorial effect (Sect. 4).

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[117] Wintour, P. (2014, October 12). British police's use of Ripa powers to snoop on journalists to be reined in. The Guardian. http://www.theguardian.com/world/2014/oct/12/police-ripa-powers-journalists-surveillance. For the report see http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf.

[118] Joined cases C-293/12 and 593/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[119] http://www.legislation.gov.uk/ukpga/2014/27/notes/contents.

[120] Kiss, J. (2014, July 15) Academics: UK 'Drip' data law changes are 'serious expansion of surveillance'. The Guardian. http://www.theguardian.com/technology/2014/jul/15/academics-uk-data-law-surveillance-bill-rushed-parliament.

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The detail was in regulations (SI 2014/2042). The Act operates in a very British manner. Investigatory powers will be subject to review within a year by the Independent Reviewer of Terrorism Legislation established under the Terrorism Act 2006. The independent reviewer must consider current and future threats to the United Kingdom; capabilities needed to combat such threats; privacy safeguards; challenges faced by changing technologies; transparency and oversight; and the effectiveness of existing legislation and whether there is a case for new or amending legislation. Sections 57 and 58 of RIPA 2000 provide for the appointment of an Interception of Communications Commissioner to carry out a yearly report. The Commissioner is currently a retired senior judge. His remit includes reviewing the Secretary of State's role in issuing interception warrants and the operation of the regime for the acquisition of communications data. The Data Retention and Investigatory Powers Act (DRIPA) ensures that the Commissioner will now be required to report twice a year on these issues. The Ministerial announcement referred to establishing a privacy and civil liberties board on the US model! The Intelligence and Security Committee of Parliament heard evidence on this topic and the Government proceeded with its plan. The plan includes establishing the board as an adviser to the Independent Reviewer of Terrorism Legislation. The terrorist context of these provisions has not caused alarm for their application to *all* communications. There is a trust in authority in the UK that may not be present in countries that have been under totalitarian regimes.

In July 2015, the Administrative Court ruled that Sect. 1 of DRIPA and regulations made thereunder breached EU law, specifically Arts. 7 and 8 of the Charter.[121] This was despite the fact that the UK Government deliberately avoided the EU framework. The Investigatory Powers Tribunal had also been tasked previously with a review of the legality of surveillance practices of General Communications HQ under existing legislation. Assuming that the alleged surveillance had taken place, it found there had been no breaches of Arts. 8 or 10 ECHR in relation to the legislative framework. Specific facts and the proportionality of the surveillance in individual cases were to be subject to further examination in closed hearings. In a subsequent judgment in February 2015, the Tribunal ruled that the practices concerning surveillance prior to the two rulings made in December 2014 and February 2015 breached the Convention because the practices were not in accordance with the law. There was insufficient publicity about safeguards. That deficiency had been rectified by the disclosures to the tribunal in its two hearings.[122] The decisions did not make reference to the Charter of

[121] *D Davis et al v. Secretary of State for the Home Department* [2015] EWHC 2092 (Admin).

[122] *Liberty et al v. GCHQ et al* [2014] UKIPTrib 13_77H (5/12/14), https://www.privacyinternational.org/temporaipt.pdf. The second ruling is [2015] UKIPTrib 13 77H, http://www.ipt-uk.com/docs/Liberty_Ors_Judgment_6Feb15.pdf. Also [2015] UKIPTrib 13_132 H (29 April 2015) and [2015] UKIPTrib_13_77H 2 (22 June 2015). In *Privacy International v. Secretary of State for Foreign Affairs* [2016] UKIPTrib 15_110 CH http://www.ipt-uk.com/docs/Bulk_Data_Judgment.pdf15-110 CH, the Investigatory Powers Tribunal ruled that it was permissible to use Sect. 94 Telecommunications Act 1984 to obtain bulk communications data

Fundamental Rights. Further rulings of the tribunal held that in one case interceptions involving legally protected privilege breached Art. 8 ECHR, but in another case, MP interceptions were not given a legal immunity.[123] The appeal in *Davis* was heard in November 2015. Basically, the Court of Appeal ([2015] EWCA Civ 1185) cast doubt on the Divisional Court's ruling that the CJEU's judgment in *Digital Rights* set down mandatory requirements of EU law for national legislation. The object of the CJEU's criticism was the EC Directive, not national legislation. The court believed that the CJEU's ruling could affect aspects of data retention and use not covered by EU law. This would take the ruling outside EU competence. The Court of Appeal noted that *Digital Rights* also suggested that EU law went further than ECHR protection. In the light of this, the court referred the case[124] to the CJEU requesting an expedited hearing.

An Investigatory Powers Bill recasting surveillance laws has been published for the UK. The Bill followed a review by the Independent Reviewer of Terrorism Legislation of existing laws of investigatory powers, a review by the Intelligence and Security Committee of Parliament (ISC) and by the Panel of the Independent Surveillance Review convened by the Royal United Services Institute. All three agreed that current powers remained essential for the UK's security. There were also critical reactions in the media.

This Bill introduces the requirement for 'double-lock' approval by a minister and a judge (retired) for certain warrants, i.e. interception, equipment and bulk equipment interference, bulk data and data sets' powers. Warrants may only be issued to nine responsible intercepting bodies under three specified powers: national security, prevention and detection of serious crime and economic well-being in relation to national security. Powers must be proportionate. There is to be oversight by a new Investigatory Powers Commissioner, a senior judge. There are to be special safeguards in 'particularly sensitive material', e.g. involving lawyers, MPs, doctors and journalists. The bill deals with the duration of warrants, which in some cases may only be requested by the intelligence services, e.g. in bulk powers. There will be 'single point contacts', but no warrants, for communications data and intercept

(BCD). RIPA expressly preserved Sect. 94 in Sect. 80. However, the bulk personal data system operated by the intelligence services and General Communications HQ prior to BCDs avowal (publication) in March 2015 did not satisfy ECHR requirements, i.e. it was not 'in accordance with the law'. The bulk communications data system BCD did not satisfy ECHR principles prior to its avowal in November 2015 and the introduction of a more 'adequate system of supervision' at that date. Both bulk personal data and BCD systems complied with the principles after those respective dates. The tribunal still had to consider the question of proportionality and EU law. The question of data transfer was not included. See *Big Brother Watch v. UK* n. 126 below.

[123] [2015] UKIPTrib_13_77H 2 (22 June 2015) and *Caroline Lucas MP et al v. The Security Service et al* [2015] UKIPTrib 14_79-CH (14 October 2015).

[124] Case C-203/15 *Tele2 Sverige* [2016] ECLI:EU:C:2016:970. See on return to England *Secretary of State v. T.Watson* [2018] EWCA Civ 70 where the court confined itself to ruling that DRIPA s 1 was inconsistent with EU law where the objective pursued by granting access to data was not restricted solely to fighting serious crime, or where access was not subject to prior review by a court or an independent administrative authority (para. 13).

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connection records. The Bill retains the extra-territorial effect of the 2014 Act. Crucially, a right of appeal from the Investigatory Powers Tribunal's decisions to the Court of Appeal is introduced for the first time. The IPT can inform individuals who have been victims of 'serious errors' by surveillance bodies. In some cases existing powers, as in equipment interference, will remain in previous legislation although a new 'more explicit' regime will be introduced. Schedule 6 provides for the making of codes of practice on the operation of the powers. The Bill says nothing about use of informers and other forms of human surveillance.

The ISC of Parliament issued a critical report on the Bill in February 2016. Amongst other criticisms, it recommended laws on universal and not just professional privacy protection and stated that the Secret Intelligence Service's capabilities in equipment interference, bulk data sets and communications data are too broad and lack clarity.[125] A revised Bill was presented to Parliament and was enacted in late 2016.[126]

2.5 *Unpublished or Secret Legislation*

2.5.1 The Expert is not aware of any specific case in which the constitutionality of unpublished or secret measures has arisen in an EU context within the UK. A Westlaw search shows that neither of the CJEU cases has been considered by English courts.

However, non-publication of determining criteria affecting rights has featured as a principle of constitutional significance in recent UK Supreme Court litigation. First of all, use of unpublished criteria on the basis of which decisions affecting individual entitlement were made was not uncommon in our administrative

[125] HC 795 (2015–16) Report on the Draft Investigatory Powers Bill.

[126] For the first Bill see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf. For the revised Bill see http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0143/cbill_2015-20160143_en_1.htm and https://www.gov.uk/government/collections/investigatory-powers-bill for draft codes and policy statement on the bill. Criticism was made that the Bill was neither consistent with Case C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650 nor *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015. See *Guardian* Letters 15 March 2016. Following the case of *Tele2 Sverige*, n. 124 above, the English High Court ruled that Part 4 of the Investigatory Powers Act 2016 breaches the EU Charter of Fundamental Rights because access to data was not restricted to fighting serious crime and there was no prior review by a court or independent administrative body before access: *R (Liberty) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin). The CJEU had already referred to it by the Investigatory Powers Tribunal questions on transfer out of the EU of data and notification of data subjects affected. The government also conducted a review of the Act for necessary reforms. The reforms will not address national security matters which the government insists are outside the competence of the EU. The ECtHR ruled that RIPA 2000 breached Arts. 8 and 10 in relation to bulk intercepts and acquisition of communications data: *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 13 September 2018.

practice. Discretionary social security payments, prison administration and rights of prisoners were characterised by such practices. Widespread criticism led to publication of such criteria. There was also the risk of invocation of principles of legal certainty (and legal clarity) and legality.

Primary legislation must be published in Bill form for Parliament to consider and approve. Delegated legislation must be published, but it may take effect before publication. However, criminal prosecutions depend on publication. There would be a serious risk of a delegated measure being ruled *ultra vires* if it determined rights and was not published. A famous scandal in the mid-1990s, which helped bring down a Government, involved the collapse of a criminal trial when it emerged that export regulations, on which the prosecution was based, had been changed without notifying Parliament or the public of the changes. A difficult question arises if unpublished criteria that are not based in law are used to influence exercise of a discretion. The courts may take the view that where rights are involved, any unpublished criteria are susceptible to challenge where they influence a decision. Where rights are not involved, it may turn on context.

In *Ahmed*, HM Treasury implemented UN Security Council resolutions under an Act of 1946.[127] These covered the same subject matter as was covered in *Kadi*, i.e. orders freezing the bank accounts of suspected terrorists. Parliament had not approved the UK implementing measures. The court ruled that the measures in vital respects went beyond the requirements of the resolutions and could not be justified by the general words contained in the 1946 Act in so far as they interfered with the human rights (common law, not ECHR) of the claimants who had been subject to asset freezing orders.

In *Alvi*,[128] the Supreme Court upheld the quashing (ruling legally invalid) of a decision by the Home Secretary who had relied on materials not approved under the Immigration Act by Parliament to determine whether the alien claimant could remain in the UK. Basically, if the provisions were rules determining a right to remain or not in the UK, the Immigration Act 1971 Sect. 3(2) required that they be approved by Parliament and published. This was to be distinguished from guidance which was not of legal effect:

> The Act itself recognises that instructions to immigration officers are not to be treated as rules, and what is simply guidance to sponsors and applicants can be treated in the same way. It ought to be possible to identify from an examination of the material in question, taken in its whole context, whether or not it is of the character of a rule or is just information, advice or guidance as to how the requirements of a rule may be met in particular cases.[129]

[127] *HM Treasury v. Ahmed* [2010] UKSC 2. See Sect. 2.13 above. The Supreme Court distinguished *Ahmed* in *Youssef v. Secretary of State for Foreign etc Affairs* [2016] UKSC 3.

[128] [2012] UKSC 33. See *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12 and *R (Reilly) v. Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); and generally Sect. 2.13 above.

[129] Ibid., para. 63 Lord Hope and paras. 41, 53 and 92.

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The decision in *Alvi* should be compared with *Munir*[130] and *New College Ltd.*[131] In both cases, the guidance was published although not approved under Sect. 3(2). In both cases the guidance did not have a coercive effect determining rights, which is a contestable conclusion. They were mere guidance and were not subject to Sect. 3(2).

My appraisal would be, given that the EU courts had upheld the importance of legal certainty in the judgments referred to, domestic UK courts would look askance at any measure taking *legal* effect to interfere with the rights of individuals, unless such measure was properly passed and published and satisfied the requirements of legality.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 The situations in domestic law have invariably involved domestic measures based on EU provisions or the challenge to domestic measures based on EU provisions – often accompanied by arguments based on ECHR Art. 1 Protocol 1. Domestic courts have followed the *Foto-Frost* jurisprudence so as not to rule on EU measures. German constitutional jurisprudence may have an influence in future developments.[132] Now that it is accepted that the Charter applies to the UK and that no opt-out has been secured, we will see increasing arguments based on the Charter.[133]

The relevant case law on proportionality, proprietary rights, legal certainty and legitimate expectation has all been developed in relation to domestic measures where laws have been challenged because of breaches of EU general principles and ECHR provisions. A few points need to be made.

First of all, EU general principles and ECHR rights have strengthened immeasurably the armoury of UK judges in judicial review. They have been adapted to domestic contexts. It has been a great success story in the promotion of law's neutrality and challenging arbitrary power.[134] Furthermore, our membership of the European Union and of the Convention on Human Rights has helped to subject our

[130] [2012] UKSC 32.

[131] [2013] UKSC 51.

[132] See *R (HS2) v. Secretary of State for Transport* [2014] UKSC 3. Note Laws LJ's dicta in *Thoburn* in Sect. 3.1.1 below on the limits of the general words of Sect. 2(1) ECA 1972 to authorise unconstitutional EU actions.

[133] See Joined cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECLI:EU:C:2011:865 and *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336, paras. 43–48 and *R (AB) v. Secretary of State of the Home Department* [2013] EWHC 3453 (Admin), paras. 7–14. See the Commons European Scrutiny Committee's report HC 979 (2013–14).

[134] Birkinshaw 2014. See e.g. *R (Miranda) v. Secretary of State for the Home Department* [2016] EWCA Civ 6 where a power to stop persons at ports and airports under the Terrorism Act 2000 Sched. 7 and seize encrypted materials related to journalism (originating from the Snowden

constitution to juridification, a process that will outlive any departure from 'Europe' by the UK.[135] The UK Government has taken measures to check the advance of judicial review.[136] Secondly, boundary disputes as to when EU law and legal principles apply have become more flexible. Originally, a rather formal approach was taken, so if a matter was not considered an EU matter, EU general principles did not apply.[137] However, in *Rugby Football Union v. CIS Ltd* 'the rubric, "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law"'.[138]

The decisions involving proprietary rights in English cases have all been challenges to domestic measures based on EU treaty provisions and general principles. The courts have not imposed exacting standards of review and have found no breaches of EU law, but have found transgressions of ECHR law, as in *Roth*,[139] or courts have allowed public health factors to favour preventative action, as in *Eastside Cheese*.[140] The maintenance of public health had to carry great weight in the balancing process in a proportionality review. The approach to proportionality review in cases launching challenges based on the ECHR or EU law was nicely illustrated in *Sinclair Collis* although the approach has now been criticised.[141] This concerned the domestic statutory and regulatory provisions banning the automatic sale of tobacco products from vending machines, which is especially important in public houses and clubs. Articles 24 and 36 EC and Art. 1 Protocol 1 ECHR were invoked. Arden LJ observed that the ECHR may provide greater protection than EC rights. The majority ruled that the ban, despite the widespread redundancy that would ensue, was not disproportionate. The measures were not, per the majority, 'manifestly inappropriate' under EU legal principles.

One crucial issue in relation to domestic measures concerns the question of which law applies to a challenge to domestic measures based on EU measures before the English courts. The case concerned the Tobacco Directive which was brought on a preliminary reference to the CJEU by Germany.[142] The CJEU ruled

revelations and material stolen from the US National Security Agency) was ruled a breach of Art. 10 ECHR insofar as the seizure was not authorised by an independent judicial authority.

[135] Birkinshaw and Varney 2016.

[136] HL 174 & HC 868 (2013–14) http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/174.pdf. See Criminal Justice and Courts Act 2015, Part 4.

[137] *R v. MAFF ex p First City Trading Ltd* [1997] 1 CMLR 250 (QBD) Laws J.

[138] [2012] UKSC 55, para. 28. Followed by *Davis* above [2015] EWCA Civ 1185, paras. 92 and 98.

[139] [2002] EWCA Civ 158.

[140] [1999] EWCA Civ 1739.

[141] [2011] EWCA Civ 437. See Arden 2013. A more subtle approach criticising *Sinclair* was adopted in *R (Lumsdon) v. Legal Services Board* [2015] UKSC 41 where interference with a 'fundamental freedom' was involved. See *R (GBGA) v. Secretary of State CM&S* [2014] EWHC 3236 (Admin), paras. 99–110 and *R (BASCA) v. Secretary of State BIS* [2015] EWHC 1723 (Admin), paras. 135–148.

[142] Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453.

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for the first time that a directive was *ultra vires* under now Art. 114 TFEU. The proceedings in England concerned delegated legislation based on the (as yet to be ruled invalid) Directive.[143] The application was to prevent the Secretary of State making the regulations (presenting them to Parliament for approval) because of the allegedly illegal basis of their provenance.

In *R v. Secretary of State for Health*[144] the Court of Appeal overruled a high court judgment which had issued an injunction against the Secretary of State to prevent the making of the regulations implementing the Directive. The majority ruled that the law to govern interim relief was Community law established in the *Zuckerfabrik* decision and not domestic law laid down in a 1975 judgment of the House of Lords for domestic matters. This approach was upheld in the House of Lords by majority. What is of interest is the spirited dissent by Sir John Laws and Lord Hoffmann. For Laws, to refuse to allow the injunction against measures so clearly based on an illegal EC measure was an affront to the rule of law itself. For Hoffmann, the division of responsibilities within a Member State was entirely a matter of domestic law. It was domestic law which ordained the powers of a minister to formulate regulations and the procedure to follow. Community law only became involved on a 'renvoi' from Sect. 2(2) ECA 1972. The substance was governed by domestic law. By general agreement it was easier to succeed in a claim for an injunction under domestic law than under EC law. Both Laws and Hoffmann were instrumental in a new scepticism to EU law and questions of sovereignty.

In *ABNA*[145] the court followed the majority in *Tobacco* and accepted that the governing law was EC law, but found that even so, the balance was in favour of an injunction given the powerful arguments on illegality and the potential serious risks to a firm's 'trade secrets, confidential information and know-how built up over many years', which the draft regulations would require under EC law.

Some see a growing scepticism in recent decisions of the Supreme Court. *Walton v. Scottish Ministers*[146] contains a crucial statement by Lord Carnwath where he states, without hearing legal argument on the point, that provision of public law relief for breaches of EU law is not as of right but at the court's discretion, aligning the position precisely with domestic law.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 Not applicable, as the UK is not part of the eurozone.

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[143] *R (on the application of Imperial Tobacco Ltd) v. Secretary of State for Health* [2001] 1 All ER 850 (HL) and [2000] 1 All ER 572 (CA).

[144] [2000] 1 All ER 572.

[145] *R (ABNA) Ltd v. Secretary of State for Health* [2004] 2 CMLR 39.

[146] [2012] UKSC 44. See *R (Champion) v. N Norfolk DC* [2015] UKSC 52 in support.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 There are no easily available statistics listing when preliminary references have been requested by the parties in a decision before a UK court or tribunal. Recent annual reports of the Supreme Court do now include statistics on preliminary reference requests. In 2013–2014, the UK Supreme Court made two preliminary references, with 12 requests not being referred, as the Supreme Court refused permission to appeal the case from the Court of Appeal to the Supreme Court.[147] In 2012–2013, two preliminary references requests were made and 14 refused due to the refusal of the Supreme Court to hear the appeal in the case from the Court of Appeal.[148]

According to statistics provided by the CJEU,[149] the number of preliminary references from the UK courts for the relevant period is as follows: 2001–21; 2002–14; 2003–22; 2004–22; 2005–12; 2006–10; 2007–16; 2008–14; 2009–29; 2011–26; 2012–16; 2013–14; Total – 242.

Ten cases heard by the CJEU in the period 2006–2013 concerned the validity of an EU measure in a preliminary reference sent by the UK courts. Twenty questions lodged before the CJEU by the UK courts for a preliminary reference in the period 2001 to 2013 concerned the validity of an EU measure. Of those 20, 13 were challenges to regulations and seven to directives. Only one case in 2006–2013 resulted in the annulment of the EU measure – C-351/04 *IKEA Wholesale*, where anti-dumping regulations were declared invalid as disproportionate and contrary to WTO findings.[150] Only four cases raised human rights issues, all relating to property rights.[151] Most challenges concerned procedural issues, breaches of international law and proportionality. Two challenges were based on a lack of competence of the EU, specifically relating to the regulation of the internal market under Art. 114 TFEU.

What is the most striking constitutional issue is that challenges have mostly been brought by large corporations protecting their commercial interests. In particular, challenges were made to: taxation issues;[152] environmental

[147] Annual Report of the UK Supreme Court 2013–2014, HC 36. http://www.supremecourt.uk/docs/annual-report-2013-14.pdf.

[148] Annual Report of the UK Supreme Court 2012–2013, HC 3, http://www.supremecourt.uk/docs/annual-report-2012-13.pdf.

[149] Court of Justice of the European Union, Annual Report 2013, Luxembourg 2014, p. 106. http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf.

[150] C-351/04 *IKEA Wholesale* [2007] ECR I-07723.

[151] Case C-154/04 *Alliance for Natural Health and Others* [2005] ECR I-06451; Case C-453/03 *ABNA and Others* [2005] ECR I-10423; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, supra n. 142.

[152] Case C-134/13 *Raytek and Fluke Europe* [2015] ECLI:EU:C:2015:82; Case C-215/10 *Pacific World and FDD International* [2011] ECLI:EU:C:2011:528; Case C-372/06 *Asda Stores* [2007] ECR I-11223, Case C-58/01 *Oce van der Grinten v. Commissioner for Inland Revenue* [2003] ECR I-09809.

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measures;[153] the classification of products as dangerous substances and therefore requiring greater regulation;[154] regulations designed to protect consumers;[155] the establishment of regulatory bodies;[156] regulation of fish stocks;[157] competition protections;[158] and the regulation of food products.[159] One challenge was brought by an individual concerned with the compatibility of regulations governing residence requirements for welfare provisions with citizenship and free movement provisions.[160]

2.8.2–2.8.3 In some respects, the EU has a higher standard of review than UK law, as it adopts proportionality as a general head of review. However, there is academic concern that the EU has a lower standard of review in practice, particularly as regards the lower proportion of human rights challenges with regard to EU acts in EU law.[161] Statistical surveys reveal that leave to appeal has been more readily granted by the House of Lords on human rights challenges, although these challenges were statistically less likely to succeed than other challenges.[162] Most UK judicial review challenges do now raise human rights issues. There remains concern that the CJEU prioritises commercial interests and the free movement provisions over fundamental human rights. This would suggest a need for the CJEU to strengthen its standard of judicial review in human rights cases.

It is not possible to make a fair comparison of the review of legislative acts in the EU with the review of legislative acts in the United Kingdom. With regard to challenges under the Human Rights Act, the high rate at which the Government responds to declarations of incompatibility and the rigorous reports of the Joint Committee of Human Rights would suggest a willingness to provide a stringent

[153] Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755; Case C-308/06 *Intertanko* [2008] ECR I-04057.

[154] Case C-15/10 *Etimine* [2011] ECR I-06681; Case C-14/10 *Nickel Institute* [2011] ECR I-06609; Case C-343/09 *Afton Chemical* [2010] ECR I-07027.

[155] Case C-58/08 *Vodafone* [2010] ECR I-04999; Case C-344/04 *International Air Transport* [2006] ECR I-00403.

[156] Case C-558/07 *SPCA* [2009] ECR I-05783.

[157] Case C-388/04 *South Western Fish Producers' Organisation and Others* [2006] ECLI:EU:C:2006:82, removal from the Register, 6 February 2006; Case C-535/03 *Unitymark* [2006] ECR I-02689.

[158] Case C-351/04 *IKEA Wholesale*, supra n. 150.

[159] Case C-154/04 *Alliance for Natural Health* [2005] ECR I-06451, Case C-453/03 *ABNA and Others* [2005] ECR I-10423; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case, C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, supra n. 142; Case C-329/01 *British Sugar* [2004] ECR I-01899.

[160] Case C-537/09 *Bartlett v. SS for Work and Pensions* [2011] ECR I-03417.

[161] Chalmers et al. 2011, pp. 241–248; Williams 2004; Douglas-Scott 2002, pp. 460–461 and pp. 454–458.

[162] Shah and Poole 2009.

review of human rights.[163] There would also appear to be a growing willingness of the UK courts to go beyond the requirements of the judgments of the European Court of Human Rights to provide a stronger protection of human rights in areas where the Strasbourg Court grants a wide margin of appreciation.[164]

With regard to the review of administrative actions, figures vary according to judicial review actions in the courts and the review of immigration and social and welfare cases through the tribunal system. In 2013 there were 15,700 applications for judicial review in the courts of England and Wales. Of 1,513 cases eligible for a final hearing in 2013, only 232 had reached a decision with 66% being found in favour of the applicant.[165] With regard to immigration cases, of the 67,449 cases determined in the Immigration and Asylum Chamber of the First-tier Tribunal in 2013/14, 56% were dismissed and the remaining 44% were upheld. In the area of Social Security and Child Support, 40% of cases determined in 2012–2013 were decided in favour of the applicant. With regard to benefit applications, 44% of Employment Seekers Allowance, 42% of Disability Living Allowance, 19% of Job Seekers Allowance and 26% of Personal Independence Payments were decided in favour of the applicant.[166] These figures would suggest that the UK courts are less deferential than the CJEU when reviewing administrative actions. They support the call for a stronger standard of judicial review by the CJEU, particularly with regard to the protection of human rights.

2.8.4 The UK courts have not adopted a position on the extent to which they review measures implementing EU law. UK courts would only be able to review implementation measures achieved through secondary legislation or implemented by the devolved legislatures.

2.8.5 No concerns have been raised with regard to a resulting gap in judicial review given the lack of scrutiny of legislative acts in the UK. Concerns might arise, were there to be disparities between directly effective EU law and Convention rights. Here, it is possible that the UK courts would apply Convention rights over directly effective EU law, were the two to diverge. However, it is likely that in this case EU law would be interpreted so as to be compatible with Convention rights.

2.8.6 No issue has arisen in the UK regarding the lack of equal treatment between those falling under domestic law and those falling under EU law.

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[163] Ministry of Justice, Responding to Human Rights Decisions, Cm 8727 October 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf.

[164] *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

[165] Ministry of Justice, Court Statistics Quarterly, January to March 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf.

[166] Ministry of Justice, Tribunals Statistics Quarterly, January to March 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319488/tribunal-statistics-quarterly-january-march-2014.pdf.

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2.9 Other Constitutional Rights and Principles

2.9.1 Concerns have been expressed by the Constitutional Committee of the House of Lords as to the breadth of Henry VIII clauses which enable the executive to modify primary legislation. These concerns are expressed generally, including, though not specifically focusing upon, the Henry VIII clause found in the European Communities Act 1972. These are perhaps minimised, as the EU Committee of the House of Commons and the European Scrutiny Committee of the House of Lords would be able to raise concerns about the use of secondary legislation to implement EU law, were they to consider that this gave rise to constitutional issues.

2.10 Common Constitutional Traditions

2.10.1 The principles of *nulla poena sine lege* and of 'open justice' can both be regarded as constitutional principles of the common law, forming part of the constitutional traditions of the UK. Privacy is an emerging principle. It would not extend to the protection of a general freedom not to be recorded.

There would be merit in national courts referring both to the ECHR and to national constitutional law protections. There is a recent trend in the case law of UK courts to place greater emphasis on the constitutional principles of the UK as opposed to the ECHR. Often these principles are cited in tandem. It may be harder to refer to constitutional principles in other legal systems of the EU. UK law, in particular, is more likely to refer to principles found in the common law of the UK, US, Australia, Canada and New Zealand.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 The UK has not seen a large amount of academic discussion as to whether the CJEU should set the standard of Charter rights in line with, or go beyond, the standard of the ECtHR. Nevertheless, there is discussion as to the extent to which UK law should mirror interpretations of Convention rights provided by the ECtHR.[167] UK courts have been prepared to go beyond ECtHR judgments, providing a higher protection of rights, where there is no clear case law from the ECtHR and where there is a broad margin of appreciation.[168] This is regarded as a power but not an obligation of the court.[169] Courts have provided a lower protection

[167] See, for example, Wright 2009; Irvine 2012 and Sales 2012.

[168] *P v. Cheshire* [2014] UKSC 19.

[169] *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

of rights where there are fears that the ECtHR has not appreciated the specific common law context in its judgment and where the ECtHR decision that the UK courts refuse to follow is in the process of being appealed to the Grand Chamber.[170]

In the opinion of the author of this section of the report, there is a need for a higher degree of deference to be paid by the CJEU to the decisions of the national constitutional courts and for a greater ability for national courts to provide a higher protection of rights than that found in the Charter or in general principles of Community law. However, this is subject to two provisos. First, there is a need to take account of whether the EU has itself enacted measures which provide greater clarity than the Convention rights, providing a democratically agreed EU specification of a particular right or of the resolution of a potential conflict of rights. The Charter does not provide this level of clarity, being a combination of broadly expressed rights and principles, although some Charter provisions may provide the requisite level of clarity. In these instances, there should be less scope for deference to the national constitutional courts. Secondly, human rights adjudication in the European Union works best when it facilitates dialogue between the CJEU and the national constitutional courts. Dialogue is harmed where there is the ability for either the CJEU or the national constitutional courts to always have the last word. Therefore, whilst dialogue requires greater deference, this needs to be deference as respect, based on the reasoning of the national courts and their greater expertise in areas of national interpretations of rights as opposed to deference as submission. Moreover, there should be no absolute rules as to whether national constitutional courts or the CJEU should always have the final say as to the authoritative determination of human rights.

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1 There was public debate on the introduction of the European Arrest Warrant and at the time of the enactment of the implementation measures. There were also campaigns citing concerns over the civil liberties implications by human rights organisations – e.g. Liberty,[171] Justice,[172] and Fair Trials International.[173] These concerns were also reflected in parliamentary debate on the implementation measures, specifically regarding the lack of double criminality, the lack of clarity regarding the speciality rule, bail provisions, the definition of a judicial authority

[170] *R v. Horncastle* [2009] UKSC 14.

[171] https://www.liberty-human-rights.org.uk/tags/european-arrest-warrant.

[172] http://www.justice.org.uk/pages/european-arrest-warrant.html.

[173] http://www.fairtrials.org/justice-in-europe/the-european-arrest-warrant/.

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and the potential lack of a right of appeal, and the lack of a guarantee of a retrial for those convicted *in absentia*.[174]

There was less concern raised with regard to the Data Retention Directive. The UK initially lobbied the EU to adopt the Data Retention Directive. There was little scrutiny over the Data Retention (EC Directive) Regulations 2007, which implemented the Directive's requirement with regard to land lines and mobile phones, although concerns were raised in the House of Commons and the House of Lords as to the content of the Data Retention (EC Directive) Regulations 2009 and their implications for privacy. There have, however, been campaigns from civil liberties groups,[175] in addition to recent criticism from the Joint Committee on Human Rights over the Data Retention and Investigatory Powers Act 2014.[176]

2.12.2 Although these issues do not arise specifically in the UK, concern has been expressed by parliamentarians and public interest groups that there is frequently insufficient time for parliamentary debate when implementing EU measures that raise constitutional issues.[177] This concern is exacerbated by the narrow standing requirements for direct challenges, particularly as regards the standing of public pressure groups, the use of indirect challenges through Art. 267 TFEU to predominantly protect commercial as opposed to constitutional rights, and the low level of annulment of EU measures.

2.12.3 I would support the adoption of a process to suspend the application of EU measures, pending an investigation into the legality of the measure, where important constitutional issues have been raised by a number of constitutional courts. I would also recognise the defence of unconstitutionality during an infringement proceeding. I would also support the adoption of a process of greater pre-legislative scrutiny over EU measures that raise constitutional issues. A good model for this could, perhaps, be the work of the Joint Committee of Human Rights in the Westminster Parliament, particularly if this body were able to consult widely and receive information from human rights groups and constitutional courts. This body could either be formed as a Committee with the European Parliament or a

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[174] Broadbridge S. The Introduction of the European Arrest Warrant. House of Commons Library Paper, SN/HA/1703. http://www.parliament.uk/business/publications/research/briefing-papers/SN01703/the-introduction-of-the-european-arrest-warrant.

[175] https://www.liberty-human-rights.org.uk/campaigning/no-snoopers-charter. Statewatch tried to challenge the Data Retention Directive, but was not granted standing. It did, however, make submissions to the CJEU in the Case C-301/06 *Ireland v. Council* [2009] ECR I-00593 challenge to the Directive; see http://www.statewatch.org/news/2008/apr/eu-datret-ecj-brief.pdf.

[176] http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Rt_Hon_Theresa_May_MP_160714.pdf.

[177] See, for example, the criticisms of slow response times from the Government and the lack of time for debate from the House of Lords European Union Committee, Report on 2013–14, 2014–15 HL paper 6, and its report on The Role of National Parliaments in the European Union, 2013–14, HL paper 151, and the criticisms of the House of Lords during the 2nd and 3rd reading of the Data Retention and Investigatory Powers Bill 2014 in the House of Lords (Hansard HL 16 July 2014, cols 600–665).

body at the EU level but outside of the formal EU framework. This would encourage greater dialogue to avoid constitutional crises and work towards developing a European human rights culture.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 I share concerns about the potential for an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. I believe that this potential reduction in the standard of protection is due to a lack of wider awareness and the difficulties of protecting rights in a system of multilevel governance. These difficulties are exacerbated by the general consensus surrounding abstract rights – such as expressed in the Charter – coupled with divergence as to how these rights should apply in particular circumstances. In particular, divergence can arise due to the relative historical importance of the protection of particular human rights in different Member States.

2.13.2 Accession of the EU to the ECHR will not resolve these issues, as illustrated by the tension in UK law as to the extent to which the UK should interpret Convention rights differently from the ECtHR. I believe a better solution can be found in creating more effective means of dialogue between national courts and the CJEU, and between national parliaments and the European Parliament. This will, in turn, require greater deference to national constitutional courts, but also, in addition, greater deference by national constitutional courts to democratically determined European solutions to specific human rights issues.

I would also advocate greater pre-legislative scrutiny of human rights. However, I would prefer for this to be performed by a body similar to the Joint-Committee on Human Rights found in the Westminster Parliament and for the body to be formed at the EU level. First, this institution consults more widely than current constitutional tribunals and so is able to provide better-informed analyses. Secondly, the Joint Committee performs a less abstract form of scrutiny and is more capable of suggesting possible solutions. Thirdly, the Joint Committee is more likely to provide reasoned conclusions, which can facilitate political debate and also democratic dialogue between courts and legislatures, and between national constitutional courts and the CJEU.

2.13.3 I would advocate a change in the style of judgment of the CJEU, both allowing for dissenting opinions and encouraging greater explanation of the reasoning deployed to reach particular conclusions. I would also advocate greater attention to be paid to the arguments of the parties, particularly when dealing with constitutional issues raised by national constitutional courts or by the parties to the proceedings.

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3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The UK remains in essence a dualist state. International agreements have no effect in domestic law until implemented, usually by legislation. This doctrine pays obeisance to parliamentary sovereignty. Provision is sometimes made for implementation by regulations – usually a statutory Order in Council. There are many cases on interpreting domestic law in accordance with international obligations in treaties and in accordance with customary international law. There is, despite the dualist philosophy, a great degree of influence of international law in the UK domestic courts.[178] However, the basic approach is that the UK Government may enter whatever international agreements it wishes (see Sect. 3.2.1 below). There are no constitutional impediments to entering treaties. There are legal procedures involving ratification (see Constitutional Reform etc Act below), but treaties have no domestic effect until implemented by legislation or statutory regulations. If the Government were to enter into a very unpopular treaty, it would have to face the political consequences in Parliament, the press and media and from the public.

Outside EU areas, relevant provisions contain no references to the objectives sought by international co-operation, set no limits to the delegation of powers, and/or values and principles that ought to be upheld by the state when participating in international co-operation.

Until the Constitutional Reform and Governance Act 2010, treaties did not have to be laid before Parliament by law. Since the 2010 Act, treaties, subject to the conditions below, must be laid before Parliament.

Under Sect. 20, treaties may not be ratified unless (a) a Minister of the Crown has in the first instance laid before Parliament a copy of the treaty, (b) the treaty has been published in a way that he or she thinks appropriate and (c) a period (21 days which may be extended by 21 days or less (Sect. 21)) has expired without either House having resolved that the treaty should not be ratified. Subsection (3) then explains that a further procedure, which is set out in subsections (4) to (6) (see below), will apply if the House of Commons resolves that the treaty should not be ratified (whether or not the House of Lords did the same). There are exceptions to this provision. Subsection (4) provides that a treaty may still be ratified if, after the House of Commons has resolved that a treaty should not be ratified during period above, (a) a Minister of the Crown has laid before Parliament a statement explaining why the treaty should nevertheless be ratified, and (b) a 'period B' has

[178] Bingham 2010, Chap. 10. See Birkinshaw 2015 pp. 47–85. See Lord Mance in *Keyu et al v. Secretary of State for Foreign etc Affairs* [2015] UKSC 69, paras. 144–151 and *R (Wang Yam) v. Central Criminal Court* [2015] UKSC 76, paras. 35–38 for qualifications; see *R (Bashir) v. Secretary of State for the Home Department* [2018] UKSC 45, para. 7.

expired without the House of Commons having (again) resolved that the treaty should not be ratified.

Section 22(1) provides that the procedure under Sect. 20 does not apply if a Minister of the Crown is of the view that, exceptionally, a treaty should be ratified without the conditions of that section having been met. However, a treaty may not be ratified by virtue of subsection (1) after either House has resolved, as mentioned in Sect. 20(1)(c), that the treaty should not be ratified.

The United Nations Act 1946 (see the *Ahmed* case above) allows for the implementation of Security Council resolutions. The use of that Act in relation to asset freezing orders was noted above. The International Criminal Court Act 2001 gives effect to the Statute of the International Criminal Court and makes provision for offences in the Statute to become crimes under domestic law.

The Human Rights Act 1998 made provision for giving 'further effect to rights and freedoms guaranteed under the ECHR' but involved no transfer of power – apart from that given to domestic judges!

International obligations are implemented in a very pragmatic manner. There are no accompanying grand statements of principle, merely an attention to practical and procedural detail.

3.1.2 Not applicable.

3.1.3 There are no constitutional texts in the UK, if that means a written constitution. The Supreme Court in the *Ahmed* case,[179] observed how disparities may emerge between international measures imposing sanctions and domestic orders where there is an absence of scrutiny by Parliament.[180] The Foreign Affairs Committee had over a decade earlier recommended that any sanctions approved by Government should be notified to the select committee. The Government declined to accept the recommendation. The Supreme Court noted how overseas regimes had introduced procedures in primary legislation to ensure human rights protection and express authorisation for delegated powers in such cases.[181] This has not occurred in the UK.

Ahmed was decided on domestic law. The Supreme Court rejected an application by the Government to defer the coming into force of the judgment pending amending legislation.[182] The CJEU in *Kadi* had deferred the effect of its judgment. The Government response was to present a bill to Parliament to reverse the effects of the judgments by legislation which was enacted within days of the judgments.[183] Ten months later, the regime was contained within legislation which also provided fuller judicial protection to those subject to sanctions orders.[184]

[179] *Ahmed* [2010] UKSC 2 and above n. 127.

[180] Second Report of the Foreign Affairs Select Committee on Sierra Leone HC 116-I and Government Reply Cm 4325, (1999).

[181] *Ahmed* [2010] UKSC 2, paras. 48–50.

[182] *Ahmed No. 2* [2010] UKSC 5.

[183] Terrorist Asset Freezing (Temp Provs) Act 2010. See generally Walker 2011.

[184] Terrorist Asset Freezing etc. Act 2010.

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In UK law, the emphasis is once again on practicalities and efficacy rather than high principle.

3.1.4 With a constantly evolving constitution based on judicial decision, convention, legislation and parliamentary procedure it is not easy to identify any relevant material in response to this question regarding the role of the national constitution in the context of international law and global governance. UK courts take inspiration from other common law jurisdictions in formulating responses to human rights claims. Recent case law has emphasised this influence at a higher level than ECHR jurisprudence.[185] The UK Judicial Committee of the Privy Council has a long, sometimes controversial history (now in decline) of adjudicating constitutional case law from the Commonwealth and the written constitutions of the member countries. Appeals still concern cases dealing with capital punishment.

Parliament's primary focus is on domestic affairs. It holds the Government accountable for foreign policy (below). It now operates under a convention whereby hostilities in foreign countries by the armed forces have to have parliamentary approval after a Commons vote. Memories are still very fresh of such a vote being used to authorise invasion of Iraq in order, inter alia, to lead 'to a representative government which upholds human rights and the rule of law for all Iraqis'.[186]

My belief is that such initiatives are more likely to come from academic input and through the Foreign Office[187] and bodies such as the British Council and interest groups promoting principles of good governance, access to justice and transparency.[188]

3.2 The Position of International Law in National Law

3.2.1 Relevant legislation has been outlined above in Sect. 3.1.1.

Constitutionally, international law does not have any effect within the UK or its component countries until it is implemented by domestic legislation. However, a treaty may not violate statutory or common law rights.[189] Such violation could prevent ratification.[190]

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[185] *Kennedy v. The Charity Commission* [2014] UKSC 20.

[186] Hansard HC Debs 18 March 2003.

[187] https://www.gov.uk/government/publications/human-rights-and-democracy-report-2013/human-rights-and-democracy-report-2013 See *HMG Strategy for Abolition of the Death Penalty* (2011) FCO which includes increasing the number of abolitionist countries. See Simpson (2004). See Birkinshaw supra n. 178.

[188] Baroness Hale has written on the helpful interventions of NGOs in litigation involving terrorist detention cases both at home and abroad: https://supremecourt.uk/docs/speech-131214.pdf, p. 13.

[189] *Walker v. Baird* [1892] AC 491.

[190] *Rees-Mogg v. Secretary of State for Foreign Affairs* [1994] 1 All ER 457. For the EU Act 2011 and an unsuccessful challenge, see *R (Wheeler) v. Prime Minister* [2014] EWHC 3815 (Admin).

Although courts will not invoke treaty obligations directly in municipal law, domestic courts will interpret legislation implementing treaty provisions in a manner that is consistent with treaty provisions.[191] A common law presumption exists that Parliament will act consistently with international obligations. Even where a treaty is not implemented, it may be used to assist in interpretation of legislation.[192] This is especially so in the case of human rights conventions.[193] In *Oppenheimer v. Cattermole*,[194] Lord Cross said that 'the courts of this country should give effect to clearly established rules of international law'. In *Kuwait Airways Corp*,[195] Lord Nicholls continued: 'This is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important.'

If a statute is clear and allows no scope for the international principle to be applied then it will not be so invoked.[196] There is nothing that the international obligation can clarify. If the statute is clear then any exercise of discretion under the statute could not be affected by the international obligation constituting a 'relevant consideration' for the decision-maker.[197] It must be said that this approach must be questioned now. Pure dualist theories have been heavily attenuated.

Where a measure can be interpreted consistently and inconsistently with an international obligation, the former should be adopted.[198] The principle also applies to the interpretation of the common law.[199] On this basis, the ECHR had a role, although the courts oscillated in its application, in assisting the interpretation of domestic law before its formal incorporation by the HRA 1998. However, the courts could not use the ECHR directly to create rights and duties before it was implemented.

Treaties are usually implemented by legislation, or by delegated instruments. Parliament has a variety of methods to give effect to treaties by use of legislation. Implementation by delegation would invariably be by a statutory Order in Council (see above Sect. 3.1.1). Such orders are subject to light-touch scrutiny and approval.

In interpreting treaties so implemented, the courts are not constrained by the usual techniques of interpretation but apply broad principles of general acceptance

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[191] *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116 (CA).

[192] *Corocraft v. Pan American Airways Inc*. [1969] 1 QB 616, 653B-C (CA). See the diametrically opposed judgments of the Supreme Court on whether the UN Convention on the Rights of the Child could be used to assist interpretation of domestic regulations capping welfare payments. The majority ruled they could not because they were not relevant. See the powerful dissent of Baroness Hale and Lord Kerr: *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16.

[193] Hunt 1997, Chaps. 4, 5 and 6.

[194] [1976] AC 249, 278.

[195] [2002] UKHL 19, para. 28.

[196] *R v. Home Secretary ex p Brind* [1991] 1 AC 696 and Hunt 1997*; Salomon v. Comrs of C & E* [1967] 2 QB 116; see *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22.

[197] *R v. Home Secretary ex p Brind* [1991] 1 AC 696.

[198] See Lord Bingham in *Garland v. BREL* [1982] UKHL 2.

[199] *Pan-American World Airways v. Dept of Trade* [1976] 1 Lloyd's Rep 257.

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approaching a provision as an 'internationally agreed instrument' and not a national regulatory instrument.[200] The Vienna Convention provides basic principles.[201] The context may determine whether a term employed by the treaty is to be interpreted in a manner determined by the international obligation (*autonomous/sui generis)* or by domestic usage.[202]

The Human Rights Act 1998 makes special provision for interpretation of implemented ECHR rights by UK courts.

3.2.2 *In extremis*, dualism holds that international law and domestic law occupy different and hermetically sealed space. As such, the doctrine is simply not correct. The relationship is described by Feldman as 'a semi permeable membrane'.[203] The doctrine has been subject to criticism for many years, but the concept still contains a kernel of truth. The reason for the UK approach is to deprive the executive of the ability to change the law of the land by prerogative power alone and without Parliament. This is a legacy of the struggle between Crown and Parliament in English constitutional history. Domestic courts will not adjudicate on claims that arise from the existence and interpretation of treaties until they are implemented into domestic law.[204] Treaties are executive acts and cannot assume the place of legislation.[205] UK courts will not interpret international instruments that operate within the field of international law alone.[206]

There are well known qualifications to this theory of dualism which are brought about by *ius cogens* and customary international law.[207] In the latter case, for an English court to apply the doctrine, a rule has to have 'attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision'.[208] English courts have shown a reluctance to give a generous

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[200] *Buchanan & Co v. Babco Ltd* [1978] AC 141, at 152, *R v. Home Secretary ex p Adan* [2001] 2 AC 474, at 515.

[201] Brownlie 2012.

[202] *Al Sirri v. Secretary of State for the Home Department* [2012] UKSC 54; *R v. Guy* [2013] UKSC 64. See *Assange v. The Swedish Prosecution Authority,* supra n. 196. On Julian Assange see UN WGAD, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E.

[203] Feldman 2011, Chap. 5, p. 142.

[204] *Rayner (Mincing Lane) Ltd v. Department of Trade* [1990] 2 AC 418, 499. See *Keyu* and *Wang Yam* supra n. 178.

[205] *Thomas v. Baptiste* [2000] 2 AC 1 (PC) (Lord Millet).

[206] *R (Corner House Research) v. DSFO* [2008] UKHL 60, paras. 43–46 (Bingham) and paras. 59–68 (Brown). Nor will they recognise internationally defined crimes as domestic crimes until implemented under legislation: *R v. (M Jones)* [2006] UKHL 16. See, however, *Youssef,* supra n. 127.

[207] See Bingham 2010, Chap. 10; Greenwood 2013, Ch. 14.

[208] *The Christina* [1938] AC 485 at 497; *Trendtex Banking Corp v. Central Bank of Nigeria* [1977] QB 529 (CA); *J H Rayner (Minving Lane) Ltd v. DTI* [1990] 2 AC 418.

accommodation to the principle[209] despite an old approach that regarded such rules as a part of (or a source of) the common law.[210] Professor Feldman has written how domestic courts and Parliament have sieved international law before invoking its principles in domestic litigation or legislation.[211] Feldman has also described how in cases reported in England and Wales in 2001 and 2002, only two international conventions apart from the ECHR were considered in a total of six cases.[212] The position was broadly comparable in 2010. The UN Convention against Torture was considered in 2005 by the House of Lords and Court of Appeal.[213] The Supreme Court from its inception in 2009 until July 2014 (318 cases) has considered international law other than EU or ECHR provisions in 23 cases. This does not include references to other national law such as French, German, Belgian, etc.

3.3 Democratic Control

3.3.1 Negotiation and ratification are for the Crown alone but may be subject to statutory requirements. Parliamentary approval, where statutorily or, post *Miller*, constitutionally required, will make matters conditional and justiciable.[214]

Parliament, both Houses, has an array of select committees. These can be very effective scrutineers of policy, and in some cases finance and administration. They investigate the substance of policy. The Foreign Affairs Committee of the House of Commons examines the Foreign and Commonwealth Office (FCO), diplomatic service, bodies in receipt of funds from the FCO and FCO responsibility for UK participation in international and regional multilateral organisations such as the United Nations, the OECD, NATO and the European Union. The Committee chooses its own inquiries, and calls witnesses and evidence. Witnesses in a typical inquiry include ministers and officials from the FCO, and a range of other witnesses depending on the nature of the inquiry; this may include representatives from academic and research institutions, interest groups, international organisations, former diplomats as well as journalists. Committees are often advised by expert advisers.

The usual culmination of a Foreign Affairs Committee inquiry is a report made to the House and published in hard copy and on its website.[215] The Committee

[209] *A v. Secretary of State for the Home Department* [2004] EWCA Civ 1123 and [2005] UKHL 71.

[210] *Triquet v. Bath* (1764) 3 Burr 1478 and Blackstone *Commentaries* iv, 67.

[211] Feldman 2011. See Sales and Clement 2008.

[212] Feldman 2011, p. 156. He compares this paucity with the constitutional duty on South African judges in cases concerning constitutional rights to consider international law and a power to consider 'foreign law' under the South African Constitution Sect. 39(1).

[213] Supra n. 211. See *Jones v. Ministry of Interior etc.* [2006] UKHL 26.

[214] *Rees-Mogg v. Secretary of State for Foreign Affairs* [1994] 1 All ER 457; *Miller* supra n. 5.

[215] http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/inquiries1/.

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reaches conclusions and makes recommendations to the Government in its reports. The Government has undertaken to give a detailed response to the Committee's reports within two months of publication. The Committee's reports are 'often debated' either in the House or in Westminster Hall within the Houses of Parliament.[216]

The Public Accounts Committee has undertaken inquiries into Government expenditure and is the most formal of parliamentary committees. One very famous inquiry and report on Pergau Dam produced evidence of Government misspending on overseas aid, which was crucial in a judicial review on the legality of aid expenditure.[217] The objects of the expenditure were not legally sanctioned.

3.3.2 There is no relevant legislation or practice on referendums with regard to international organisations other than the EU.

3.4 Judicial Review

3.4.1 Courts do not adjudicate on treaties in a UK context until the treaty is implemented by domestic law.

The *Ahmed* case had within its sights the domestic regulations implementing the UN Security Council resolutions – although some of the UK judges were very critical of Security Council practices. One must be clear. It is not an international measure that is subjected to legal scrutiny but the domestic implementing measure. However, the international measure may be examined to assess the domestic measure's meaning or legality. Has the domestic measure gold-plated the international provision impermissibly? With what has been said already, the focus is on Parliament and the common law, not the treaty.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 This has not been an issue for the courts. Charities and Parliament have raised concerns about the UK Government being in breach of international human rights law in relation to disability (e.g. the public interest group Just Fair).[218] The UK has not ratified the International Covenant on Economic, Social and Cultural Rights and was notably hostile to the Charter of Fundamental Rights, particularly Part IV on solidarity – although it is acknowledged that the Charter is binding on the UK. UK

[216] http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/role/.

[217] *R v. Foreign Secretary ex p World Development Movement* [1995] 1 All ER 611.

[218] http://just-fair.co.uk/hub/single/disabled_failed_by_savage_cuts/ See also *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16.

Governments have been reluctant to promote economic, social and solidarity rights to the lexicon of human rights.

The EU/US Transatlantic Trade and Investment Partnership (TTIP) met with hostile reaction in some sections of the quality press because of its alleged undermining of national democracy, legality and judicial protection.

The proposals have led to considerable concerns about democracy and legality, which have led to Early Day Motion 793 in Parliament, signed by 38 MPs from all parties,[219] a scholarly letter to the European Commission signed by 120 senior academics (including 45 from different UK universities),[220] campaign groups' petitions to the Department of Business, and debate in mainstream newspapers (including the *Independent* and the *Guardian*).

The Early Day Motion by MPs has called for the removal of the Investor-State Dispute clauses, on the grounds that these

> would enable foreign investors to file complaints against a national government whenever investors perceive a violation of their rights and that these complaints are filed directly to international arbitration tribunals and completely bypass national courts and the judicial system; […and that] there is a real risk that these provisions in the TTIP could overturn years of laws and regulations agreed by democratic institutions on social, environmental and small business policy.

One specific area of concern highlighted by healthcare workers, patients' groups and trade unions has been that the TTIP may render irreversible the privatisation of parts of the National Health Service; to this end campaigners note that Slovakia was forced to pay $22m (£13.4m) in damages after the Government reversed the liberalisation of its health insurance market.[221]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

A useful starting point is Sir Peter Gibson's 'The Report of the Detainee Inquiry' (December 2013) into allegations of security and intelligence services' involvement in abusive detention of suspected terrorists overseas.[222] In *Abdul-Hakim Belhaj*

[219] http://www.parliament.uk/edm/2013-14/793. See further http://ukconstitutionallaw.org/2015/01/24/david-hart-qc-ttip-more-foreign-judges-critising-our-laws/.

[220] See https://www.kent.ac.uk/law/isds_treaty_consultation.html.

[221] For coverage, see Wright, O., Morris, N. (2014, January 14) British sovereignty 'at risk' from EU-US trade deal: UK in danger of surrendering judicial independence to multinational corporations, warn activists. The Independent. http://www.independent.co.uk/news/uk/politics/british-sovereignty-at-risk-from-euus-trade-deal-uk-in-danger-of-surrendering-judicial-independence-to-multinational-corporations-warn-activists-9057318.html.

[222] http://www.detaineeinquiry.org.uk/. See also *Hakim Belhaj v. Straw, the Intelligence Services etc* [2017] UKSC 3 on the alleged respondents' (including the former foreign secretary) participation in the unlawful abduction, detention and rendition of the appellants and the claim's permission to proceed.

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v. Straw,[223] the Court of Appeal, allowing the appeal in relation to justiciability, gave the appellants permission to proceed in their action alleging the respondents' (including the former foreign secretary and the security and intelligence services) participation in the unlawful abduction, detention and rendition of the appellants by US agents overseas. The case reflects an interesting development on inroads into the Act of State doctrine, and the Supreme Court upheld the judgment of the Court of Appeal ([2017] UKSC 3).

Also of use is the Home Affairs Committee's report on Counter-Terrorism[224] and reports by the Independent Reviewer of Terrorism Legislation.[225]

It should be noted that the UK-US Extradition Treaty[226] and international arrest warrants[227] have caused concern. While the Home Secretary's decision not to extradite Gary MacKinnon, described by the US authorities as 'the biggest military computer hack of all time', met with approval from civil liberties groups, especially because of his Asperger's syndrome, there was criticism from Labour MPs and accusations of inconsistency in treatment. Islamic prisoners with the same condition had been extradited. The Home Secretary spoke of introducing a 'forum bar' to prevent prosecutions overseas where prosecution was possible in the UK. Courts would make orders where it was not in the interests of justice to allow a prosecution overseas.[228] Any such bar would provoke trenchant criticism from US authorities. A forum bar has meanwhile been introduced and was successfully relied on in the *Love* case involving the Asperger syndrome victim Lauri Love who was wanted by the US authorities on suspicion of hacking into FBI and other computer systems. Love will not be extradited and it is unknown whether he will face charges before English courts.[229]

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[223] [2014] EWCA Civ 1394. See also: *Yunus Rahmatullah v. Ministry of Defence etc* [2017] UKSC 1 and placing limitations on acts of state in contemporary litigation. See further *Shergill v. Khaira* [2014] UKSC 33.

[224] HC 231 (2013–14). See also: *Yunus Rahmatullah v. Ministry of Defence etc.* [2017] UKSC 1.

[225] https://www.gov.uk/government/publications/terrorism-acts-in-2013. See further the Intelligence and Security Committee Detainee Mistreatment and Rendition HC 1113 (2017-19).

[226] See with regard to a Kent businessman, Akwagyiram, A. (2012, April 27) Christopher Tappin: Why was a retired Briton extradited to US? BBC News. http://www.bbc.co.uk/news/uk-17865761. See inter alia: *R (Razgar) v. Secretary of State* [2004] 2 AC 368; *Norris v. Government of the USA* [2010] UKSC 9; *Zoumbas v. Secretary of State* [2013] UKSC 74; *HJ (Iran) v. Secretary of State* [2010] UKSC 31 – deportation and fear of gay persecution.

[227] (2013, November 27). Interpol accused of failing to scrutinise red notice requests. The Guardian. http://www.theguardian.com/uk-news/2013/nov/27/interpol-accused-red-notice-requests.

[228] See with regard to Gary McKinnon suffering from Asperger's syndrome, (2012, October 16) extradition to US blocked by Theresa May. BBC News. http://www.bbc.co.uk/news/uk-19957138.

[229] *Love v. Government of the USA* [2018] EWHC 172 (Admin). Controversy has arisen over the case of two UK nationals fighting for ISIS who were captured by Syrian Kurdish forces in Syria when correspondence was published in the British press between the UK Home Secretary and the US Attorney General. The correspondence revealed that the UK would provide evidence to the USA for a prosecution in the USA carrying a possible sentence of death. This was alleged to be in breach of the UK's international legal obligations. A judicial review of the Home Secretary's action was commenced in England. The two men had their UK passports and UK nationality

Postscript: The impact of the UK referendum decision to leave the European Union

It is hard to summarise the constitutional implications for the UK constitution of the referendum result to leave the European Union. Some of the consequences could be extremely far-reaching – the change in the nature of the relationship between the UK and the EU, the potential splitting of the Union given the majority of votes being cast in favour of remain in Scotland and Northern Ireland, not to mention the potential consequences for parliamentary sovereignty and the protection of human rights. Nicola Sturgeon, the Scottish First Minister, called for a second referendum on Scottish independence, giving rise to a vote of the Scottish Parliament in favour of a second referendum; although this has now been left on the back-burner pending the Brexit negotiations.

The one point of constancy is that the UK does indeed remain a nation with an evolutionary and flexible constitution. The constitutional and legal debate surrounding the referendum result have brought the advantages and disadvantages of this form of constitutional design into the spotlight. With no clear legal answer to the constitutional requirements needed to trigger Art. 50 TEU, there were answers ranging from the need for an exercise of the prerogative only, the prerogative combined with a potential convention for parliamentary resolution or debate, the need for an Act of Parliament and even the need for a second referendum. There were also arguments as to whether, legally or constitutionally, the UK has to adhere to the referendum, the lack of detail in the EU Referendum Act 2015 pointing to the conclusion that the referendum is advisory only. Whilst this may encourage normative debate, the uncertainty also has consequences, particularly in times of political uncertainty, following the resignation of the Prime Minister following the referendum result. The Supreme Court clarified in the *Miller* decision that legislation was required, although there was no legal requirement for legislation to be subject to a legislative consent motion from the devolved legislatures.[230] The European Union (Withdrawal of Notification Act) 2017 received the royal assent on 16 March 2017, paving the way for Theresa May to notify the European Council of the UK's intention to withdraw from the European Union on 29 March 2019.

In terms of the issues covered in this report, we concluded that whilst the need to incorporate the primacy of directly effective EU law may have been a catalyst for the modification of parliamentary sovereignty, the real modification to sovereignty stemmed from the courts regarding the concept as a principle of the common law and the creation of constitutional statutes, which may not be subject to implied repeal and which can place restrictions on the extent to which sovereignty is transferred to the EU. This juridification of constitutional law was also exemplified

revoked: See Bowcott, O. (2018, October 9). Javed 'appeased US' on death penalty in Isis suspects' trial. The Guardian.

[230] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593.

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in the development of the principle of legality, in the growing adoption of proportionality and the protection of human rights through the common law. Whilst *Miller* confirmed the primacy of directly effective EU law in the UK, and recognised the unique constitutional significance of the UK's membership of the EU, grafting a new source of law into domestic law, it focused more on this being achieved through Parliament's intention in the European Communities Act 1972. However, it also stressed the importance of constitutional statutes and the principle of legality.

The European Union (Withdrawal) Bill proposes that the Charter will no longer have effect in UK law post Brexit.[231] The Act 2018 will transform current EU law into 'EU-derived' laws. The supremacy of these EU-derived laws will continue to apply as regards legislation enacted prior to, but not after, Brexit.[232] This may weaken the remedies available to protect human rights. The Human Rights Act 1998 does not allow for legislation which contravenes human rights to be struck down by the courts, and it is unlikely that this will be included in any forthcoming British Bill of Rights. Nevertheless, the growing juridification of the UK constitution, influenced by both the European Union and the European Convention on Human Rights, may continue to grow, particularly in these confusing times when the constitution is in flux and with the mass media coverage of the UK Supreme Court's decision in *Miller*.[233] The Supreme Court and Court of Appeal have both accepted the possibility that, in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law would be able to declare such legislation unlawful.[234] It may be that the longer lasting legacy of the UK's relationship with the European Union is a growing desire for constitutionalism, be this through the growing influence of the courts or through a growing awareness of the importance of informed political debate and constitutional safeguards.

[231] European Union (Withdrawal) Act 2018, Clause 5(5).

[232] Ibid., Section 5(4) and see Section 5(5).

[233] See Sect. 2.6.1 above.

[234] *Moohan v. Lord Advocate* [2014] UKSC 67, para. 35 per Lord Hodge with Baroness Hale and Lords Neuberger, Clarke and Reed and *Shindler v. Chancellor of Duchy of Lancaster* [2016] EWCA Civ 469, paras. 49–50 and *R (Public Law Project) v. Lord Chancellor* [2016] UKSC 39, para. 20.

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The Constitution of Malta: Reflections on New Mechanisms for Synchrony of Values in Different Levels of Governance

Peter G. Xuereb

Abstract The report observes that the Maltese Constitution of 1964 has significantly been influenced by the British constitutional tradition. This includes references to Erskine May as the British parliamentary 'Bible', the Westminster model of cabinet and parliament, and the fact that the Constitutional Court has weaker powers (acts can be repealed by Parliament only). The concept of the rule of law is drawn from English constitutional textbooks, from Dicey to Wade. However, a key difference is that unlike in the UK system, Parliament in Malta is not supreme but is subject to the Constitution as *suprema lex*. The bill of rights in the Constitution is similar to the ECHR; some constitutional provisions are not enforceable (e.g. a clause on limitation of rights). EU and international law, broadly speaking, have not presented acute constitutional issues. Nevertheless, the report notes a gap in the protection of constitutional values at the EU level, and an even greater gap at the global level. A case is made that the national and the 'wider' level ought to operate in synchrony according to the same core fundamental values and principles. The report puts forward the suggestion to expand the so-called yellow card mechanism so that constitutional issues beyond proportionality and subsidiarity could be raised by national parliaments *ex ante* when a proposal for EU legislation is issued.

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Supremacy · Neutrality · *AJD Tuna* and the principles of legitimate expectations, proportionality and justice and the adversarial principle

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Maltese Constitution[1] of 1964, known as the Independence Constitution, was a post-Colonial constitution of the 1960s that spoke of the Queen of the United Kingdom as the Head of State of what effectively was a new, independent state within the British Commonwealth. It was amended in 1974 to constitute Malta as a Republic within the Commonwealth of Nations, by Act LVIII of 1974, and the first Maltese (non-executive) president was appointed. The Westminster model of cabinet government was selected, and Erskine May[2] is still the parliamentary reference point, but otherwise the model of a written constitution, replete with a reasonably extensive and judicially enforceable bill of rights inspired by the European Convention on Human Rights of 1950 (hereinafter European Convention or ECHR), and with limitations on parliamentary sovereignty, was chosen. A status of 'active neutrality' was enshrined in the Constitution in 1987 by an amendment made by Act IV of 1987. Membership of the European Union required some further changes, but not so as to affect the essential fundamentals of the state or in such a manner as to render the changes irreversible. Leaving the EU would be just as easy in terms of parliamentary action as was joining. An Act of Parliament passed by majority and repealing the European Union Act 2003, the national Act of Parliament providing for membership of the Union by incorporating the EU *acquis*, would suffice. Still, no sovereignty clause appears in the Constitution, save as to the supremacy of the Constitution over any other law, with ultimate political sovereignty implicitly lying with the people. The author's preference *de lege condenda* would be for inclusion in the Constitution of an express declaration of the principle that sovereignty resides in the people.

It can be said that the Maltese Constitution is equally 'legal' and 'political'. Like other constitutions of the new Commonwealth, the new Constitution preferred to spell things out as a matter of strict law rather than leave matters to residual discretion.[3] As an independence constitution in origin and a republican constitution

[1] http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566.

[2] The British Parliamentary 'Bible'.

[3] Cremona 1997, p. 77.

in actuality, it provides the supreme law of the land, while doing so against a heavy political and legal backdrop of evolving membership of the regional (European) and international (global) communities.

1.1.2 The rationale of the Constitution consists both of establishing statehood and sovereignty and of limiting the exercise of public power. While the locus of the ultimate political power is left unstated, except that the people are clearly sovereign every five years in terms of the obligatory general elections, Malta is constituted as a sovereign state and a national polity, with democratic political institutions that are clearly but not expressly subject to the rule of law and an independent judiciary called upon to enforce the Constitution and laws made under it. The Constitution both (a) declares sovereignty in international law and organises the state and (b) limits the exercise of power internally by reference to constitutional rights and liberties and checks and balances, as well as international obligations. It is hard to say that any one of these dominates. But it is clear that Parliament is not supreme (unlike in the traditional UK sense), for Parliament is subject to the Constitution as *suprema lex*. Professor J. J. Cremona cites Professor Sir Kenneth Wheare as stating that the supremacy of a constitution over the institutions which it creates derives from its very nature; it not only regulates the institutions but also 'governs the government'. It is from this combination of factors that the effective application of the principle of the rule of law emerges. In Professor Cremona's view, Art. 6 of the Constitution – the supremacy clause – merely (and redundantly, as well as dangerously – because it subjects it to possible amendment) restates this otherwise implicit principle.[4]

The observance of international law is key, as is the observance of human rights. Of the two, it is perhaps the former that is the more highly evolved, with lessons still to be learned in the area of human rights and individual remedies. Having said that, there is also room for improvement on the operation in practice of separation of powers and due checks and balances, and it is currently a question as to how and to what extent the model of cabinet government as it has evolved needs change.[5]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 Although there was arguably no need to make provision in the Constitution for EU membership, it was thought prudent to do so. The result was the amendment of Art. 65(1) of the Constitution, which reads as follows:

[4] Cremona 1997, p. 106.

[5] The Today Public Policy Institute 2014 Part II paras. 26 et seq., and 72 et seq.

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> 65. (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.

Article 65 was given this current form by the European Union Act, Act V of 2003,[6] Art. 7. It is in virtue of this Act that Malta has acceded in due course to subsequent treaties, including the Lisbon Treaty in 2007.

It is clear that Art. 65(1) cannot operate as a permanent commitment to membership of the Union for the reason that Art. 65(1) can be amended by a majority of all the Members of the House under Art. 66(5) of the same Constitution. It was presumably thought, however, that the Constitution should contain some reference to the Union inasmuch as joining the Union was a highly controversial national political issue, not least for the reason that a considerable transfer to the Union institutions of, and limitation on, legislative power for the future was involved. However, ultimate sovereignty is clearly retained in the Constitution in the form of the maintenance of the alterability of this constitutional provision.

1.2.2 The Constitution was amended by majority in Parliament,[7] following a non-binding referendum in favour of membership and a subsequent national election won on the basis of a mandate to take Malta into the Union. The Constitution was amended by Act No V of 2003, titled the European Union Act of 2003.

The relevant rules are in Art. 66, sub-arts. (5) and (7) (b) as follows:

> (5) In so far as it alters any of the provisions of this Constitution other than those specified in sub-articles (2) and (3) of this article, a bill for an Act of Parliament under this article shall not be passed in the House of Representatives unless at the final voting thereon in that House it is supported by the votes of a majority of all the members of the House.
>
> …
>
> (7) In this article – (b) references to the alteration of any of the provisions of this Constitution or of the Malta Independence Act, 1964 include references to the amendment, modification or re-enactment, with or without amendment or modification, of that provision, the suspension or repeal of that provision and the making of a different provision in lieu of that provision.

The Lisbon Treaty was given effect in Malta via the application of Art. 2(2) of the European Union Act 2003, which empowers the Prime Minister to order that any new Treaty be 'treated as one with' the Treaty signed in Athens in April 2003. This was done by the Treaty of Lisbon Order (S.L. 460.20, Legal Notice 42 of 2008), which was promulgated on 1 February 2008.

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[6] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8926&l=1.

[7] It may be noted in passing that the amendment of some specified provisions of the Constitution, notably the provision on the prorogation or dissolution of the House of Representatives, requires a referendum vote in favour. See Art. 66(3) of the Constitution.

1.2.3 The amendments were made as a matter of course. Ever since the controversy on membership was decided in political terms by the general election of 2003, with the Labour Party changing its policy on EU membership as a result of its defeat at the polls in an election dominated by the membership issue, national consensus has prevailed on the issue of Malta's continuing membership, which was also demonstrated by the unanimity on the vote in Parliament for ratification of the Lisbon Treaty and the consequential amendment of Maltese law. The amendments were drafted by the Office of the Advocate General.

1.2.4 There have been no further EU-related amendment proposals.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 As far as the relationship between Maltese law and EU law is concerned, this is covered by Art. 3 of the European Union Act of 2003, Chap. 460 of the Laws of Malta, which provides:

> (1) From the First day of May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty. (2) Any provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable.[8]

In the first place, this provision encapsulates the transfer of legislative power to the Union effected by the signature of the Treaty(ies) and their ratification by Malta. My analysis is that this transfer occurred upon signature and then ratification by the passage and coming into effect of the European Union Act, in virtue of Art. 65 of the Constitution. Secondly, this provision encapsulates the 'supremacy' of Union law (this by effect of Art. 3(2) of the European Union Act).

1.3.2 There have been no statements on the transfer or delegation of sovereignty by the Maltese Constitutional Court itself. The author's view is that there has been, objectively speaking, a transfer *pro tempore* of legislative power (as long as Malta remains a Member State and the European Union Act remains in force) to the institutions of the Union in the fields of competence of the Union and subject to the Treaty procedures for the exercise of that competence, and that Maltese constitutional theory must be regarded as accommodating this. However, precisely how this would be articulated by the Constitutional Court is an open question in the absence of any indications from it on this matter.

[8] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8926&l=1.

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1.3.3 The limits are to be found embedded in the wording of Art. 65 of the Constitution. They are not particularly strict. It is most unlikely that the Constitutional Court would second-guess the determination of Parliament, except where the effect of a parliamentary resolution would undermine the very fabric of the Maltese state and sovereignty itself. This is because ultimate and entire sovereignty continues to reside in the Maltese state as constituted by the Constitution; Malta is a state under international law, and Malta cannot cease to be such by virtue of any action taken by Parliament under Art. 65 as it stands. However, there is a major caveat, since in theory at least there is the legal possibility of amendment of every constitutional provision, although the applicable procedure can vary and would follow one of three different modes, but with one of them available for each provision of the Constitution. Even Art. 1, constitutive of the Republican State of Malta, and Art. 6 (supremacy of the Constitution) can (at least textually and theoretically) be amended by special majority in Parliament under Art. 66(2).

Thus, any major overhaul of the State of Malta would at the very least require a two-thirds majority vote in Parliament, in some cases with a referendum result in favour, but politically-speaking, surely full consensus bordering on unanimity among the citizens of Malta would be needed. It is not known whether the constitutional revision exercise currently under way will propose a greater direct role for the people. The dynamics of the constitutional development of the Union itself and Malta with it may well play a role in any debate on these lines.

1.3.4 The Constitutional Court has not had occasion to proclaim the supremacy of EU law over the national Constitution or vice versa, for example in particular in the context of an alleged conflict between a constitutional provision and Union law. Nor, arguably, could it do so in such stark terms. The constitutional accommodation of the supremacy of EU law rather appears to take the form of an Act of Parliament passed in virtue of the Constitution and to be applied in practice by loyal co-operation and 'co-operative interpretation/constitutionalism/dialogue', but with the Maltese legal and constitutional system retaining a hypothetical 'final say' for the Maltese Constitution/Constitutional Court regarding (a) the interpretation of the Constitution, and (b) the applicability or otherwise in a particular case of an EU rule.

This is because the Constitution, in Art. 6, expressly declares that the Constitution is the supreme law of the land by declaring that:

> 6. Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, *if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void* [emphasis added].

There is, therefore, potential (perhaps only hypothetical) conflict with Art. 3(2) of the European Union Act, inasmuch as this latter provision appears to provide for the supremacy of Union law, not only in the sense of applicability in a particular case but by rendering any 'incompatible' Maltese law *pro tanto* ineffective and void of effect. The apparent conflict would be removed if the word 'law' in Art. 3(2)

were read to exclude the Constitution, but the latter itself refers to itself in terms of being a law,[9] and in any case the intention of the legislator in the European Union Act was clearly that of incorporating the *acquis* which, as is well known, predicates the 'supremacy' of Union law over conflicting national law 'however framed'.

If any EU law were applicable in Malta but inconsistent with the Constitution, then presumably that would *pro tanto* and in that case render the European Union Act (which mandates its application) inconsistent with the Constitution (requiring its non-application), making the Act itself also *pro tanto* and in that case void and of no effect. This is one reading and does not exclude any other analysis or interpretation being made by the courts. However, the Maltese courts will always first seek to reconcile the Constitution and any other law with EU law as a matter of interpretation before finding any 'conflict' between such laws.

The Maltese legal system generally follows the line that all Maltese law will be interpreted in line with Malta's international obligations, which include its obligations as referred to in the European Union Act 2003. The Maltese courts have unequivocally accepted the direct applicability of EU regulations and declared them to be applicable in preference to conflicting national law.[10]

1.4 Democratic Control

1.4.1 The Standing Committee on Foreign and European Affairs is the parliamentary body charged with checking draft Union legislative proposals for compliance with subsidiarity. In practice, Parliament is more or less dependent in this regard upon the Government for information and analysis as to the impact of proposed EU legislation on Malta generally, and the economy or industry, whether in general or in particular, lacking as it still does the resources to do this entirely independently in a satisfactory way. Key subsidiarity issues are sometimes missed. Parliament has at times sought to give itself effective autonomy in this regard, but with no lasting success as yet.

1.4.2 The first EU-related popular referendum was 'voluntary' and held by a Nationalist Party (conservative) Government in order to sound out the people on membership. The referendum was not mandated by the Constitution and was non-binding in legal terms. The majority Yes vote (for Union membership) result was discounted by the opposition party as being simply non-binding. Membership of the EU was then in fact decided in political terms by a general election, held within weeks of the referendum in March 2003, with the losing opposition party accepting the result of the general election as the people's definitive verdict on EU membership. No other referendums have been held since then on purely EU

[9] Article 6 speaks of 'any *other* law' (author's italics).

[10] See for example, *Sansone v. Comptroller of Industrial Property*, Court of Appeal, Application 15/20 of 2005, decided on 22 March 2006. See generally Sammut 2009.

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matters. Maltese law (including the Constitution) does not as a rule require the holding of a referendum for constitutional change, although it does require the use of referendum in the case of some constitutional amendments and also provides for abrogative referendums. Direct democracy is not a main feature of the Maltese constitutional scene, although Governments have occasionally employed a non-binding referendum. The current constitutional revision process, which commenced in 2014 on Government initiative[11] but without a clearly defined starting point, is meant to consider the possible introduction of referendum as a tool of direct democracy.[12]

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 The amendment of Art. 65 of the Constitution was probably dictated by a perceived need to legitimise membership by reference to some form of transfer of power clause or constitutional competence. The opposition had been arguing that Art. 6 of the Constitution (the supremacy of the Constitution clause) precluded EU membership, and that this article would need to be deleted for Malta to be able to join; indeed the Government had received this very advice. The present author had argued that neither this nor the insertion of an 'EU law supremacy clause' was strictly needed nor indeed desirable, and that Member State practice as to constitutional provisions on the question of conflict of national law with EU law was widely divergent, including in the then current Member States; there has been a marked tolerance for an understated approach as long as it appeared clear that EU law would in practice be given application as and where required by EU law. However, the lack of a constitutional provision permitting and regulating the transfer of legislative power was, it seems, considered a lacuna, and the solution was the amendment of Art. 65 to provide expressly for this vis-à-vis the European Union. The Constitutional Court was not involved. It was a combination of the desire of Government to do, and appear to be doing, things constitutionally and transparently, to regulate matters rather than leaving them to later chance interpretation or attack, in combination with the relative ease of making the necessary amendment once it was realised that the Union *acquis* did not actually require the deletion of the supremacy clause (Art. 6), far less its substitution by an EU law supremacy clause. The general public was by now in relatively strong acceptance if not support of Union membership. Therefore, the constitutional culture, the quest to enhance the legitimacy of EU membership, the need to take the Constitution seriously and to reflect the shift of power to the supranational level, the support of

[11] The present Government had promised a constitutional convention on a possible 'second republic' in its electoral manifesto of 2013.

[12] Generally see, for a contribution by an independent think-thank, The Today Public Policy Institute 2014.

the public, as well as the relative ease of the amendment procedure, all played their part in the introduction of a rather innocuous amendment to Art. 65 in the very same Act that rendered the EU *acquis* effective in Malta.

1.5.2 Perhaps the amendments were limited in scope due to the vehement opposition there had erstwhile been to membership of an increasingly 'federal' Union, often articulated in 'loss of sovereignty' and 'lack of voice' terms. The least controversial/inflammatory legal solutions were found. These were not the minimum required to allow the *acquis* to be put into effect. The European Union Act 2003, incorporating the Art. 65 constitutional amendment, replicated in large measure the wording of the United Kingdom's European Communities Act of 1972. Article 3 of the Maltese European Union Act was arguably strongly enough worded in terms of 'supremacy' as to at least raise a question of compatibility with the Constitution, but it seems that consensus about making membership work prevailed over hypothetical, and possibly sterile, debates.

As to 'waning constitutionalism', there has not been any real debate on this, but politicians from both sides have commented upon the democratic deficit within the Union. This is linked to a perception that it is hard for Malta and other small Member States to obtain solidarity-inspired attention from their fellow Member States in face of the general drive for deeper European integration, the strategies adopted by more powerful or influential Member States and the difficulty still found by the national parliament to properly monitor EU proposals, as well as other related issues. The Maltese feel close to their politicians, so that the syndrome of double remoteness is, in general, missing. Further, according to surveys, the Maltese are among the citizens who feel close to Brussels and other centres of policy/law-making in the EU.[13] Their Members of the European Parliament are among the most readily accessible. However, the feeling is one of a domineering group at the centre. Domestically, it is accepted that the Constitution is in need of review also for domestic reasons to do with a heightened need for accountability of the national government, an outdated set of provisions on neutrality and new institutional demands, among other reasons. The review process is taking some time to gather momentum but interest in the Constitution (and its review) has not diminished. Indeed, it is thought of as an important and even vital safeguard in the supranational and international contexts, and the 'EU amendments' made were truly on the minimalist side. It is not thought likely that any policy shift will be made on that score.

1.5.3 The author's view is that the general opinion in Malta would be that it is vital for constitutionalism – in the sense of limited government – at national level to be intertwined with constitutionalism – in the same sense – at regional and global level. In other words, these other levels must themselves be '*appropriately*' constitutionalised, especially if they are to be further empowered. The role of the

[13] European Commission, Public Opinion in the EU, Standard Eurobarometer 82, Autumn 2014. http://ec.europa.eu/public_opinion/archives/eb/eb82/eb82_first_en.pdf.

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national constitution would not change, and the global constitutional picture must be reflected in the national constitution, but this also applies in reverse. The real challenge then is to devise the regional and global constitutional compact under the form of constitutionalism and most crucially to build appropriate mechanisms of voice and solidarity (in both the procedural and substantive senses) into this regional and global constitutionalism. At regional European level, the Lisbon Treaty (building on the Constitutional Treaty) quite clearly set out to do more of this, but a gap remains. We have a much larger gap at global level. At the same time, constitutional tolerance is said to be a key value. Power is increasingly exercised at supranational level because it is being transferred to this level or even simply taken at this level. It is up to states to balance the transfer of powers to this level with added constitutionalism and constitutional values operating at this level. In the author's view, changes to national constitutions would best be designed in a context which involved the constitutionalisation of the exercise of power at the 'higher' level according to a multilevel – or (as I prefer) on a 'wider' scale (if we use the language of the 'horizontal' constitutionalism model). Both levels or spheres should operate in synchrony according to the same core fundamental values and principles. New mechanisms and instruments need to be devised for this purpose.

We have recently witnessed the need for constitutional accommodation in most Member States to permit new Union powers or the unforeseen exercise of power at Union level. This is emerging as something of a trend. In my view – and this view was expressed at the time of the future of Europe debate at the turn of the century but resonates even more powerfully today – the final understanding and adoption of the principle of solidarity (enforcing the value claimed by the Treaty) is the key. With true and active solidarity even full integration can be achieved, but without it every step will prove tortuous and fraught with backtracking and avoidance. An active principle of procedural and substantive solidarity[14] – not to be confused with a redistributive policy – would be based on a multi-level dialogic approach that applied – through the Institutions – the practice of input and output legitimacy based on taking different national interests into full account, weighing them against the common good at EU level, and then proceeding to balance the proportionate pursuit of the EU level common good by the safeguarding or accommodation of each national interest. This is a combined solidarity and common goods approach to the future parallel constitutional evolution of the Treaties and of the national constitutions. It is not only about respect for the essence of national constitutions. It goes beyond this, to respect for legitimate national interests. This practice of real solidarity requires a constitutional underpinning at both Union and national level. If put in place, it would allow for the pursuit of ambitious aims at EU level while securing maximum agreement for the required action at EU level – precisely through the solidary respect for legitimate individual national interests. Legislative and other decision-making procedures would be adapted to provide for this.

[14] See Xuereb 2002.

Mechanisms of review and challenge would ensure that an objection could be made to the use of power otherwise than in accordance with this principle of solidarity. For example, I would argue that the subsidiarity yellow card procedure should be extended to the exercise of the solidarity principle (and duty). Or a parallel structure could be created. If a certain number of Member States felt that a legislative proposal did not evince a reasonable degree of solidarity, the procedure would send the proposal back for further consideration at that early stage. In fact, other grounds of a constitutional nature might be added, so that the monitoring and review by national parliaments would be made to cover other constitutional issues, such as the proper observance of human rights (for details, see Sect. 2.12.3). Such mechanisms would ensure early consultation and dialogue, and ultimately pre-empt the possibility or even certainty in some cases of 'post-adoption challenges' to EU measures, not only before the Court of Justice but also before national supreme courts. In the latter case any challenge would have to have its basis in national law, meaning that a clash would have occurred between Union legislation and national (possibly constitutional) law. It would be far better to recognise principles at EU level and ensure their application or enforcement at this level (with full dialogue between levels) than to adopt legislation or other measures that give rise to chagrin at national level and legal challenges at that level that would have to be settled by reference to national law. It is far more likely that the necessary accommodations will be found through a process that ensures solidarity *ex ante* rather than one that relies on raw majoritarianism with the possibility of subsequent challenge on grounds that require of the Court something that a sensitive Commission and political process are far better able to deliver. I have written elsewhere that

> [a]s recent events in the Union have shown, state sovereignty needs to be constantly re-evaluated. Otherwise national interest will be pursued not through cooperation, but through the power of the veto, and even when this obstructs the pursuit of the wider common good. This makes it a constitutional issue for all the Member States and the Union as a whole.[15]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Since 1961, Malta's constitutional documents have featured a list of fundamental rights with corresponding action for enforcement. The Constitution of 1964 is the main document but the list of rights was enhanced by the European Convention Act of 1987, which extended the same right of action to the new rights

[15] See Xuereb 2012, p. 169.

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derived from the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). As to the general principles, they have tended to emerge almost as a matter of custom in the '*gurisprudenza*' (judgments) of the courts, especially of the First Hall of the Civil Court in its constitutional jurisdiction, and of the Constitutional Court. General legal principles are not applied in a way that they could be considered as sources of fundamental rights protection.[16]

2.1.2 Article 32 of the Constitution provides as follows:

> Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, *but subject to respect for the rights and freedoms of others and for the public interest*, to each and all of the following, namely – (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, *subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest* [emphasis added].

This preambular set of limitations is reflected in specific provisions legitimising derogation in the case of each right (except for protection from inhuman or degrading treatment), such as 'by a provision of law which is reasonably required in the interest of public safety, public order, public morality or decency, public health or the protection of the rights and freedoms of others'. Several provisions speak both of 'reasonably required' and 'reasonably justifiable in a democratic society'. The standard is substantially similar to that of the ECHR.[17]

2.1.3 While the rule of law underpins its entire edifice, there is no direct reference to this principle in the Constitution.[18] Under threat at certain points in history, it has been strengthened from time to time. For example, as a reaction to the non-appointment of Constitutional Court judges between 1972 and 1974, the Constitution now provides an automatic mechanism for the constitution of the Court in default of specific nominations (Art. 95(5) of the Constitution). Other aspects include access to justice, the hierarchy of the courts and the system of appeals. Again, at one stage it seemed as if the First Hall of the Civil Court was subverting the hierarchical system by insisting that its 'original' jurisdiction gave it a power of review over the Constitutional Court, centring around the issue of how

[16] Azzopardi 2012.

[17] Cremona 1997, p. 82.

[18] An initial discussion document was produced in September 2014 by 'The Today Public Policy Institute' (TPPI), with a view to launching a public debate on constitutional reform on these lines. The TPPI has recommended that this and other principles be considered for incorporation in the Constitution via a future Constitutional Convention amending the Constitution. The Today Public Policy Institute 2014, paras. 22–25.

an alleged breach of fundamental rights by the Constitutional Court itself was to be remedied if not by a new action before the First Hall in its constitutional jurisdiction.[19] In the course of such traumatic episodes, the language of the rule of law has tended to be heard.

The concept is drawn upon in legal education and training from English constitutional text-books and authors, from Dicey to Wade, and Lords Denning and Bingham, and is a point of reference in our constitutional judgments. Access to justice is a key principle. In the fundamental rights context it takes the form of the (relatively recent) right of action safeguarded by the Constitution and available for the protection and enforcement of the rights listed in Arts. 33 to 45, as well as the rights covered by the European Convention Act 1987. The novelty of this right of action was that it was made available also in the case of potential ('likely') breaches of a fundamental right. However, there is a proviso to the availability of this right of action. The proviso in Art. 46(2) reads: 'Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.' The *non liquet* permitted here is unusual for the Maltese legal system.[20] Ultimately, as Professor J. J. Cremona, the main author of the 1964 Constitution, has written, it is allegiance to the rule of law that provides for the proper working of the Constitution. The clear implication is that it is not some document that of itself guarantees the rule of law but a vigilant people that will use the Constitution, whether regarding proper law-making, independence of the judiciary, hierarchy of the courts or human rights provisions to guarantee the rule of law in practice.[21] Of course, the document must be so orientated. Access to justice, a fair trial, enforcement of civil rights by an impartial and independent tribunal, and other key elements of the impartial application of law and administration of justice are enshrined in the so-called right to the protection of the law in Art. 39 of the Constitution. Principles stemming from the rule of law, such as due process, fairness, fair hearing and *audi alteram partem* are recognised as fundamental rights as a result of Art. 6 ECHR, made part of Maltese 'supreme' law by the European Convention Act of 1987.[22]

The Constitution provides that laws shall only come into effect when published, but that Parliament may make laws that are retroactive. Art. 72 provides:

> (1) The power of Parliament to make laws shall be exercised by bills passed by the House of Representatives and assented to by the President. (2) When a bill is presented to the President for assent, he shall without delay signify that he assents. (3) A bill shall not become law unless it has been duly passed and assented to in accordance with this

[19] See on this, Mifsud Bonnici 2004, paras. 15–28.

[20] See further, Mifsud Bonnici 2004, Chapter VI.

[21] Cremona 1997, p. 118.

[22] Azzopardi 2012.

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> Constitution. (4) When a law has been assented to by the President it shall without delay be published in the Gazette and shall not come into operation until it has been so published, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.

While Parliament may make laws with retroactive effect, Art. 39(8) of the Constitution entrenches the principle that a person cannot be convicted of a crime if the act or omission, when it took place, did not constitute such an offence.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 There have been no cases specifically on this matter. However, issues can arise where economic freedoms clash with classic rights as interpreted and applied in Malta in certain cases. For example, abortion, seen as an assault on 'life', remains a criminal offence under Maltese law. On this basis attempts to provide this 'service' (as described by the Court of Justice) in Malta or to procure or otherwise arrange for it to be obtained outside Malta have met with police or other action. There has been one difficult case in which a father attempted to stop his partner from proceeding abroad for an abortion. Another example involved the surgical separation of twins that were joined at birth where one of them (the more viable one) stood a chance of surviving if the operation were carried out, but with the certain knowledge that the other would die 'during' any operation to separate them and that both would certainly die without any surgical intervention. The matter was finally decided in an English court (where the twins had been taken) in favour of the operation (carried out in the UK),[23] but the outcome would conceivably have been different in a Maltese court (and hospital), and any economic right or freedom of movement right in play might possibly have been relegated to second place by a Maltese court.

As far as social rights are concerned, Malta is a Republic 'founded on work and fundamental rights and freedoms' (Art. 1(1)) and 'committed to social progress among nations' (Art. 1(3)), and the Constitution seeks to protect social principles by declaration (non-justiciable principles) in Chap. III. This creates a very strong presumption in favour of these principles and a strong rule of interpretation that all legislation must be in conformity with them. Thus, the Maltese courts are called upon to ensure balance between economic aims and rights, and social aims and individual rights. Nevertheless, as has been strongly asserted by a group of NGOs in their recent replies and recommendations in response to a Government consultation exercise on the protection of human rights, second generation rights sadly

[23] Dyer 2000.

remain non-justiciable as such, and third generation rights are totally absent from the Constitution.[24] Any future constitutional review must remedy this situation.[25]

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 The Constitution provides for the presumption of innocence in Art. 39(5) as follows:

> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty: Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

This does not appear to have caused any difficulty for application of the European Arrest Warrant (EAW) regime. The fact that Art. 39(5) has not been amended means that there has not been any articulation of a 'compromise' if any was considered necessary as a result of the introduction of the EAW.[26] It is arguable that Art. 34 of the Constitution, which protects the right to freedom from arbitrary arrest or detention, could have been amended in order to better allow textually for the operation of the EAW. Nevertheless, it does not seem to have caused any problems or raised any controversy in practice. According to the European Commission Report of 2011 on the first five years of the operation of the EAW, Malta has not had problems applying the EAW regime.[27] The grounds on which execution of an EAW has been refused relate to (a) *ne bis in idem,*[28] and (b) prescription.[29]

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[24] Aditus et al. 2014, para. 18.

[25] See The Today Public Policy Institute 2014, paras. 22–25 and 64.

[26] The EAW was introduced by the Extradition (Designated Foreign Countries) Order of 7th June, 2004 as amended, S.L. (Subsidiary Legislation) No. 276.05, under powers given by the Extradition Act 1982, Chapter 276 of the Laws of Malta. http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9718&l=1.

[27] COM (2011) 175 final, Report from the Commission to the European Parliament and the Council on the Implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States. See Sammut 2012, p. 460 at pp. 469–470, who states that 'there are no specific problems involving Malta as (sic.) the AFSJ in criminal matters'.

[28] Article 39(9) of the Constitution and Art. 14 of S.L. 276.05.

[29] Filletti (undated).

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2.3.1.2 The courts will not simply rubberstamp a request for extradition, but will ensure that the evidence produced is satisfactory.[30] There is no report of a request being reviewed on the ground of a claim of innocence by the person concerned.[31]

2.3.2 *Nullum crimen, nulla poena, sine lege*

2.3.2.1 These principles are set out in Art. 39(8) of the Constitution, which provides that:

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

In my opinion, these principles are given the same level of protection today, and will be a ground for refusing extradition in principle. The dual criminality principle is regulated by Art. 10 of the Extradition Act and Art. 18 of the Extradition Order (S.L. 276.05), and there has not been any real criticism on this score.

2.3.3 *Fair Trial and* In Absentia *Judgments*

2.3.3.1 Under Art. 39 of the Constitution every person charged with a criminal offence is entitled to be present and to make his defence during related judicial proceedings. These rights are recognised by Art. 15 of the Extradition Act with regard to committal proceedings. The Maltese courts have not had occasion to review the standard of protection in this context.

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[30] See Art. 15, S.L. (Subsidiary Legislation) No. 276.05. For example see *Police v. Andriy Petrovych Pashkov* – Court of Criminal Appeal – 10/9/2009. Extradition Act (Chapter 276) – Evidence collected in the requesting country: Documents purporting to set evidence heard on oath in the requesting country are admissible as evidence in extradition proceedings, although the witnesses were not heard in the course of judicial proceedings. The Act does not require that the witnesses must have been heard by a judicial authority. Although witnesses are heard according to the applicable procedure in the requesting country, the evidence has to be confirmed on oath or by affirmation or declaration, and must be duly authenticated according to law. In this case the documents filed by the prosecution did not show or disclose that the declarations made by the various persons heard by the authorities in the requesting country had been confirmed on oath or by declaration or affirmation. The Court of Appeal held that in the absence of such oath, declaration or affirmation, the documents were not admissible as evidence for the purposes of the Extradition Act.

[31] See Cremona 1997, p. 118 and Dyer 2000.

2.3.4 Fair Trial – Practical Challenges

2.3.4.1 All persons are entitled to legal assistance, legal aid and translation services.[32] There is no particular NGO at the present time providing funding or assistance. I would support the creation of such a system as is proposed as an important counterweight to the disadvantages faced by persons facing criminal proceedings abroad, some of whom may well be innocent and in need of support and an informed liaison with the national authorities.

2.3.4.2 Based on the CEPS report mentioned in the Questionnaire regarding extraditions between 2005 and 2011, an attempt was made to identify cases through the study of media sources to ascertain the outcome of extraditions by reference to guilt or innocence as subsequently determined, with no result.

2.3.5 Effective Judicial Protection: Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 There has been no constitutional case lodged on the lines of the Estonian case or similar. Nor has there been real debate as to the compatibility of mutual recognition and the rule of law, although misgivings have been expressed in the criminal field to the effect that the automatic application of mutual recognition could lead to a possible breach of fundamental rights by individuals falling into the gap between two or more legal systems.[33]

2.3.5.2 There has been no real debate on the suitability of the transposition of mutual recognition from internal market to criminal law. The author would agree with the view expressed by an academic colleague to the effect that '[c]riminal law must be based upon legal certainty and must be a condition (sic) of public trust. It must be based on the rule of law and for these reasons may not be equated with the economical (sic) field'.[34] Indeed, a balance needs to be struck around the concept of legal certainty according to real need, which raises the issue of proportionality.

2.3.5.3 Sammut has written that:

> [A] further pivotal difference concerns the mode and effect of recognition. Mutual recognition in the internal market involves the recognition of regulatory controls and standards and is geared towards the national legislator and administrators. In the criminal field it involves the recognition and enforcement of court decisions by judges in order to primarily

[32] Article 11(1A) of the Extradition (Designated Foreign Countries) Order, S.L. 276.05.

[33] See for example, Sammut 2012, p. 470.

[34] Ibid.

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> facilitate the free movement of enforcement rulings. While the principle of borderless Europe applies in both cases, one has to be more careful in the criminal field. So fundamental rights are an issue but there is more than that.[35]

2.3.5.4 There have been no such calls in the sense of public statements on the desirability of the introduction of a proportionality test or for the (re-)introduction of some measure of judicial review. However, the concern expressed in some Member States is perfectly understandable on such points as the provision or otherwise of sufficient evidence of a case to answer, or whether an offence is sufficiently serious, or whether there is a sufficient link between the offence and the country to which the individual is to be extradited. In the author's view, there would need to be a fair balance in the standard of review set and possibly a maximum harmonisation approach taken. The German Government's call for a possible 're-vision' of the rule of law in the EAW case is of interest, in my view, for the reason that it might lead, if not to a review of 'the concept of the rule of law', then at least to a restatement of an acceptable form of the common constitutional tradition of essential procedural safeguards in an extradition context, to be observed by all Member States. Equally, it is possible that best practice can indicate, with benefit to all interests involved, the re-instatement along standard lines of judicial review in civil and commercial matters.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

A tangential aspect that has arisen and that straddles the 'national' and 'European' occurs in the i-gaming field, and may occur in other areas in the future. Some Member States are seeking to have their criminal law provisions, allied to a national requirement for the licensing of certain economic activity (for example, the provision of betting services), acquire automatic recognition and enforcement in other Member States and by EU law itself. This is even without formal harmonisation of criminal law at EU level, and sometimes via such methods as the promotion of Council of Europe Conventions on administrative, police and judicial co-operation.[36] This prospectively raises acute issues not only for human rights or fundamental freedoms, but fundamentally for the interplay between constitutionally and Treaty-granted and protected economic rights on the one hand, and the limits of national sovereignty in criminal law on the other hand.

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[35] Ibid.

[36] Mizzi, D. (2014, July 11). Malta seeks European Court ruling over sport betting convention. Malta Today. http://www.maltatoday.com.mt/news/national/41098/malta_seeks_european_court_ruling_over_sport_betting_convention#.VLZAZnt4FIY.

2.4 The EU Data Retention Directive

2.4.1 Directive 2006/24[37] was implemented by Legal Notice No. 198 of 2008, which amended Subsidiary Legislation (hereinafter S.L.) 440.01[38] – the Processing of Personal Data (Electronic Communications Sector) Regulations of 2003. In connection with these same Regulations, the Court of Appeal has held that any limitation on a human right (in this case the right to privacy) as protected by the Constitution, the European Convention Act of 1987 and the ECHR is to be interpreted restrictively and applied in strict accordance with the law.[39] Apart from the disproportionate burden on the service provider if a police or security services request made under an exception is too widely drawn (as was found in this case), the human rights aspect was vital. The request in the particular case was such as to cover a wide area and potentially a very large group of persons, almost all of whom would be totally unconnected with any alleged offence (arson attacks). The Court noted the dangers of the wholesale placing of large groups of persons under suspicion, and the disclosure of data related to them without their knowledge, referring even to the road to totalitarianism and shades of a police state.[40] Nor was such a strategy the only reasonable option for the police. The judgment therefore applies a form of reasonableness or proportionality to the facts. The case was decided before the implementation of the EU Directive, but is of interest in that it decided issues similar to the ones that featured in the annulment of the Directive.

Apart from being evidence of the application by the Maltese courts of a proportionality principle as a general principle of Maltese law and EU law when interpreting and applying Maltese law implementing EU law, the case also shows that the Maltese courts would be likely to regard a blanket rule on retention as a violation of the constitutional rights to privacy and integrity of the home and property under Art. 38 of the Constitution, and to freedom of expression, including the right to receive information and ideas, to communicate ideas and information without interference, as well as to freedom from interference with correspondence

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[37] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[38] http://www.idpc.gov.mt/dbfile.aspx%5CSL440_01.pdf.

[39] *Mobisle Communications Ltd. v. Kummissarju Ghall-Protezzjoni Tad-Data*, Court of Appeal (Inferior Jurisdiction), Ref. No. 15/2006 decided on 3 October 2007.

[40] In the Court's words: '*Mhux lanqas tollerat illi l-utenti kollha, indiskriminatament, jitqeghdu taht suspett biex a xelta taghha, il-Pulizija tkun tista' tgharbilhom bil-process ta' eliminazzjoni. Jekk dan jithalla jsir ikun qed javvicina l-qaghda ghal dak ta' stat polizjesk jew totalitarju li man-nozzjoni ta' socjeta` demokratika u libera, kif nafuha, ma ghandu xejn x' jaqsam.*' (at p. 28 of the relevant judgment). Translation by the author: 'Nor is it allowable for all users, indiscriminately, to be placed under suspicion with the Police then exercising discretion as to whom among them to eliminate from the investigation. That would be to approach the modus operandi of a police or totalitarian state, and one that is far removed from what is acceptable in a free and democratic society as we know it.'

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under Art. 41 of the Constitution. Police and security service powers are hedged around with strict controls and the need for high-level authorisation, and then apply only in the case of serious crimes or threats to public security. Data cannot be held for longer than is necessary, nor used for any purposes outside those stipulated by law, and communication and transfer are strictly controlled.

There have been no specific cases on the law implementing Directive 2006/24 as such, but the above is indicative. The Maltese courts would apply general principles to ensure a balance between powers and rights, as demonstrated by the *Mobisle Communications Ltd.* case above. The relevant provisions of the Constitution, however, do not reflect the digital age nor the essence of the core right to privacy of information in such an age. They are sorely in need of revision since as they stand, it is arguable that they themselves do not protect core rights as recognised by other applicable human rights documents, including the ECHR and the EU Charter of Fundamental Rights (Charter). A person is therefore more likely to turn to these latter documents, and the European Convention Act 1987 (Art. 32), when appropriate, in order to rely on a right to privacy that will then be circumscribed by the relevant EU-led legislation as well as by 'what can be shown to be reasonably justifiable in a democratic society' according to the terms of the Constitution.[41] Article 32 of the Constitution states that 'every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, … but subject to respect for the rights and freedoms of others and for the public interest, to … respect for his private and family life'. However, Art. 32 is not legally enforceable.[42] It is only possible to sue in the Maltese courts on grounds of 'private and family life' under Art. 8 of the European Convention Act 1987 (ECA 1987) and not under Art. 32 of the Constitution itself. Unusually for an ordinary piece of legislation, the ECA 1987 is enforceable through the competent courts.[43] It can, however, be repealed via a simple majority vote in Parliament. Thus, the protection afforded by the ECA 1987 is not considered to be on par with the provisions in Chap. IV (Arts. 33–45) of the Constitution which are entrenched[44] and require a two-thirds majority in Parliament to be amended.

Maltese law, as amended by the implementing law, has not been amended since the annulment of the Directive in April 2014. There is no official indication as to what action will be taken if any; however an inter-ministerial committee has been set up with a view to evaluating the situation and recommending an appropriate response.

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[41] The principal 'let-through' phrase found in both Arts. 38 and 41 of the Constitution.

[42] See Art. 46. Article 32 is the only Article in Chapter IV of the Constitution entitled 'Fundamental Rights and Freedoms of the Individual' which is not enforceable before a court of law.

[43] Generally, see Conference of European Constitutional Courts, XIIth Congress.

[44] By virtue of Art. 66 of the Constitution.

2.5 Unpublished or Secret Legislation

2.5.1 There has been no constitutional case on this. Certainly, it has been seen that there can be a strong political backlash if Parliament feels that it is not being kept sufficiently informed of administrative action. As things stand, Art. 72 of the Constitution requires all laws, of whatever nature, to be published in order to have effect. Therefore the concept of 'secret legislation' is a contradiction in terms. It is in this light that I would expect the Maltese Constitutional Court to react negatively to any call to apply the *Heinrich* judgment, as going a step too far.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 Although Malta had similar problems as other Member States regarding sugar stocks upon EU membership,[45] the stocks were lower than in the Central and Eastern European states (leading to a 1 million EUR fine in the case of Malta), and the Maltese courts have not been called upon to consider the issue or the general principles of law mooted here.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 The constitutionality of the European Stability Mechanism (ESM) was not overtly the primary issue for the Maltese Parliament. However, constitutional questions were especially at the root of interventions in Parliament made by former Prime Minister Alfred Sant.[46] These included accountability to Parliament for use made of the European Financial Stability Facility, with the ratification treaty including a new clause that Malta's representatives on the ESM Boards of Governors and Directors were to report annually to the House Public Accounts Committee. Otherwise, the Government of the day argued that ratifying the ESM

[45] Grech, H. and Camilleri, I. (2005, April 10). Malta Risks Paying Millions in EU Fine over Sugar Hoarding. Sunday Times of Malta. http://www.timesofmalta.com/articles/view/20050410/local/malta-risks-paying-millions-in-eu-fine-over-sugar-hoarding.93850. See also: Camilleri, I. (2006, November 14). EU Fines Malta Nearly 1 Million Euros. Times of Malta. http://www.timesofmalta.com/articles/view/20061114/local/eu-fines-malta-nearly-euro-1m.35396.

[46] (2012, July 7). EU Financial Treaty Ratified. The Times of Malta. See also: Dalli, M. (2012, June 19). Malta supports ESM bailout for Spain. Malta Today. http://www.maltatoday.com.mt/news/national/18986/malta-supports-esm-bailout-for-spain-20120619#.VBA9uGN7SQc.

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was in the national interest as it offered a better financial alternative, with a surer cap on Malta's exposure (of some 160 million EUR)[47] than the alternatives employed or which might be employed. The financial calculations appeared to dominate the parliamentary debate, but with underlying considerations of viability and control playing their part. There was no debate about the irreversibility or unconditionality of the commitment, as the issue was treated mainly as an issue of manageability.

2.7.2 General discussion about the constitutionality of other proposed measures has taken place internally in the financial institutions, the financial press and some conferences.[48] Amending the Constitution to allow for the Fiscal Compact's 'golden rule' required some debate,[49] but in the end the consensus not to act by amendment of the Constitution prevailed.[50]

2.7.3 Malta has not been subject to a bailout/austerity programme. The author's view is that many in Malta would share much of the reasoning of the Constitutional Court of Portugal. It is worth recalling that the social progress of all nations is a fundamental principle and policy objective of the Constitution of Malta.[51]

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 With regard to indirect judicial review via preliminary references, the answer is that there has been one case where a question was raised as to the validity of Regulation 530/2008 and of Art. 7(2) of Regulation 2371/2002. The Court of Justice found Regulation 530/2008 to be partially invalid.[52]

2.8.2 The author shares the view that the Court of Justice of the European Union (CJEU) has demonstrated a propensity in the past to apply a liberal standard of review to EU measures. The national standard on the other hand requires a searching enquiry into the matter on the basis of general principles of law. Certainly, any review of an allegation of a breach of fundamental rights will apply a

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[47] For the Budget for 2015, the totals of Government revenue and expenditure are projected at around 3.5 billion euros and 3.7 billion EUR, respectively. See for example, http://www.act.com.mt/articles-publications/Budget-Measures-Implementation-2015.php.

[48] See for example, Central Bank of Malta 2013.

[49] Camilleri, I. (2012, March 3). No Decision yet on Constitutional Change. Times of Malta. http://www.timesofmalta.com/articles/view/20120303/local/No-decision-yet-on-the-constitutional-change.409377.

[50] For a full run-down of the Fiscal Compact ratification and related arguments in Malta, see European University Institute 2013.

[51] Article 1(3), Constitution of Malta.

[52] Case C-221/09 *AJD Tuna* [2011] ECLI:EU:C:2011:153.

strict standard of compliance, and it may be that the latest *Kadi* judgment,[53] among some others, will bring the CJEU closer to the national 'norm'. Importantly, it seems to indicate the possible emergence of a 'new constitutionalism' in the EU legal order, with human rights occupying a (more) central place in EU legal order discourse. At the same time, as has been noted by some, this seems to imply a (welcome) shift in focus from the market integration imperative to a broader constitutional, political and social underpinning for the rule of law in the EU legal order.

2.8.3 The Constitutional Court has exercised the power under Art. 6 of the Constitution to uphold the supremacy of the Constitution, including its human rights provisions, relatively vigorously.[54] Yet it has been criticised for its stance that even where the European Court of Human Rights has ruled against the government in regard to the application of a law found to be in breach of human rights, the Constitutional Court considers itself unable to affect the (legislative) position for the future by declaring the legislative act in question 'null', which would apparently be seen as 'abrogating' the Act and as something that only Parliament is empowered to do.[55] Of course, the Constitutional Court will declare anti-constitutional laws and acts to be 'to the extent of the inconsistency, void', in accordance with Art. 6 of the Constitution.[56] All apparently turns on a claimed distinction between the meaning and effect of the terms 'null' (not used in the Constitutional provision) and 'void' (the term actually used). It is considered by the Constitutional Court to be a matter for Parliament to repeal the offending legislation. This could well be a vestige of the British constitutional influence, and may on this score provide a unique source of contrast with the position generally held in continental constitutional law.

2.8.4 There is no Constitutional Court ruling on the review of measures that implement EU legislation. The view of the author is that the Maltese Court would review the Maltese legislation/measures first and foremost under the Constitution, while interpreting the relevant EU legislation sought to be implemented according to EU norms, including the general principle of protection of human rights and the Charter of Fundamental Rights, but would carry out the review primarily in the

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[53] Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v. Kadi* [2013] ECLI:EU:C:2013:518.

[54] See generally, Mifsud Bonnici 2004. See also Zammit 2008.

[55] See the controversy between Dr. Giovanni Bonello, former judge at the European Court of Human Rights, and Chief Justice Dr. Silvio Camilleri, with excerpts available at: Chief Justice Clarifies Position, The Judiciary 2013. http://www.judiciarymalta.gov.mt/newsdetails?id=86 and http://www.judiciarymalta.gov.mt/home?l=1. See also the comment by former Chief Justice and Judge at the European Court of Human Rights, Dr. Giuseppe Mifsud Bonnici in Bencini, A. (2013, May 26) Constitutional supremacy is self-evident. Times of Malta. http://www.timesofmalta.com/articles/view/20130526/opinion/Constitutional-supremacy-is-self-evident.471246. See also The Today Public Policy Institute 2014, para. 79, where The Today Public Policy Institute observes that the Executive and the Legislature have 'in effect usurped' the power of the Constitutional Court to determine the validity or otherwise of laws under the Constitution.

[56] See Degaetano 2008.

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context of the Constitution and of the European Convention Act of 1987. In my opinion, it would be theoretically (and very hypothetically) open to an applicant to argue that the Court should apply a higher standard than was being argued was the EU standard of protection, but he would need to do so by reference to a clear opposing prescription in the Constitution.

2.8.5 It is not suggested that the standard of review in Europe is considered to be necessarily lower than it is in Malta. The Maltese courts will, in practice, review measures implementing EU law for alleged breach of human rights. Also, I opine that the Maltese courts are likely to presume equivalence of protection, but will apply any higher standard as mandated by EU law and the Constitution itself. It is unclear what the courts would do if a lower standard of protection were indicated by EU law. This is hypothetical, as the European Convention provides a minimum standard in both spheres, and it has not been the subject of a statement by the Constitutional Court. Arguably, however, the Court would be obliged under the Constitution to apply the higher national standard according to the Constitution and the European Convention Act of 1987, and certainly up to the minimum standard of the ECHR.[57]

2.8.6 The broad issue of differential treatment has not been raised. In the author's view, it is highly unlikely that different standards would be applied in the absence of objective justification in a democratic society (if such were possible). The domestic protection would operate as the minimum standard at all events, as the human rights provisions apply to all persons present in Malta.

2.9 Other Constitutional Rights and Principles

2.9.1 There has indeed been an increase in, and possibly also a shift to, the use of ministerial power, through subsidiary legislation, for the implementation of EU directives.[58] The result is one of less transparency, as well as less awareness, for all involved in the legislative process and afterwards. It may also be that in some areas the resulting complex of legislation in a particular area lacks cohesiveness or even coherence. To this may be allied the issue of 'copy/pasting' directives into national law. Again there are implications here for the democratic process, and ultimately the perception of EU legitimacy.

Another issue may be the apparent willingness of the CJEU to defer the application of the principle of proportionality to national laws which come up for

[57] See further Azzopardi 2012.

[58] There are no specific criteria in Maltese constitutional law for what has to be enacted as parliamentary statutes, except for the incorporation of certain treaties where an Act of Parliament is required.

scrutiny as possibly infringing this principle of EU law, as well as fundamental Treaty law, to the national courts. The gaming sector is an example. The argument runs that if the rule of law means the uniform application in practice of fundamental treaty rights in all Member States, then to leave the ultimate determination of the proportionality of national measures which allegedly unjustifiably restrict the exercise of those rights to the national courts could militate seriously against the proper and uniform application of EU law, to the detriment of individuals seeking to exercise their rights under EU law.

2.10 Common Constitutional Traditions

2.10.1 Certainly, the rights and principles mentioned in the questionnaire, such as *nulla poena sine lege* and the right to judicial protection, could be among the candidates for principles that form part of the 'common constitutional traditions'. It might also secure broader agreement for permitting a move away from Art. 53 of the Charter if a new Convention were held in order to debate values in Europe, with a view to identifying common values (whether traditional or not), possibly on the basis of a report to be prepared by a team of experts. However, it is not clear that moving away from Art. 53 would be a good thing. Professor J. H. H. Weiler has famously argued[59] for the retention of national legal systems as autonomous national laboratories of human rights, involving a bottom-up approach to the evolution of human rights. It is also for the Fundamental Rights Agency to monitor developments in the Member States with a view to identifying such commonalities.

2.10.2 The suggestion that courts making a reference might give more information to the Court of Justice as to the issues of national law – including constitutional law and the values that are thereby upheld – probably already exists as part of the exhortation for loyal co-operation between courts envisaged in the preliminary ruling procedure, at least in theory. This could be built upon if the national courts could be permitted to *not* 'settle' difficult questions of national law before making the reference (as the CJEU has requested in the past) but to submit the issue in the round, while of course limiting the formal questions to questions of EU law. Consensus issues such as the rule of law and so on – especially the principles underlying the rights – could with benefit from the subject of another democratic Convention (say on the Application in Practice of the Charter and the European Convention), an exercise which may or may not lead to treaty revision, but should lead to consensus or better mutual understanding.

[59] Weiler 1999.

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2.11 Article 53 of the EU Charter and the Issue of Stricter Constitutional Standards

2.11.1 This is a difficult question for the EU, going forward. On one view, Art. 53 was part of the 'deal' in accepting the Charter as a legally-binding and enforceable document. It is part of the constitutional compact, based on a particular analysis of Member State systems and concepts of Union and citizenship (national and Union). Altering it would be seen as a fundamental Treaty change. The *balance (resolution of conflict) between rights* in a society, as long as a minimum standard is observed for each right, is a matter of national values and culture. It may also be related in some cases to 'national identity', arguably as protected by the national constitution. A full case (straddling law, society, culture, family, international relations, politics and so on) would need to be made for abandoning the national dimension of human rights (societal) development, which on the whole has tended towards a heightening of protection of rights, in favour of what can otherwise lead to a Europe-wide – indeed Union-led – search for, and commitment to, the lowest common denominator also in a cultural and values sense. One might also ask what role would be left for the national legislator and the national judge. There has been little discussion of these issues in Malta. In general, most are content that the standard of the ECHR, allied to the Charter, would likely apply.[60] However, in the parliamentary debates leading up to the adoption of Act XIV of 1987 (the European Convention Act), it was emphasised that the European Convention standard would apply where the Convention gave greater protection, and that the principle should always be that the human rights provisions with the more extensive 'definition' should prevail. Also, it is realised that the EU legal order may take protection beyond the European Convention standard, and that this could lead to another layer of conflict as to the 'right' balance of rights. In short, clearer thinking is needed on the relationship between rights and values.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 There was no public debate in Malta on constitutional rights at the time of implementation of the European Arrest Warrant Framework Decision[61] or adoption of the EU Data Retention Directive.

2.12.2 There have not been any occasions from which conclusions can be drawn in this regard, as there has never been constitutional controversy over the

[60] See Cremona 1997, p. 84.

[61] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

implementation of any EU law. In my opinion, the same scenario as occurred in Sweden and Germany could arise in Malta, but it is more likely that the issue would be flagged at an early stage and a solution of some kind would be found before the stage of implementation, especially on the issue of full debate.

2.12.3 I would prefer the emphasis to be on a system whereby such issues were flagged in advance of adoption, indeed *ex ante* at the time of the proposal of EU legislation, possibly on the model of the subsidiarity control, with the possibility of an *ex post* challenge before the Court of Justice if an allegation of breach of general principles or a challenge on other valid grounds could be made. However, as to the grounds for challenge, it is a question for discussion and study whether any challenge would be adequately governed by Art. 263 TFEU, including by reference to the principles set out in Art. 4(2) TEU and Arts. 52 and 53 of the Charter. The matter could perhaps be raised by a number of constitutional courts and/ or parliaments.

Therefore, in other words, I think that 'EU un/constitutionality' under the Treaties (I believe we can use this language since Lisbon at least) lends itself to an *ex ante* control as stated above. Indeed I would go further. In my view the *ex ante* control mechanism applied in the case of subsidiarity should be extended to all 'constitutional' issues, therefore including the principle of proportionality and, generally, all general principles of Union law (many of which, after all, are 'derived' from the common *constitutional* traditions of the Member States). This would allow proposals which are perceived to be problematic also from the national constitutional perspective to be flagged at an early stage, and would pre-empt both *ex post* challenges and outright 'rebellions' via national court proceedings that would otherwise result purely from the failure to address the EU-level constitutional arguments in their proper political forum at the earliest possible stage. The wider applicability of the yellow card procedure would allow for – indeed secure – proper and timely (early) consideration by the Commission of all constitutional implications and minimise the risk of any failure to consider and 'accommodate' (as and if necessary) national concerns about the proposed exercise of Union power as judged against the overriding norms of EU law. It would give national parliaments a mechanism for raising issues of national constitutional concern about the proper exercise of Union power according to EU norms at that early stage. It would be an exercise in solidarity and fit perfectly with the multi-level constitutional approach. It would then become far more likely that any *domestic* control would be focused on the domestic constitutionality or otherwise on the *domestic* implementing measure, treated as a separate issue from the EU constitutionality of the EU measure under the Treaty. Otherwise, of course, there could be *ex post* control before the Court of Justice, with the possible finding that an EU norm contradicts EU constitutional principles. But the rather damaging scenario of the Court of Justice having to annul an adopted measure because (or at least so it would damagingly appear from the perspective of synchrony between the EU constitutional safeguards and Member States' constitutions), of a national Constitutional Court objection would be much

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diminished. Moreover, fuller and more open democratic constitutional debate would be the result, with all the benefits of real multi-level constitutional dialogue.

2.13 The Protection of Constitutional Rights in EU Law

2.13.1 I have some concern about the apparent reluctance/incapacity of the Court of Justice to engage (possibly due to the absence of fuller Treaty powers) in an in-depth review of EU law and of national implementing law by fully applying the constitutional principles applicable, including the principle of subsidiarity, the principle of proportionality (including to national measures adopted to implement EU law) and settling human rights 'values issues', from an EU legal order perspective, thus omitting to give, in many cases where such clarity is warranted, a clear indication to the Member States that EU law is considered valid and applicable/inapplicable in certain ways. In exercising this jurisdiction, the Court of Justice would be guided by the (possibly revised) principles referred to in Sect. 2.12.3 above.

2.13.2 Exceptions have on the whole been made due to necessity and as proportionate, as in the case overall of the European Arrest Warrant. Nevertheless, the system may be permitting a lowering of standards in the European context, and permitting Member States to deny certain Treaty rights without fullest accountability. In my view, the *ex ante* and *ex post* controls in place against possible excesses can be improved, even from an 'efficiency in integration' perspective, for doubts and differences in Member States need to be ironed out before the stage of implementation if EU law is to be applied uniformly throughout the Union at the point when this is supposed to happen. At that stage it should be clear that the EU measure is legitimate, both because it is consonant with EU constitutionality and fully respectful of essential national constitutionality. Any shortcomings have probably been due to inadequate awareness, itself possibly due to the Union decision-making structures not being fully geared to the constitutional dialogue needed between the Union institutions and the Member States, and also due to some deficiency in the rules to be applied in such debate, i.e. the constitutional metarules – such as the reach of the principles of subsidiarity and proportionality (including the ability to raise a reasoned objection on the basis of the latter principle as part of the *ex ante* monitoring of EU proposals in national parliaments).

In my view, as long as the system ensures that subsidiarity and proportionality are applied at all levels, and access to a court in order to test their application is guaranteed, then the Court of Justice must be permitted to review Union acts and also national implementing acts for conformity with such acts. An EU Constitutional Court, as has been advocated by some over the years, might be the best candidate for such a role. At this point it then becomes important for the European Convention regime to operate with effectiveness upon the EU legal order, including upon the judgments of the Court of Justice, without unquestioned and

irrebuttable presumptions as to equivalence of protection or compliance, but with application of a review function over the prior control by the Court of Justice over the exercise of any margin of appreciation. The ECHR's minimum floor of protection would operate as such, preventing action from swinging beyond the extreme on any one side of a conflict of rights (values) issue. There would end the role of the European Court of Human Rights in Strasbourg (ECtHR). Otherwise, it would be for the Court of Justice (or a Union Constitutional Court) to determine whether an EU law was or was not respectful of EU constitutional law in all its aspects – including respect for common constitutional traditions and the essence of each Member State constitution.

2.13.3 No constitutional issues have been raised by the Maltese courts in a preliminary ruling request. However, as a matter of personal opinion following on from previous replies, the responsiveness of the CJEU will take the form of a revised role for the CJEU – or for a Union Constitutional Court if one were created. The Court would have a defined constitutional jurisdiction modelled on the very multi-level or horizontal (as I prefer) constitutionalism of the Union. Due deference would need to be paid to the essence of each national constitution, and to national identity as protected therein, while the principles of constitutional validity would be fully and better articulated and enforced at each 'level' (in each sphere). Comparative law techniques would serve as the basis for identifying and interpreting rights as part of the common constitutional traditions of the Member States. Similar rules would apply for establishing common values, which could also be articulated in the Treaty. Besides a strict review of EU measures, I would also favour dialogue about diversity, possible convergence through dialogue and then a degree of EU-level judicial review of national implementing measures for their observance or failure to observe the limits of the permitted exceptions to the exercise of Treaty rights and respect for recognised human rights and fundamental freedoms. The Treaty and the Charter oblige Member States to observe the Charter in implementing EU law. The EU Court must exercise full competence in this matter, including as to the limits on any margin of discretion permitted a Member State, while taking due account of such essential constitutional 'essence' as may be asserted.

2.13.4 In my view it would be legitimate to ask national institutions to be more pro-active in upholding the rule of law at Union level by ensuring a proper mesh with the national level. This could be done through proper implementation by the legislature or proper guidance by the national constitutional court, which could perhaps be given an *advisory jurisdiction* in such matters,[62] without encroaching on

[62] I envisage a kind of *ex ante* advisory constitutional jurisdiction, where the court indicates how *in abstracto* it would tend to view a certain issue from the constitutional perspective. This is different from the situation that exists in Malta, where the Constitutional Court has no advisory jurisdiction. It simply sees itself as having no competence to declare laws invalid, and it is of no effect if the ECtHR has declared them to be in breach of the Convention and therefore of the European Convention Act of Malta. This reduces the judgments of the ECtHR to mere 'advisory'

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parliamentary privileges such as the latter's role in monitoring the principle of subsidiarity and, I would add, proportionality, which is also properly seen as a constitutional principle. The national constitution should make as clear as possible what is within its essence (within the meaning of Art. 4(2) TEU) even if this means a new constitutional exercise at national level, possibly on the basis of a template to be prepared by the drafters of this Treaty provision.[63] It is important that reference also be made to the other key constitutional value of the Union, namely solidarity, to emphasise the obligation to safeguard human and fundamental rights but above all the dignity of the person in all circumstances of Union action in each Member State. In this way the human dignity of the citizen will be placed first and foremost in the EU constitutional schema that consists both of the Treaty and national constitutions in the context of human and fundamental rights protection. True two-way loyalty, solidarity and goodwill in a properly synchronised constitutional space in the Union, offering respect for national identity and essential constitutional provision in each Member State, arguably require a fuller monitoring mechanism than only in relation to the principle of subsidiarity and only in virtue of a rather large number of objections. As far as respect for Art. 4 TEU is concerned, an *ex ante* objection procedure, and an *ex post* judicial review by the Court of Justice in dialogue with the national constitutional court, might be contemplated. The author believes that the opportunity should be taken as it arises to refine and develop Art. 4 (2) TEU, possibly by identifying the essential values constitutive of national identity (possibly on a 'compatibility with common traditions' test) and as highlighted in apposite national constitutional provisions.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 As to transfer of powers, reference has been made above to the 'EU amendment' made to Art. 65 of the Constitution on the exercise by Parliament of its legislative power. Not framed expressly as a transfer of power clause, but rather as an enabling and delimiting (limitation) clause that focuses on the exercise – by objective or purpose – of legislative power by the Parliament of Malta, the clause does not in express terms 'permit' but rather appears to 'recognise' the (therefore, presumably, inherent) capacity of the Maltese Parliament to transfer legislative

opinions, except in the case of the solution proposed here, where the judgment of the Constitutional Court would be applied.

[63] Art. 4(2) TEU could be further developed from a synchrony, and mutual respect and loyalty, perspective.

power *pro tempore* and *pro tanto* to the EU institutions or any international organisation or other entity by assuming international obligations which have that effect.

There is a general listing of particular objectives and of specific values and principles to be upheld when participating in international co-operation, such as might condition, and delimit the scope for, the exercise of this power. The power under Art. 65 must be exercised 'for the peace, order and good government *of Malta*' and '*in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations* in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003 [emphasis added]'. The words in italics indicate by reference that the objectives must be in conformity with the principles of international law and Malta's obligations under the Treaty of Accession to the EU. The provision therefore enshrines a loyalty obligation to the international rule of law and to the objectives and values that Malta shares as a member of the international community governed by international law and as a Member State of the European Union.

Additionally, Art. 1(3) of the Constitution declares that 'Malta is a neutral state actively pursuing peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance …' (see further in Sect. 3.1.3).

By Art. 3(1) of the Ratification of Treaties Act, Act V of 1983,[64] where a treaty is one which affects or concerns (a) the status of Malta under international law or the maintenance or support of such status, or (b) the security of Malta, its sovereignty, independence, unity or territorial integrity, or (c) the relationship of Malta with any multinational organisation, agency, association or similar body, such treaty shall not enter into force with respect to Malta unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of the Act. The Act then provides in Art. 3(2) that in the case of (a) or (b) above, or where the treaty contains a provision which is to become, or be enforceable as, part of the laws of Malta, the ratification or the authorisation or approval of the ratification shall be by Act of Parliament. Article 3(3) expressly provides that no treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament. Here then, we have a strong form of dualism as far as concerns treaties falling within the scope of Art. 3(1). On the other hand, as to treaties that do not fall within the scope of Art. 3(1), Art. 5 provides that the Government's powers are not similarly constrained. Authorisation to ratify the Treaty of Accession of 16 April 2003 was given to the Government by Art. 6 of the European Union Act 2003.

There are no provisions in the Constitution specific to any international organisations or institutions other than the EU via reference to the Treaty of Accession of 2003.

[64] http://justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono&gotoID=304.

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3.1.2 Article 65 was amended by Art. 7 of the European Union Act 2003 to include express reference to the ability of Parliament to legislate 'in conformity with' the obligations assumed by membership of the Union.[65] It does not use the language of power to transfer or delegate powers. The wording appears to effect a 'clarification' of the 'breadth' of the Maltese Parliament's powers, which are assumed to include the power of transfer or delegation to organisations such as the EU. This would tally with the minimalist logic of a 'nation-oriented' or 'domestic-centred' constitution that sees and presents things from a domestic perspective (the powers of Parliament and their extent, rather than expressly conferring a transfer of power competence which would allow it to be said that a transfer had taken place) even if international obligations are undertaken that will at least *pro tempore* radically alter the legislative dynamic and bring into play a multilevel system of governance and constitutionalism. I believe this was partly a matter of constitutional culture, and perhaps partly a matter of deliberate political judgment as to what was acceptable to the people in 1993, as well as practicable (including acceptable to the opposition) in terms of constitutional amendment in order to 'accommodate' the idea of EU membership, as well as partly the fact that the future of Europe debate was still in train and academic rationalisations about European constitutionalism were in their youth, if not infancy. The language is the neutral language of stating that Parliament may legislate in order to transpose/transform a treaty (and obligations *thereby* assumed) into Maltese law – the classic dualist approach to international treaty law – without really addressing the fundamental constitutional issue of transfer of powers head on. In other words, the relative obligations are regarded as 'assumed' already *by* the treaty of accession, but made binding in Malta by virtue of the European Union Act passed in accordance with the parameters set out in Art. 65. Again, it seems that all drafting was done by the Advocate General's office.

3.1.3 The courts, the Government or Parliament have not sought to re-open the question considered in the previous paragraph. On the other hand, it is different with regard to Malta's neutrality, which might be seen as an obstacle to full international co-operation whether at EU or even global level. Malta's neutrality was introduced, defined and enshrined in the Constitution in 1974, with amendment in 1987, in Art. 1(3) of the Constitution which reads:

> Malta is a *neutral* state *actively* pursuing peace, security and social progress *among all nations* by adhering to a *policy of non-alignment* and refusing to participate in any military alliance. Such a status will, in particular, imply that: (a) no foreign military base will be permitted on Maltese territory; (b) no military facilities in Malta will be allowed to be used by any foreign forces *except* at the request of the Government of Malta, and only in the following cases: (i) in the exercise of the inherent right of self-defence in the event of any armed violation of the area over which the Republic of Malta has sovereignty, *or in*

[65] Art. 65 of the Constitution reads: '65. (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.'

> *pursuance of measures or actions decided by the Security Council of the United Nations*; or (ii) whenever there exists a threat to the sovereignty, independence, neutrality, unity or territorial integrity of the Republic of Malta; (c) except as aforesaid, no other facilities in Malta will be allowed to be used in such manner or extent as will amount to the presence in Malta of a concentration of foreign forces; (d) except as aforesaid, no foreign military personnel will be allowed on Maltese territory, other than military personnel performing, or assisting in the performance of, civil works or activities, and other than a reasonable number of military technical personnel assisting in the defence of the Republic of Malta; (e) the shipyards of the Republic of Malta will be used for civil commercial purposes, but may also be used, within reasonable limits of time and quantity, for the repair of military vessels which have been put in a state of non-combat or for the construction of vessels; and *in accordance with the principles of non-alignment* the said shipyards will be denied to the military vessels of *the two superpowers* [emphasis added].

As I have written elsewhere,[66] it is arguable that the second clause of paragraph (e), in particular, may be regarded as redundant in light of the ending of the Cold War (at least the first one, for we may be on the threshold of the second). It has also been argued that the entire provision centres around a policy of 'non-alignment' (as between 'the superpowers' – which may now be *more* than the 'old' two, at least in prospect), rather than strict neutrality, and that non-alignment is not a fixed concept in international law but must bear reference also to the climate of the time when the provision was adopted. This type of reasoning calls much into question, also in light of the evolution of the role and competence of the Union in the sphere of Foreign and Security Policy. One recalls the duty of loyalty under the Treaty but also the objectives of the Union especially post-Lisbon. Indeed, the provision speaks of an 'active' neutrality, one that is intended to actually permit Malta to be pro-active in the pursuit of peace, security and social progress among all nations. This does not indicate a passive stance. While participation in a military alliance is excluded (Malta was told in the course of membership negotiations that the EU was not such and was not to become such), the ban on the use of Maltese facilities by foreign military forces is open to a number of exceptions, one of which is the pursuance of measures or actions decided by the Security Council of the United Nations. This all shows that the matter is not clear cut, and that some think that an attempt at 'clarification' of Malta's international active neutrality status should be made in any constitutional review exercise that may be undertaken if this status is to be generally understandable within the context of our membership of the EU and within the new global context. Therefore, the neutrality clause is one clause that has been identified as being in need of review/revision in light of developments relating to Malta's EU role and to changes on the international scene.

3.1.4 The declared constitutional commitment of Malta to the social progress of all peoples will be commented upon in response to question 3.5. Suffice to point out

[66] See Xuereb 2001, 2006. See also EC Directorate, Ministry of Foreign Affairs, Department of Information Report, 1990, pp. 153–154.

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here that Art. 1(3) commits Malta to actively pursue some global desiderata. Malta's neutrality was seen as a means to that end. The commitment is to actively use our status as a non-aligned independent state with a wide range of commercial, cultural and philosophical ties as well as proximity to the two main sides of the Mediterranean putting us on the frontier with the Arab world and Africa, and placing us at the centre of all Mediterranean states, and to do so for peace, prosperity and justice. Malta's foreign policy has rested on these pillars ever since. It might be termed Malta's international vocation, as enshrined in its Constitution. Any revision of the Constitution can be expected to build upon the perceived international vocation of Malta going forward into the future. I therefore certainly do not exclude the possibility of developing this clause into one mandating a more general pro-active and active approach to upholding democracy, the rule of law and human rights in the context of global governance, while placing this also in the context of EU membership.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 As emerges clearly from Art. 65 of the Constitution, and Art. 3 of the Ratification of Treaties Act of 1983 as amended, Malta is in principle a dualist state. Although there has been no real debate on this in Malta, Malta is aware of the fact that some other Member States adopt a monist stance – at least when it comes to membership of the EU, but often as a general stance. There have been no arguments in favour of abandoning the dualist stance, although again Malta is aware that the European Union Act 2003 has the effect of making 'directly applicable' EU law directly applicable in Malta, and that this is not a strict dualist position, but then it is recognised that EU law is not ordinary international law. In short, in my view constitutional constructs and doctrines apply as modified and transformed in the EU membership context. We need to be constantly aware of the *sui generis* nature of the EU and its legal order. It is this new order that can then help explain, inform and give language to the new constitutionalism in Malta itself and at the same time to the regional and world orders now evolving.

3.3 Democratic Control

3.3.1 There have been occasional calls for a greater role *ex ante* in foreign affairs for the Maltese Parliament. For example, it was a cause of some chagrin when a commitment was given in relation to Partnership for Peace involvement (re-activation) without any reference, far less discussion, in the House, leading to

the resignation of the head of the Maltese representation in Brussels.[67] Another example is the granting of permission for warships to use Maltese shipyards.

In terms of thinking about Parliament's involvement at the stage of implementing international commitments, a useful starting point is the case of the EU, with two key examples being the need to transpose directives and the *ex ante* scrutiny or *ex post* challenge of Commission proposals/adopted legislation for compliance with the principle of subsidiarity. A key development, in the author's view, would be the *ex ante* scrutiny of a European Commission proposal or any Union act for compliance with human rights in accordance with the national constitution. Issues have arisen in Malta in relation to the principle of proportionality, where Malta took the position that a proposal went against the principle but had to accept the Commission's stance that the procedure of *ex ante* control does not extend to this principle, despite the wording of the title of Protocol No 2. The Latvian example on the IMF conditionality given in the questionnaire shows that other issues can arise, in the broader context of global governance, in relation to other general principles of law, which should be recognised as having constitutional status.

3.3.2 The Constitution neither expressly permits nor prohibits the holding of referendums on international organisations or international treaties. This does not mean that a referendum may not be held, but simply that it has no constitutionally binding effect, so that any result is binding only in political terms. Such was the referendum of 2003 on the question whether Malta should join the European Union.

3.4 Judicial Review

3.4.1 There is no mechanism in Maltese law for the review of Treaties and measures adopted under international law, separate from the challenge of the Maltese implementing decisions or laws under the Constitution. In this connection, the institution of a mechanism at EU level for the challenge of a prospective EU measure for breach of some general principle of law would allay the need for an individual Member State to raise the issue of validity of EU law under constitutional law *ex post*, for it would raise the issue as a 'constitutional' issue under EU law *of the validity of the measure of another international organisation* directly within the EU. There should, however, be some mechanism which would permit a Member State to participate in the Union review process. Similar thinking ought to take place in the context of global governance.

[67] Vella, M. (2012, April 20) Update 2 Government reacts to Labour motion for Richard Cachia Caruana's resignation. Malta Today. http://www.maltatoday.com.mt/news/national/17598/labour-motion-calls-for-resignation-of-richard-cachia-caruana-20120420#.

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3.5 The Social Welfare Dimension of the Constitution

3.5.1 The debate as to 'social Europe' at the time of the referendums on the Treaty establishing a Constitution for Europe (the so-called and ill-fated 'Constitutional Treaty') was closely followed in Malta. The social dimension of the Treaties is an important one in Malta's eyes. The accountability of the institutions, and of all decision-makers, including in the economic sphere, and of the new 'European' regulators, is a matter of real interest, which many in Malta trust will continue to be addressed at all levels and especially throughout the sphere of economic and financial governance. It would be well for the principles and liabilities to be expressly spelt out and for appropriate investigative mechanisms to be put in place, thus mirroring political accountability under the national constitutions. There is every reason to extend this, possibly by EU initiative, to non-EU, global financial and economic institutions.

3.5.2 Malta has not been subject to a bailout and austerity programme. It has watched with concern as others have defaulted or been rescued, and it has been with a degree of chagrin that Malta has had to accept the imposition of central solutions against the wishes and to the sacrifice of whole populations while proper accountability and punishment appear to have been lacking both in the public and in the private spheres in those Member States in which the worst defaults were committed. Nor have Member States been able to agree easily on the solutions, demonstrating that solidarity could be better organised and underpinned by the European constitutional level.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 Regarding the proposition about the erosion of constitutional rights, the rule of law, judicial review, democratic control, or accountability in the face of global threats or pressures, Malta has not remained entirely untouched but has, in general, not had to adopt draconian anti-terrorist legislation and so on of its own beyond what has been adopted at European Union or other wider international level.

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The Netherlands: The Pragmatics of a Flexible, Europeanised Constitution

Leonard Besselink and Monica Claes

Abstract The Constitution of the Netherlands, which dates back to 1814–15, is an evolutionary constitution, based on incremental historical developments. A notable feature is that the Constitution bans constitutional review of Acts of Parliament and of treaties. A bill of rights was introduced in 1983; however, it omits a number of rights included in the ECHR and the EU Charter. Constitutional rights are not justiciable, in the sense that they cannot be invoked against primary legislation. The ECHR and the EU Charter are often regarded as providing stronger protection. Due to historical reasons, the notions of sovereignty and the people as the ultimate source of public authority have been absent in the Dutch legal and public discourse. The Dutch Constitution does not have the centrality to public debate that constitutions have in other Western countries. A salient feature of the Constitution is that although it does not mention the EU or the ECHR, it opens the legal order for both nearly unconditionally, granting them primacy over any conflicting national law. Contestation and conflict sensitive and fundamental constitutional issues are rare in the courtroom or in legal terms. Court cases have raised the question whether national institutions can derive powers from an EU measure directly, e.g. when

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imposing the obligation to repay EU subsidies, and whether an international technical standard that is available only after payment can be legally binding on individuals.

Keywords The Dutch Constitution · Amendment of the Constitution regarding EU and international law/Europeanisation of the Constitution · The Supreme Court of the Netherlands · Evolutionary constitutionalism · Ban on constitutional review of Acts of Parliament and of treaties · European Arrest Warrant and extraditions Data Retention Directive · Fundamental rights · ECHR · EU Charter Absence of discourse on sovereignty and people as the source of public authority Repayment of subsidies · Binding nature of unpublished international technical standards

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

In this report we explain some of the apparent paradoxes pertaining to the constitutional system of the Netherlands. For a proper understanding of the constitutional situation in the Netherlands, one should be acutely aware of the distinction between the formal constitution, of which the *Grondwet* (literally 'Basic Law') is the central part, and the substantive constitutional rules contained in the other sources that are generally considered to be part of Netherlands' constitutional law, which include international and European treaties providing for fundamental rules concerning the exercise of public authority, in particular human rights treaties, and certain general principles of constitutional law in a democratic state under the rule of law. The *Grondwet* does not mention Europe, neither the European Union nor the European Convention on Human Rights, although – as we explain in Sect. 1.2.1 – it opens nearly unconditionally the legal order for both, granting them primacy over any conflicting national law. Hence, in the absence of any mention of Europe, the constitutional order turns out to be strongly Europeanised. Another paradox is that the *Grondwet* is entrenched and its amendment cumbersome (see Sect. 1.2.2), but the primacy of European law and directly effective international law, combined with a constitutional practice and political culture in which the formal constitution does not occupy an important place (as we explain in Sects. 1.1.1–1.1.2 and 1.3), provide it with great flexibility. We sketch in Sect. 2 the constitutional pragmatics with regard to specific constitutionally sensitive topics, such as fundamental rights protection and the constitutional principles concerning the rule of law with regard to the European Arrest Warrant and Data Protection. In Sect. 3, we describe briefly how this opens the legal order to the various forms of global governance.

1.1.1–1.1.2 The Constitution of the Netherlands is of the historical type: it is based on more or less incremental developments.[1] The current formal constitution, the *Grondwet*,[2] is generally considered to date back to the one issued in 1814, which constituted a constitutional monarchy in the Netherlands, and to 1815, when this was amended to implement the results of the Vienna Congress.[3] The 1848 revision, adopted against the backdrop of revolutions in Europe, introduced a system of parliamentary democracy, and defines the constitutional system of the Netherlands to date. The year 1848 is also when Art. 115 was adopted, which stated that 'statutes are inviolable'. In 1983 the text of the Constitution was modernised and simplified, and a bill of rights was introduced in the opening chapter of the Constitution. Article 115 was reformulated and renumbered, so that Art. 120 now provides that 'Courts shall not review the constitutionality (*grondwettigheid*) of Acts of Parliament and treaties', where *grondwettigheid* refers to the compatibility of Acts of Parliament and treaties with the provisions of the *Grondwet*.

The Dutch Constitution can be characterised as an 'open constitution': it does not set up a closed system. It is generally agreed that the broader constitution is made up of several components, of which the written document entitled 'Constitution for the Kingdom of the Netherlands' is only one, be it the central, part. In the Dutch language, a distinction can be made between the document containing the formal Constitution ('*Grondwet*') and the broader category of fundamental rules and principles governing the relationships between the state organs, between the domestic and the international legal orders and between the state and the individuals ('*constitutie*'). This resembles the distinction between *Grundgesetz* and *Verfassung* in German constitutional law. In addition to the *Grondwet*, the *constitutie* also includes unwritten principles, constitutional conventions, some international treaties, the Charter of the Kingdom,[4] and certain organic laws and decrees.[5]

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[1] Besselink 2014b, pp. 1189 et seq.

[2] For provisions prior to 2004, the translation used is the version by Besselink 2004b; later provisions are our own, given certain shortcomings of the English version published by the Government of the Netherlands at https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

[3] The Republic of the United Provinces (1581–1795) did not have a single written constitution in the modern sense of the word, although there were several constitutional documents and charters such as The Union of Utrecht (1579) and the Act of Abjuration (1581). In 1798, a constitutional document, the *Staatsregeling voor het Bataafse Volk*, established the Batavian Republic, but it was short-lived and abolished already in 1801.

[4] The Charter operates as the basic law of the Kingdom of the Netherlands, which includes the country in Europe (the Netherlands to which the Caribbean islands of Bonaire, St. Eustatius and Saba were added in 2010), as well as (currently) Aruba, Curaçao and Sint Maarten. It ranks higher than the Constitution.

[5] These are normal Acts of Parliament (and some royal decrees) and do not have a higher rank or stronger force of law. They are considered 'organic' because they concern the organisation of the state and provide an elaboration of constitutional provisions from the *Grondwet* or otherwise unregulated constitutional matters. Examples are the Act on Municipalities and the Act on the

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The Constitution (*Grondwet*) is unostentatious, simple, sober and short. It contains no grand concepts such as sovereignty,[6] no preamble, no *invocatio dei*, no *Staatszielen*. It does not mention the symbols of the state, the flag, the anthem or the motto, or any other elements that would be considered *Verfassungskitsch*. The main reason for this is that the Netherlands Constitution is not revolutionary, that is to say adopted to make a clear break with the past, nor does it sanction the sovereignty of the state or establish a new regime. It is rather an evolutionary, 'long-term constitution', based on more or less incremental historical developments, aimed at codifying a state of affairs, rather than modifying the political system for the future.[7] In 2006, the National Convention promoted the idea of a preamble to the Constitution, in order to give expression to some evident fundamental values of Dutch society and strengthen the Dutch national identity.[8] The 2009–2010 Constitutional Committee, however, did not see the added legal and political value of such a preamble, and pointed to the fact that it was unlikely that consensus would be found on its text, for instance on whether it should contain an *invocatio dei*. This also has to do with the fact that the Netherlands sees itself as a country of 'minorities' that keep one another in check. This consociationalism implies that Dutch politics and governance are characterised by a common striving for broad consensus on important issues, within both the political community and society as a whole. The Constitution is only to a limited extent considered to express the 'national identity' of the state, the political community or the people of the Netherlands. The values it protects are, on the whole, values that the Netherlands shares with other nations.

The 2009–2010 Constitutional Committee did recommend the adoption of a general clause that would express the most fundamental features of the Constitution – which have never been written in the constitutional text before – namely that the Netherlands is a democratic state under the rule of law, that the government respects and protects human dignity, fundamental rights and fundamental principles, and that public authority can be exercised only pursuant to law.

This part of the advice of the Committee was picked up by the Upper House, and a bill adding a general preliminary clause to the text of the Constitution has recently been introduced in Parliament. Yet, the text proposed reads very differently, stating

Provinces, and the royal decree providing for the rules of procedure of the Council of Ministers. The rules of procedure for the States-General (the Netherlands Parliament) are autonomous decisions of each of the two Houses of Parliament that provide detailed rules on the parliamentary system and its practice.

[6] On (absence of) the concept of sovereignty in the Dutch constitutional discourse on European integration, see De Witte 2004.

[7] Besselink 2004a, b, p. 18.

[8] Nationale Conventie, *Hart voor de publieke zaak. Aanbevelingen van de Nationale Conventie voor de 21e eeuw* (Caring for the pubic cause: recommendations of the National Convention for the 21st century), September 2006, pp. 42–43.

merely that '[t]he Constitution guarantees democracy, the rule of law and fundamental rights'.[9]

In the Dutch constitutional culture, the Constitution and constitutional law play only a limited role in politics and in the public debate.[10] In this respect, the Constitution is not 'a living document': it is considered first and foremost as a document for the government and public authorities, not for society and the citizens. But even in the legal scene, the Constitution does not play the lead role: issues of constitutionality of legislation are often downplayed as they are not justiciable in any case, while compatibility with fundamental principles is often phrased in terms of compatibility with human rights treaties, such as the European Convention on Human Rights (ECHR). The legal and political authority of the Constitution is thus overshadowed by European and international (human rights) law (mainly ECHR and EU law), which operates as a substitute constitution. Even the Council of State, the Government's prime advisor on the legality of legislation, does not place the Constitution and constitutional law at the centre of attention, but rather looks to the ECHR and other international treaties to draw the legal lines that should not be crossed. The limits of governmental and legislative action are found in international treaties, which were only meant as a European minimum level below which no state should go, rather than within the country's own constitution. Paradoxically, this silence with regard to the Constitution and its underlying values is often seen as desirable and good: the Constitution reflects the constitutional settlements of the past,[11] political compromises that should not be too easily challenged. Silence on constitutional matters is seen as a sign of constitutional peace and harmony.[12] This is reinforced by an uncertain attitude relating to constitutional interpretation and contestation: the Constitution says what it says, no more and no less, and constitutional change should be brought about by constitutional amendment, often piecemeal, 'to keep the Constitution up to date'. Neither the Legislature, nor the Council of State, the Government nor the courts see it as their role to develop a 'living Constitution', to take the lead in adapting it to the changes of time through interpretation, or indeed to present themselves as the 'ultimate interpreter' of the

[9] '*De Grondwet waarborgt de democratie, de rechtsstaat en de grondrechten*'. This Bill was introduced in the Lower House on 9 July 2016, TK [Parliamentary Documents] 34 516, Nos. 1–3.

[10] See e.g. Oomen 2009, pp. 55–79; Oomen and Lelieveldt 2008, pp. 577–578.

[11] In his speech at the occasion of the presentation of the report of the Royal Committee on the Constitution, Donner, the current vice president of the Council of State, then Minister for Justice, labelled the Constitution as '*gestold verleden*', 'history solidified', and expressed the view that the Constitution mainly settles political conflicts of the past. It offers a legal framework, rather than an inspiration for the government or even less so for society. See https://www.rijksoverheid.nl/documenten/toespraken/2010/11/11/toespraak-minister-donner-bij-in-ontvangst-nemen-advies-staatscommissie-grondwet.

[12] Tijn Kortmann, a leading scholar in constitutional law, considered the lack of discussion on the Constitution a sign of its strength: 'a constitution that is not "living" is not necessarily dead as a doornail', but may be well-accepted in the hearts and minds of politicians, civil servants and the general public. On the latter point: he did not consider it a loss that the Constitution was not known among the general public, as it was generally of very little avail to them. See Kortman 2008, p. 15.

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Constitution. The absence of a constitutional court, and the political and pragmatic nature of constitutional review by the Advisory Council of State, stand in the way of developing a thorough and sophisticated discourse, and of developing a *Dogmatik* comparable to for instance the German, Italian or Spanish debates, which are heavily affected by the close relationship between the academic community and the constitutional court.[13]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The European Union and Dutch membership do not feature in the text of the Constitution. Nevertheless, the Dutch Constitution has been revised once in the light of European integration. In 1953, in light of the then recently established European Coal and Steel Community (ECSC) and the planned European Defence Community (EDC), and with a view to further European integration, the chapter on foreign relations was adapted. It opens with a provision proclaiming that '[t]he government shall promote the development of the international legal order' (Art. 90). In order to make it clear beyond doubt that it is constitutional for powers to be transferred, Art. 67 (now Art. 92) declares that legislative, executive and judicial powers can be transferred to international institutions pursuant to a treaty. In addition, and again with a view to ensuring the smooth participation of the Netherlands in the international legal order generally and European integration specifically, the famous Arts. 65 and 66 were adopted. These provisions, now numbered Arts. 93 and 94 of the Constitution, provide for the direct effect of treaty provisions that are 'binding on anyone' and have duly been published, and award them primacy over conflicting provisions of national law.

The practical effect of these early amendments to date is that there is a high level of fit between European law and the Dutch constitutional environment. While Dutch judges may for a while have struggled with the concept of direct effect and were reluctant – given the traditional inviolability of primary legislation – to actually set aside national law in favour of international treaties and European law, adoption of the case law of the European Court of Justice (ECJ) on direct effect and primacy of EU law was rather smooth in the Netherlands.

1.2.2 In terms of the amendment procedure, the Constitution is rigid. The procedure for constitutional amendment is cumbersome and lengthy. It requires the approval by two consecutive parliaments with elections in between, and approval by a two-thirds majority in both Houses the second time. Twenty-three amendments have been passed between 1814 and 2008, that of 2008 being the last one to date, but several have been rather marginal.

[13] For a striking analysis of the situation in Germany, see e.g. Möllers 2011, pp. 283–408.

1.2.3–1.2.4 The consecutive amendments of the European Treaties have never given rise to constitutional amendment. When the Maastricht Treaty was being adopted, there was some debate among constitutional lawyers on whether approval of that Treaty required the procedure in Art. 91(3) of the Constitution. If a transfer of powers conflicts with the Constitution or would lead to such conflicts, approval of such transfer requires a two-thirds majority in both Houses of Parliament (Art. 91 (3) of the Constitution).[14] Thus, the fact that a Treaty tabled for approval conflicts with the Constitution does not mean that it cannot be approved and ratified: it merely means that approval requires a two-thirds majority in both Houses. This comes close to what is required to amend the Constitution, but is less demanding, as it does not require approval by two consecutive parliaments and elections in between. Moreover, the approval with a two-thirds majority does not formally amount to an amendment of the Constitution. Since Treaties take precedence over the Constitution in any case, such amendment would not be necessary.

The procedure has never been followed for approval of the EU Treaties, which were thus never considered to conflict with the Constitution.[15] The provision has been interpreted as requiring a special majority only in cases of direct conflict between a provision of a Treaty and a specific provision of the Constitution. In other words, a tension with the spirit of the Constitution or principles and values underlying it is not considered sufficient to require special treatment. There was some discussion when the Treaty of Maastricht was tabled for approval, but the Government insisted that there was no conflict between the Treaty and the Constitution, and proceeded to ask Parliament for its approval in accordance with the ordinary procedure, i.e. by way of an ordinary Act of Parliament.[16] The Treaty Establishing the European Stability Mechanism (ESM Treaty) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact) have also been approved as normal treaties by an ordinary Act of Parliament, and with strong support in Parliament. The Fiscal Compact did not give

[14] The decision as to whether the special procedure must be followed is made by a simple majority in both Houses.

[15] The only European treaty that was approved with a two-thirds majority in application of (what is now) Sect. 91, para. 3 of the Constitution, was the unsuccessful Treaty establishing the European Defence Community in 1954. Outside the context of the EU, the provision has been explicitly applied only twice: concerning the Act approving the Agreement Concerning West New Guinea (Stb. 1962, 363), and concerning the Act approving the Statute of the International Criminal Court (Stb. 2001, 343). For a critical examination of the practice and related procedural conundrums, see Besselink 2003, pp. 471–480 and Besselink 2002–2003.

[16] Heringa 1992, pp. 749–866. Heringa pointed to the provisions on EMU, which he considered to be at odds with Art. 106 of the Constitution which provided (and still does): 'The monetary system shall be regulated by Act of Parliament' and the provisions on visa policy and electoral rights for EU citizens. In all cases, the Constitution endows a task to the Dutch legislature. Most scholars did not agree with Heringa's views, and neither did the Government. More recently, questions have been raised about whether the extension of EU economic governance can be reconciled with Art. 105 of the Constitution, which allocates budgetary power to the Government and Parliament acting jointly.

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rise to constitutional amendment, notwithstanding its requirement in Art. 3(2) to introduce a balanced budget rule through 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. Because the budget is adopted by an Act of Parliament of the same rank as any other Act of Parliament, this could, strictly speaking, only be achieved by incorporating such a rule in the *Grondwet*. It was, however, implemented in primary legislation, the *Wet HOF* (the Sustainable Public Finances Act – '*Wet Houdbare Overheidsfinanciën*').

The idea has been floated to make further steps in the process of European integration dependent on a stricter procedure and enhanced democratic legitimacy. One such proposal aims at amending the Constitution to require a two-thirds majority for the approval of all EU Treaties (amending treaties and accession treaties) as well as decisions to proceed to simplified revision.[17] It has been approved in a first reading by the Lower House and is pending in the Upper House at the time of writing (June 2016).

More recently, in the wake of David Cameron's referendum promise to the British people, Burgerforum EU, a private initiative, asked for a referendum in cases of further transfers of powers to the EU. The request was rejected in the Lower House, but a motion was passed asking a report of the Council of State on whether there is a competence creep and whether additional democratic guarantees could be introduced. The Council of State issued its report in the summer of 2014, and a parliamentary debate was held in the summer of 2015, when the Foreign Minister firmly rejected the idea of 'creeping competences'.

The entire Constitution continues to apply when the Government or other state organs act in the context of the European Union.[18] These bodies cannot, for instance, infringe on their constitutional obligations when participating in the Council of Ministers or other organs in which they represent the state. The relationship between the Dutch Government and Parliament is governed by the usual rules, and the conventional principles of ministerial responsibility and the duty to inform Parliament and so forth continue to apply. Government-Parliament relations are the same in the context of EU decision-making as they are in purely national matters.

Provisions of the Constitution that seem to be at least incomplete in the context of membership are simply read in the light of EU law and are further specified in

[17] *Voorstel van rijkswet van de leden Herben en Van der Staaij houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot invoering van het vereiste van een meerderheid van twee derden van het aantal uitgebrachte stemmen in de Staten-Generaal voor de goedkeuring van verdragen betreffende de Europese Unie* (Bill of the members Herben and Van der Staaij with a view to declare that there is reason to consider the amendment of the Constitution, to the effect that a requirement of a two-thirds majority for the approval of treaties concerning the European Union), 30 874 (R 1818). The private members' bill was introduced on 22 November 2006 and adopted in the Lower House on 22 September 2015.

[18] See the report of the Royal Committee on the Constitution, *Rapport Staatscommissie Grondwet 2010*, pp. 105–106.

ordinary law. Thus, for instance, Art. 3 of the Constitution stating that '[a]ll Dutch nationals shall be equally eligible for appointment to public service' is read as applying also, where relevant and with the exceptions allowed under EU law, to EU citizens. Article 4 which provides that '[e]very Dutch national shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament' is not considered to infringe EU law, as it does not say that the same does not apply, in particular cases, to EU citizens.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1–1.3.2 The Constitution has never been considered an obstacle to accession to the European Communities, the amendment of the European Treaties or to the domestic effect of European law. The concept of 'sovereignty', whether external or internal, popular or national, does not play a key role in the constitutional discourse. It is absent from the text of the Constitution. The idea that all public authority derives from the people or the nation as the ultimate holder of those powers has been virtually absent from the Dutch constitutional discourse: one tries to do without, both in theory and in constitutional practice. In many ways the very recent surge of 'sovereignty' in certain political circles and to some extent in academia is relatively novel.

The explanation for the overall lack of importance of sovereignty is historical. It has a long tradition that goes back at least as far as the Republic of the United Provinces, the political confederacy that was the result of the revolt against the ruling Spanish overlord, Philip II, and lasted from 1579 to 1795. Within this confederal state, sovereignty was not located at the federal level, but in the provinces that composed it. This state of affairs was not intentional in as much as initially a search was undertaken to find a replacement for the abjured sovereign, but no suitable foreign prince who would be sufficiently pliable to the wishes of the provincial and local (particularly the cities of Amsterdam and Rotterdam) authorities could be found. Consequently, the republic ended up doing without a sovereign at national level and instead worked on the basis of consensus among the allegedly sovereign provinces. Seeking consensus instead of asserting sovereignty became part of the political DNA of the Netherlands' political culture. And to this day, we are faced with a state and a Constitution that leave the notion of sovereignty, if at all existent, at most implicit.

1.3.3 The issue of limits to participation in European integration is a political question rather than a legal constitutional one. Sovereignty being largely absent from the legal doctrinal debate, both in the context of European integration and more generally, the question of ultimate authority and the source of all state power is left undecided.

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This has made for a very smooth adaptation to EU membership, since no core principles, no inalienable principles or values require protection against the majority of the day or against the outside world. The *controlimiti* developed in other Member States are not developed in Netherlands constitutional doctrine. There is no *Solange* case law, if only because constitutional rights are less enforceable than EU law and fundamental rights. EU law was thus never considered a threat to national constitutional rights. No Dutch court has ever claimed jurisdiction to review the validity or applicability of EU law, or developed a theory of *ultra vires* acts; no court has ever formulated a view on 'national identity' or 'constitutional identity review'.

This all sits well with Dutch consociationalism and corporatism and the socially embedded patterns of democracy that have prevailed in the Netherlands, which to a large extent result from the perception of being a country of permanent minorities. Indeed, in terms of religious denomination the Netherlands was a country of permanent religious minorities for centuries, guaranteed by freedom of (religious) conscience, although it is also true that overall there was a dominant role for the Dutch Reformed Church, with periods of greater and lesser toleration of other Christian and of non-Christian religions.[19] These realities forced a culture of consociationalism, toleration and pragmatic consensualism, which may now be under pressure after secularisation has created a new situation of a large majority of public agnosticism, which is more and more frequently framed – also by liberals – as standing in opposition against a threatening minority of migrant aliens of Muslim faith.[20]

Consociationalism and socially deeply-embedded democracy contributed to a constitutional culture where sovereignty claims were avoided, and that proved fertile soil for the reception of European law. Also, the theory of constitutional pluralism sits well with Dutch constitutional theory: European constitutional pluralism could be only a new, transnational guise of a broader pluralism, which was perhaps most elaborately theorised politically and philosophically as '*soevereiniteit in eigen kring*', sovereignty within one's own sphere. This idea was developed in Calvinist circles, initially by Kuyper in the late 19th century[21] and in a more profound philosophical sense by Herman Dooyeweerd[22] as a counterpart of Catholic doctrines of 'subsidiarity' and the social-democratic theory of 'functional

[19] Freedom of religion was guaranteed as freedom of conscience in Art. XIII of the Union of Utrecht of 1579, which became the constitutional charter of the Republic. This did not encompass freedom to profess or manifest religion publicly, which was subject to restrictions of public order. Thus, Jews, Catholics, Lutherans and dissident protestants such as the Anabaptists were tolerated but could not openly profess their faith in all the provinces and cities. For Catholics there was a constitutional prohibition between 1848 and 1987 to hold religious processions in places where they had not customarily been held in 1848 (Art. 167, *Grondwet* 1848).

[20] Issues of racism that were previously reigned in come out in the open; in a recent opinion poll nearly two-thirds of respondents found that ethnic profiling by the police is acceptable in the fight against crime, and less than one-third consider it a form of racism; see https://www.noties.nl/v/get.php?a=peil.nl&s=weekpoll&f=2016-06-05b.pdf.

[21] Kuyper 1880.

[22] Dooyeweerd 1984.

decentralisation' (note that, by the second half of the 19th century, these social groups of the various religious denominations, 'neutrals' and socialists became strongly organised in what were later called 'pillars', each having their own churches and meeting halls, sports clubs, cultural and literary clubs, insurance companies, newspapers, radio and television broadcasting, trade unions, political parties and political doctrines and theories).

In the present situation in which important social determinants of the old constitutional culture have eroded, however, in political circles, in academia and in government circles the question has been raised whether the Dutch legal order should continue to be so open towards the European Union, and whether the Constitution could not or should not provide a bulwark against the incoming tide of European law. A symptom of this was that the Netherlands was one of the Member States to reject and thereby cause the defeat of the Constitutional Treaty, and is no longer all that Europhile.

The Constitution does not specify conditions for the conferral of powers to international institutions, nor does it indicate explicit limits to such conferral. Neither does it contain an immutable core that cannot be transferred. The Dutch Constitution remains agnostic towards fundamental questions of European integration that have arisen elsewhere. In line with the historic absence of a legal sovereignty debate, constitutional doctrine is rather pragmatic. Thus it would seem that at the end of the day, the Netherlands can commit 'constitutional harakiri' or at least, there are no legal constitutional obstacles prohibiting the transfer of powers that elsewhere are labelled as essential state functions or the core of the constitution.

Over time, some limits have been suggested, but these have been few and far between. Until 1983 the provision that allows for the approval of treaties that diverge from the Constitution by qualified majority in Parliament, now Art. 91(3) *Grondwet*, allowed such divergence 'if the development of the international legal order so requires'. These quoted words – which suggest a condition and possibly a limit to transfer of powers – were dropped in 1983 as 'superfluous'.[23] The provision was considered to be essentially procedural in nature, not one to determine when a treaty diverges from the Constitution. Although it was conceded that the language did provide a touchstone, preference was given to no such clause over 'vague, shifting and incomplete criteria', all the more since the need to diverge by treaty from the Constitution could possibly be dependent on considerations that are quite different from the 'development of the international legal order'.[24]

When in 1953 the possibility was created to diverge by treaty from the Constitution, the Government expressed the view that such divergence only exists when there is a divergence from a concrete provision,[25] but it also conceded in response to two members of the Lower House, that the Kingdom could not become a party to a treaty if that would amount to giving up the 'foundations or essentials of

[23] Parliamentary documents, *Tweede Kamer* 1977–1978, 15049 (R 1100), No. 3, p. 5.

[24] Parliamentary documents, *Tweede Kamer* 1979–1980, 15049 (R 1100), No. 10, pp. 7–8.

[25] *Handelingen Eerste Kamer* [Proceedings of the Upper House], 1952–1953, pp. 480 and 484.

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the national legal order, for instance the monarchical-parliamentary system, even to the extent that these are not incorporated in the Constitution [*Grondwet*]' for the sake of the development of the international legal order.[26] These two, seemingly incompatible positions can be reconciled by distinguishing on the one hand the divergence from specific and concrete provisions as the legal constitutional standard for determining the application of the requirement of a qualified majority from, on the other hand, the existence of treaties to which the Kingdom could not become a party even with the qualified majority provided for in Art. 91(3) of the Constitution by the standards of political propriety and acceptability.

Much later, in November 1999, the Council of State (*Raad van State*) gave an advisory opinion on the implementation acts concerning foreign jurisdictions in the Netherlands (the Scottish Lockerbie court), in which it suggested that the Kingdom could not become a party, not even under the procedure in Art. 91(3) of the Constitution, to treaties that conflict with 'essential constitutional guarantees, especially the fundamental rights of chapter 1 of the Constitution', if 'the conflict with fundamental rights is so fundamental as to make ratification of such treaties unacceptable'; also, it found that the EU Treaties and the European Convention on Human Rights could be an obstacle to ratification.[27] Although the Netherlands Council of State has begun to think of itself as a kind of constitutional council, these points can be considered a political assessment in light of the matter at hand, rather than an authoritative constitutional interpretation, guiding the constitutionality of transfers of sovereign powers. This is evident from the predominant assertions that always accompany these same interventions, which insist that divergences between a treaty and the Constitution only exist when a treaty conflicts with concrete provisions of the Constitution, not when sovereignty transfers as such are concerned. This was evident in the Council's advisory opinion on cruise missiles of 23 December 1983, in which it made clear that a mere limitation, infringement or transfer of sovereignty is as such not in conflict with the Constitution,[28] that the question how far a transfer could go was not a matter of constitutional law but a political assessment,[29] and that a discrepancy with one or more specific provisions of the Constitution is required for there to be a conflict with the Constitution.[30]

All this should not be taken to mean that there is no debate on the limits of European integration: 'sovereignty' is now hotly debated, and is key to the Eurosceptic discourse. Both the ECHR and the EU are described as threats to Dutch sovereignty. But the concept is not used in the legal debate, and as such, the consequences of European integration for Dutch sovereignty (however conceived) are under-theorised. It could even be said that constitutional law and constitutional

[26] Ibid., p. 480, left column.

[27] Advisory Opinion, *Raad van State*, 19 November 1999, Parliamentary documents, *Tweede Kamer* 1999–2000, 26 800 VI A, p. 6.

[28] Parliamentary documents, *Tweede Kamer* 1983–1984, 17 980, A, p. 2, middle column.

[29] Ibid., p. 4, left column.

[30] Ibid., p. 3, left column.

theory have not been able to offer a framework to conceptualise the participation of the Netherlands in European integration.

1.3.4 The acceptance of primacy The primacy of EU law is not phrased in terms of sovereignty or the conferral of powers to the EU. The majority of constitutional lawyers, joined by the criminal chamber of the *Hoge Raad*, do not even consider the primacy of EU as deriving from the Constitution but from EU law autonomously. The constitutional provisions, which are perfectly apt to sanction the doctrines of direct effect and primacy as they have been developed by the ECJ, are not seen to regulate the domestic effect of EU law. Predominantly, scholars and courts distinguish between the direct effect and primacy of international treaties (deriving from the Constitution) and the direct effect and primacy of EU law (deriving from the very nature of EU law as set out by the Court of Justice in *Van Gend en Loos*[31] and *Costa v. ENEL*[32]).

Fundamental issues of European integration, or major steps in the process, which have given rise to constitutional case law elsewhere, such as the Maastricht Treaty, the Lisbon Treaty or the European Arrest Warrant (EAW), have never been decided by the courts. These are considered political issues which are not for the courts to decide.

1.4 Democratic Control

1.4.1 Ever since the adoption of the EEC Treaty in 1957, democracy – and more particularly parliamentary representation of citizens – has been a matter of great concern within the Dutch Parliament, the States General (*Staten-Generaal*). What was later referred to as the 'democratic deficit' was identified in the parliamentary debates already at the time the EEC Treaty was approved in 1957: the limitation of democratic representation at national level was not accompanied by parliamentary representation at the European level.[33] It is still a key concern in parliamentary debates with every amendment of the founding treaties. This also implies that right from the beginning, and at least until the moment a strong parliament had been established at European level, the role of the national parliament was viewed as part of an overall European political system.

One of the particularities of the debate in the Netherlands is the importance attributed to the European Parliament: its lack of formal powers of co-decision has been a major justification for a role for the national parliament, and its possession of

[31] C-26/62 *Van Gend en Loos v. Administratie der Belastingen* [1963] ECR 00003.

[32] C-6/64 *Costa v. E.N.E.L.* [1964] ECR 01141.

[33] At the time, this may have been inspired by similar concerns expressed in the *Bundestag*. The proposals for a resolution of the *Bundestag* were included in the parliamentary documents of the *States General*, see Bijlagen Handelingen TK [Parliamentary Documents Lower House] 1956–1957, 4725, No. 14.

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co-decisive powers as a justification to tone down that role. Nevertheless, the Dutch Parliament has always been active in scrutinising European affairs, at least in certain policy sectors. In the Act on Approval of the EEC and Euratom Treaties of 1957, it was stipulated that the Government was to send Parliament an annual overview of the development of European integration. This is the legal basis for an annual debate on European integration, since 1999, called 'the State of the Union debate' in which Dutch Members of the European Parliament (MEPs) participate.[34] Possibly the very first national parliamentary Resolution on guaranteeing the role of a national parliament was adopted by the Netherlands Lower House (*Tweede Kamer*) on 11 January 1967:

> The House, … judges that the Netherlands Government shall not agree to definitive decisions in the Council on Community measures concerning the size and distribution of the tax burden unless it has previously consulted the Netherlands Parliament.[35]

A similar veto right was introduced in the acts approving the Schengen Convention, the Maastricht Treaty, and repeated in the acts approving the Nice and Amsterdam treaties, as regards binding EU decisions on justice and home affairs. These were largely abolished on the approval of the Lisbon Treaty with the justification that those decisions were at that time within the powers of the European Parliament as a co-legislator. This shows the old concern for democratic parliamentary representation at the European level as adequate compensation for diminished democratic legitimacy at the national level. On a critical note, one must wonder whether that can fully be the case, in as much as the European Parliament (EP) cannot hold individual members of the Council or European Council to account; the Netherlands Parliament could, however, effectively sanction a minister or the prime minister for positions taken there. The assumption that accountability towards the EP is sufficient could give rise to the misunderstanding that the Dutch members of the Council and European Council are not accountable to the national parliament.[36] The pernicious effect of the Dutch approach to the democratic deficit could lead to ministers taking even less responsibility for what they agree or failed to agree to in Brussels than the low level of responsibility they are currently prepared to carry, and towards an increasingly EU-critical public opinion.[37]

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[34] The idea of an annual report may have been inspired by a similar undated resolution of the French *Assemblée*, reproduced in the Lower House parliamentary documents: 'a. *Le Gouvernement devra presenter annuellement au Parlement, en vue de son approbation, un compte rendu de l'application du Traite de Communauté Economique Européenne et des mesures économiques fiscales et sociales intervenues dans la Communauté, en exposant les mesures qu'il a prises ou qu'il entend prendre pour faciliter 1'adaptation des activités nationales aux nouvelles conditions du Marché.*'

[35] *Motie* (Resolution) introduced by MPs Berg c.s. 11 January 1967. *Bijlage Handelingen Tweede Kamer* (Appendix to the Minutes of the Lower House), 1966–1967, 8556, No. 8.

[36] For an analysis of the influence on parliamentary scrutiny after the abolition of the parliamentary veto right, see Besselink 2012a.

[37] Eijsbouts 2014, pp. 13–15.

1.4.2 When the Treaty establishing a Constitution for Europe was up for approval and several Member States decided to hold a referendum on it, the Dutch Government followed suit at the request of three pro-European Members of Parliament. The Constitution does not provide for referendums, but it does not forbid them either, as long as they are advisory only.[38] Although between 2002 and 2005 there was a Temporary Referendum Act containing general rules for advisory corrective referendums, no national referendum had been held in the Netherlands for nearly 200 years. There was, thus, no experience with the instrument when the referendum on the Constitutional Treaty was held on the basis of a separate Referendum Act in June 2005.

Asked for advice about the referendum, the Council of State stated – in a fairly sober and balanced opinion – that given the character of the Treaty, its ratification could to a certain extent be compared to an amendment of the Constitution, and a referendum would offer a realistic means to involve voters. When the Dutch people voted the Constitutional Treaty down and the Lisbon Treaty was up for ratification, that opinion would haunt the Council. The Government consulted the Council again, asking whether approval of the Lisbon Treaty would require a referendum, given that it largely resembled the Constitutional Treaty. This time, the Council of State opined that the Lisbon Treaty, in view of its contents, method and ambition, fitted in the existent process and that the changes made after the referendum (abandoning the concept of one written constitutional document, the deletion of the Charter from the body of the Treaty, the clearer demarcation of the competences of the Union and the omission of the symbols of European unification) had to be seen as a whole, and justified the choice for a 'normal' approval by way of an ordinary Act of Parliament and for not holding a referendum.[39]

Among ideas to make further European integration dependent on more strictly democratic procedures, we already mentioned the bill introducing a qualified majority of two-thirds of the vote and the request for referendums that was rejected in the Lower House (see Sects. 1.2.3–1.2.4 above).

In the meantime, the same private initiative that requested referendums for further transfers of powers managed to collect 300,000 signatures to require a referendum on the Act approving the Association Agreement with Ukraine under the new Consultative Referendum Act 2014.[40] The promoters of the referendum acknowledged that the Act might not be the best subject for an EU referendum, but they considered it the only feasible manner to have the European project put before

[38] A binding referendum is unconstitutional, since the power to create Acts of Parliament – and therefore the power to approve treaties – is vested explicitly in the legislature: the Government and Parliament jointly, in accordance with the procedure laid down in Arts. 81–88 of the Constitution.

[39] Advisory Opinion of the Council of State, 15 February 2008, W01.08.0004/I/K, Kamerstukken II 2007/08, 31 384 (R 1850), No. 4.

[40] *Wet van 30 september 2014, houdende regels inzake het raadgevend referendum* (Wet raadgevend referendum).

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the people. The attempt of a citizen to ask the Council of State for an injunction against the referendum was declared inadmissible for lack of personal interest.[41] In the referendum, 61% of voters voted against the Act, with a turnout of 32% – the 'no' vote comprising less than 20% of the electorate (which is slightly lower in proportion to the Members of Parliament who voted against the approval of the Association Agreement).[42] The result is not binding, but the Government must reconsider. The Prime Minister announced that the Association Agreement would not be ratified 'unconditionally', but postponed any decisions until after the Dutch EU presidency in the first half of 2016. In the meantime, the Netherlands Government negotiated a decision of 15 December 2016 of the European Council, mainly of an interpretative nature, to the Association Agreement, which was subsequently approved by Parliament.[43] The Consultative Referendum Act was revoked in 2018.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Not applicable.

1.5.2

(a) The Constitution has not been amended thus far, for several reasons. First and foremost, the constitutional framework is considered sufficient to support participation in the European Union. There is, thus, no perceived need for constitutional amendment. Secondly, constitutional amendment is tedious and difficult, and politicians seek to avoid it when they can. Thirdly, the political elite may well prefer the current flexibility towards European integration and would prefer not to make it more difficult for the state to make a political decision to participate in further steps in European integration. In the Dutch constitutional culture, this type of decision is considered first and foremost a political decision, which should not be in the hands of lawyers and courts, but of politicians, i.e. the representatives of the people in Parliament, as well as the Government.

(b) There is no widely shared feeling among constitutional scholars that the European deficit in the Dutch Constitution threatens the societal relevance of the Constitution. In fact, there is a widely shared consensus among constitutional lawyers that the relevance of the Constitution is limited generally, because of the

[41] *Afdeling bestuursrechtspraak (Raad van State)*, decision of 26 October 2015, ECLI:NL:RVS:2015:3399.

[42] Under the Act, the outcome of the referendum is valid if 30% of voters turn out. The outcome is not binding, but it appears politically difficult to ignore the clear majority of the vote, even though the no-vote represents only a small minority of the electorate.

[43] See European Council Conclusions, Brussels, 15 December 2016, EUCO 34/16, Annex.

absence of constitutional review, and the particular structure of the fundamental chapter in the Constitution that generally allows the legislature to restrict the rights the Constitution grants to individuals. So on the whole, there is not a general feeling of 'waning constitutionalism' as a consequence of European integration.

1.5.3 In line with the recommendations of a majority of the 2009–2010 Constitutional Committee, the authors of this report are in favour of introducing the requirement of a qualified majority of two-thirds of the vote in Parliament for the approval of treaties that have a major influence on the functioning of the constitutional order of the Netherlands – this would typically apply to the amendment of the founding Treaties of the European Union. We support the view of half of the members of that Committee that it is desirable to subject the application of international decision-making to the minimum requirements of a democratic state under the rule of law, as the Committee proposed to introduce in a new first article of the Constitution (see above Sect. 1.1). This we perceive not as a brake on European integration or on international cooperation, but as both mirroring and actively contributing to the substantive constitutionalisation of the European and international legal orders.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Fundamental rights are contained in the first chapter of the Constitution. General principles, such as legal certainty and proportionality, are not as such mentioned in the text of the Constitution. Constitutional rights do not, however, offer strong protection against the primary legislature. The Constitution proclaims rights, but then often allows the primary legislature to limit these rights, without, however, carving out the precise conditions for such limitations.[44] Moreover, constitutional rights are not justiciable in such cases, given the absence of judicial review of Acts of Parliament against the provisions of the Constitution. International conventions, such as the ECHR, the ICCPR and the EU Charter are better enforceable than rights contained in the Constitution. As a consequence, the Constitution is also often considered to be less meaningful in the political process than human rights treaties, more specifically the ECHR.

2.1.2 There is no general limitation clause in the Constitution, and the specific provisions containing rights offer the legislature significant leeway to restrict rights.

[44] By way of example: Art. 8 reads: 'The right of association is recognized. This right may be restricted by Act of Parliament in the interest of public order.'

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2.1.3 The principle of '*rechtsstatelijkheid*' (rule of law) is not laid down in the text of the Constitution, but is considered a general principle of law. Several elements of the rule of law are included in the constitutional text, such as the right to be heard (Art. 17 Constitution). The case law in this matter, however, is mainly built on Art. 6 ECHR.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 Given the limited legal effectiveness of constitutional rights, EU law is hardly considered a threat to those rights in general. It has been argued, however, that EU law does contain a bias in favour of free movement over fundamental rights,[45] while others have argued that EU law offers sufficient ways to balance fundamental rights and economic freedoms, and that there is no bias for one over the other.[46] Some authors have argued that the advent of the binding EU Charter increases fundamental rights protection in the Netherlands, given the procedural advantages of EU law over ECHR law.[47]

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

Overview of the national implementation of the EAW and the human rights clause The EAW was implemented in Dutch legislation in the *Overleveringswet 2004* (OLW).[48,49]

This Act contains a number of provisions that seem to add fundamental rights guarantees over and above what the Framework Decision[50] provides for.

First, Art. 11 of the OLW provides for a general fundamental rights exception if the court has sufficient grounds founded in facts and circumstances to suspect a 'flagrant breach' of the ECHR.[51] It does not mention Art. 6 TEU or the EU Charter

[45] John Morijn 2006.

[46] Sybe de Vries 2016.

[47] Morijn et al. 2015.

[48] The authors are grateful for very significant preparatory research on this question by Xanthe Born.

[49] Law on the surrender of persons (*Overleveringswet*), Stb. 2004, 195, 11 May 2004.

[50] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[51] '*Overlevering wordt niet toegestaan in gevallen, waarin naar het oordeel van de rechtbank een op feiten en omstandigheden gebaseerd gegrond vermoeden bestaat, dat inwilliging van het*

which are explicitly mentioned in Art. 1(3) of the Framework Decision. The provision is extremely restrictive, as it is reserved to cases of suspicion of 'flagrant breach' of the ECHR. Both elements are remarkable: in the implementation of EU law, EU fundamental rights – mainly the EU Charter – are primary, rather than the ECHR, even if the latter provides the minimum level of protection and defines the interpretation of the Charter (Art. 52(3) Charter). The restriction to cases of 'flagrant' breaches offers less protection than the ECHR, as the European Court of Human Rights (ECtHR) does not impose such a high threshold in cases of violations of Art. 3 ECHR. As such, this restriction would also infringe the duty contained in the Charter to respect the minimum level of protection contained in the ECHR (Arts. 52(3) and 53 Charter). The Dutch court that is competent to hear EAW cases as a court of sole instance from which no appeal is possible, the District Court of Amsterdam, has solved this problem to some extent by qualifying a breach of Art. 3 ECHR as 'flagrant' in itself.[52] Yet, arguments based on unfair trial have not been very successful in the Netherlands, and the courts have typically made reference to *Jeremy F*[53] and the ECtHR. Whenever a court had doubts about the prison conditions in the requesting Member State, after the judgment of the ECtHR in *Varga*[54] and in view of the pending reference by the *Hanseatisches Oberlandesgericht* in Bremen to the Court of Justice of the European Union in *Aranyosi*,[55] the court would suspend all pending cases concerning delivery to Hungary.[56] Below we discuss how courts have acted subsequent to *Aranyosi* (Sect. 2.3.1 *in fine*).

verzoek zou leiden tot flagrante schending van de fundamentele rechten van de betrokken persoon, zoals die worden gewaarborgd door het op 4 november 1950 te Rome tot stand gekomen Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden.' (Surrender shall not be allowed in cases where, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of fundamental rights of the person concerned, as guaranteed by the [ECHR]).

[52] Rb. Amsterdam, 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.

[53] Case C-168/13 PPU *F.* [2013] ECLI:EU:C:2013:358.

[54] ECtHR, 10 March 2015, *Varga and Others v. Hungary*, Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13.

[55] Joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198.

[56] See Rb. Amsterdam, 17 November 2015, ECLI:NL:RBAMS:2015:7977 and press release by the District Court of Amsterdam, 31 December 2015, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Schending-mensenrechten-in-Hongaarse-gevangenissen.aspx.

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2.3.1 The Presumption of Innocence

2.3.1.1–2.3.1.2 To the chagrin of the European Commission,[57] a defence of innocence is provided for in the *Overleveringswet* as an additional ground for refusal beyond those mentioned in the Framework Decision. The District Court has to refuse surrender if it is impossible that a suspicion of guilt can apply to the requested person with regard to the facts for which his surrender is requested (Art. 28(3) OLW). The District Court of Amsterdam must examine the claim of innocence of the requested person, which must be made prior to the hearing and supported with evidence during the hearing (Art. 26(4) OLW).

Although there is abundant case law on the EAW combined with the presumption of innocence, in the published case law there are only two decisions in which reliance on this principle has provided grounds to refuse surrender. The judicial assumption is that it is for the issuing state to assess such appeals, as they have full knowledge of the case file. Exemplary is the case of 25 April 2008[58] in which the Court stated that reliance on the presumption of innocence in the sense of Art. 6 ECHR is irrelevant in surrender proceedings in the executing state and must be left to the issuing authority. This is remarkable, as Art. 26(4) OLW is explicit that the Court must examine any claim concerning the presumption of innocence.

Of the two cases in which reliance on the principle of innocence was successful, in one case the requested person was able to produce a hospital report showing that he was in treatment for viral hepatitis A and B at the time he was said to have committed criminal offences in Germany. The court considered this report sufficient to prove that he was innocent.[59]

In the other case, the requested person produced a document that proved he was preventively detained at the time some of the criminal offences were committed for which his surrender was requested, which led the Court to decide to refuse the EAW partially, that is to say for the offences for which the actual presence of the requested person during the commission of the criminal offences was necessary. His physical presence was not necessary for the commitment of the other offences and thus his surrender was allowed for those.[60]

Finally, it must be signalled that although the Netherlands' implementing legislation does not incorporate a proportionality test, the Court often reviews the

[57] Report from the Commission based on Art. 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels: 23 February 2005, COM(2005) 63 final, p. 8; criticism on the part of Dutch criminal lawyers has come amongst others from R. Malewicz 2006, p. 498, is shared by H. Sanders 2012, par. 6 and partly by V.H. Glerum 2013, p. 622. Sanders does not agree, however, with the Commission's assumption that the claim of innocence as a ground for refusal requires an examination in substance of the case; see Sanders 2011, pp. 119–120.

[58] ECLI:NL:RBAMS:2008:BD2475, District Court of Amsterdam, 25 April 2008, para. 9.

[59] ECLI:NL:RBAMS:2011:BR3388, District Court of Amsterdam, 27 July 2011.

[60] Ibid.

proportionality of a surrender.[61] It will not surrender when it is considered disproportionate. This arguably constitutes a further breach of EU law as it adds a further ground for refusal that is not provided for in the Framework Decision.

It must be noted that the Court distinguishes 'systemic proportionality', i.e. that powers of the OLW to surrender a person may not exceed what is necessary to realise the objectives of the Framework Decision, from the proportionality of a surrender in a concrete case in light of the particular circumstances. The latter form of proportionality review is justified by the Court under reference to a Council Recommendation that holds that

> [c]onsidering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences.[62]

It is only in the second type of proportionality review that an appeal has on rare occasions been successful. The criterion is that the surrender must be 'disproportionally burdensome' (*onevenredig bezwarend*). This has only succeeded in cases of very serious health situations that involve the certainty or high chance of death of the surrendered person.[63]

In November 2015, the Court of Amsterdam suspended the surrender of a suspect to Hungary, and asked the Hungarian requesting authorities for more information about the prison conditions. The court referred to the preliminary reference sent by the *Hanseatisches Oberlandesgericht* in the *Aranyosi* case, in which that court cited a European Committee for the Prevention of Torture (CPT) report and the case law of the ECtHR, and held that there were indications of infringements of Art. 3 ECHR.[64] Since the decision of the ECJ in *Aranyosi*, the Amsterdam court has regularly applied it, and requested additional information on prison circumstances, or rejected claims that there was a real risk of inhuman or degrading treatment under Art. 4 Charter, for instance on the basis of additional

[61] Out of 911 published judgments on the European Arrest Warrant decided by the Amsterdam District Court up to June 2016, the combined search terms of '*Europees aanhoudingsbevel*' and '*evenredigheid*' yield 59 hits; the combination of the search terms '*Europees aanhoudingsbevel*' and '*onevenredig bezwarend*' ('disproportionally burdensome'), which is the criterion for proportionality in the individual case, leads to 34 hits.

[62] See District Court Amsterdam 30 December 2008, ECLI:NL:RBAMS:2008:BG9037, para. 6.3; the reference is to the Handbook on how to issue a European Arrest Warrant, 8216/1/08 REV 2 COPEN 70 EJN 26 EUROJUST 31, para. 3 'Criteria to apply when issuing an EAW – principle of proportionality', p. 14. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN757.pdf.

[63] Two cases are District Court Amsterdam 1 March 2013, ECLI:NL:RBAMS:2013:BZ3203, which is the standard to which later judgments refer, and District Court Amsterdam, 26 June 2012, ECLI:NL:RBAMS:2012:BY8250.

[64] Rb Amsterdam 11 November 2015, ECLI:NL:RBAMS:2015:7977.

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information granted by the Romanian authorities,[65] or on the basis of general information on prison conditions in Poland.[66]

2.3.2 *Nullum crimen sine lege praevia*

2.3.2.1 A study undertaken in 2010 indicated that until June 2010 in approximately a quarter of the cases, the courts undertook some form of dual criminality test.[67] Since 1 June 2010 approximately 300 judicial authorities have assessed around 300 EAWs in which dual criminality played a role. A test whether the relevant offence is listed in the OLW (that is identical to that of the Framework Decision) suffices. Until 2008, the courts would request the legislation of the issuing state from the issuing authority in translation (in English), but the *Hoge Raad* (Dutch Supreme Court) criticised this as being in conflict with the principles underlying the Framework Decision.[68] Since then, in cases of doubt, the courts will rely on the descriptions in the warrants and translate that into terms of Netherlands criminal offences, in order to assess whether the judicial authorities of the issuing state could reasonably have identified the offences as listed offences. But rarely has this been an obstacle to the surrender of the requested person. There are around 30 cases (out of slightly over 650) before the District Court of Amsterdam to be found where the requested person claimed that the listed offence and the facts as described in the EAW were in 'obvious conflict'. In three cases, this claim proved to be successful.[69]

2.3.3 Trial *In Absentia*

2.3.3.1 The optional grounds for refusal in the revised Framework Decision of 2009 concerning trial *in abstentia* is implemented differently and turned into a mandatory ground for refusal in the OLW (Art. 12). In the literature, this is justified with reference to the *Wolzenburg*[70] judgment of the Court of Justice, and it is pointed out

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[65] Rb Amsterdam 2 May 2016, ECLI:NL:RBAMS:2016:2629 (Romania). The court considered the information granted by the Romanian authorities sufficient to decide that the prison conditions had been improved since the decisions of the ECtHR relating to the relevant prison.

[66] Rb Amsterdam 24 May 2016, ECLI:NL:RBAMS:2016:3081 (Poland). The court considered the evidence adduced (ECtHR decisions dating back to 2009 and 2010 and a CPT report of 2014) insufficient to qualify the general prison conditions in Poland as a real risk of inhuman and degrading treatment.

[67] Kurtovic and Langbroek 2010, p. 4.

[68] HR 8 July 2008, para. 3.5.2, ECLI:NL:HR:2008:BD2447.

[69] District Court of Amsterdam, 26 August 2011, para. 5, ECLI:NL:RBAMS:2011:BR7003; District Court of Amsterdam, 7 October 2011, para. 4, ECLI:NL:RBAMS:2011:BT7217; District Court of Amsterdam, 25 June 2013, para. 4.1, ECLI:NL:RBAMS:2013:3852.

[70] Case C-123/08 *Dominic Wolzenburg* [2009] ECR I-09621.

that the implementing act does not broaden the cases in which surrender is to be refused. In the judgment of 16 June 2016 of the District Court of Amsterdam which followed up the judgment of the Court of Justice of 24 May 2016 in the case of *Paweł Dworzecki*[71] that the district court had referred, it relied moreover on the written answer of the Netherlands Government to a question posed by the Court of Justice on the reasons for introducing this mandatory ground. The Government stated that the reason for this was 'the protection of the right to a fair trial and for reason of creating clear and transparent criteria for the judicial authorities to decide whether to refuse the execution of an EAW'.[72] In *Dworzecki*, the issue concerned the question to what extent an executing judicial authority must ascertain whether the person tried *in absentia* had been informed of the trial, or must rely on an assessment by the issuing authority. *Dworzecki* and its follow-up clearly demonstrate how the principle of mutual recognition is subjected to restrictions informed by the right to a fair trial and the principle of legal certainty.

2.4 The EU Data Retention Directive

2.4.1 As was the case elsewhere, questions were also raised in the Netherlands about the usefulness and necessity of the Data Retention Directive.[73] During the parliamentary proceedings leading to the adoption of the Data Retention Act 2009, the issue of privacy was heavily debated.[74] The core issue was whether the Act would pass muster in the light of the right to privacy as protected under Art. 8 ECHR and Art. 10 of the Constitution. Given the fact that the Constitution does not contain a general reference framework for limitation (see above Sect. 2.1.1), the focus of attention was on Art. 8 ECHR. In the Upper House (the Dutch Senate), reference was made to the *Vorratsdatenspeicherung* decision[75] of the German Federal Constitutional Court. In light of possible effects on privacy, in the end the choice was made for a retention period of one year for fixed and mobile telephony

[71] Case C-108/16 PPU *Dworzecki* [2016] ECLI:EU:C:2016:346.

[72] District Court Amsterdam 16 June 2016, ECLI:NL:RBAMS:2016:3643, para. 5.4 *in fine*.

[73] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[74] On the background and application of the Dutch implementing Act, see G Odinot et al., *The Dutch implementation of the Data Retention Directive. On the storage and use of telephone and internet traffic data for crime investigation purposes*, Eleven International Publishing (2014); WODC Report 310a, (2014), available at https://www.wodc.nl/onderzoeksdatabase/ov-201402-the-dutch-implementation-of-the-data-retention-directive.aspx (the WODC is the Research and Documentation Centre of the Ministry for Security and Justice and aims to make a professional contribution to development and evaluation of justice policy set by the Ministry).

[75] *BVerfG*, Urteil des Ersten Senats vom 02. März 2010 - 1 BvR 256/08 - Rn. (1-345), BVerfGE 125, 260.

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and six months for internet data (as opposed to 18 months in the original proposal and 12 months after the debate in the Lower House).

The Senate remained critical and kept an eye on European developments pertaining to data retention. For example, the Senate's objections to data retention were voiced in the permanent justice committee's report on the assessment of the Data Retention Directive.[76] These concerns included a brief yet convincing analysis of the absence of pressing social need, and that not enough attention was being paid to the proportionality of the measure.

The Data Retention Act was never challenged in court, until the Court of Justice invalidated the Data Retention Directive in *Digital Rights*.[77] In several criminal cases courts have rejected the argument that evidence used on the basis of data retained under the Act could not be used, since the EU Directive on which it was based had been declared invalid. The reason for this rejection is that it is not the Data Retention Act 2009 that allowed the use of that information, but the relevant provisions of the Code of Criminal Procedure. Moreover, the case law of the *Hoge Raad* is very restrictive in disallowing unlawfully procured evidence: the unlawfulness that resides in an infringement of the right to a fair trial is distinct from that of other fundamental rights, in the sense that an infringement of, for instance, the right to privacy must be shown also to amount to an infringement of the right to a fair trial, which is not necessarily so.[78]

A different case ended in the Tax Chamber of the Court of Appeal of 's-Hertogenbosch, on 27 March 2015, that found that the use of the data collected with police cameras for the purpose of uncovering tax fraud in relation to the private use of company cars, and for which the data retention period was set in the tax legislation at seven years, had an adequate legal basis and was not disproportionate in the case adjudicated. It considered in this respect that the data retained in this case did not concern data retention in the sense of the Directive, and that *Digital Rights* did not affect the tax legislation. It then reviewed this legislation against Art. 8 ECHR. It stated that the seven-year period was related to the not unreasonable time limit for the tax authorities to be able to assess or re-assess tax obligations of citizens, and that it was up to the legislature to attune the tax legislation with the principles of data protection.

Given the extensive reliance on telecommunications in criminal cases and law enforcement, it is questionable whether Dutch courts would easily have come to a judgment like the Court of Justice. However, once either the European Court of Justice or the European Court of Human Rights has adjudicated, Dutch courts mostly apply the reasoning of the relevant European court to cases they are confronted with.

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[76] Evaluation of the Data Retention Directive (*Evaluatie van de richtlijn gegevensbewaring*), a report of the Committee to the Council and the European Parliament, (Richtlijn 2006/24/EG). Preparatory Memorandum (Senate), 2010/11, 32 797, A.

[77] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[78] A major example is Court of Appeal [*Gerechtshof*] Amsterdam, 27 May 2014, ECLI:NL:GHAMS:2014:2028.

This was the case with the District Court of The Hague that rendered the Act inoperative on 11 March 2015 in summary proceedings.[79] The power of civil courts to render inoperative any legislative act if it is 'manifestly unlawful' is based on case law of the *Hoge Raad* and extends to manifest incompatibility with directly effective provisions of treaties or of decisions of international organisations, or with directly effective EU law.

Before the Act was rendered inoperative, a Member of Parliament had presented a bill with a view to withdrawing the Act of 2009 and reinstating the prior regime. The Council of State has criticised the bill for not sufficiently distinguishing between general data and data related to the investigation of (serious) crime, thus not complying with *Digital Rights* sufficiently.[80] The bill is pending in the Lower House (June 2016).

The Government published a preliminary draft of its own intended legislation for consultation with the general public in November 2014, which introduced a somewhat stricter judicial scrutiny prior to requesting data, a limitation to more serious criminal offences as regards the possibility to request data and the obligation to store data within the EU. This legislation was criticised by several NGOs, amongst other reasons because it still did not differentiate between the retention of general data indiscriminately and the retention of data of suspects or related to suspicions of criminal offences and the proportionality of the time limits. A year later, the Government announced that a bill had been approved by the Council of Ministers and would be submitted for advice to the Council of State. Since at the time of writing of this report (July 2016) the bill has not been introduced in Parliament, we may assume that the Council of State had objections, which the Government has not yet been able to overcome.

2.5 *Unpublished or Secret Legislation*

2.5.1 The legislation in the Netherlands concerning the publication of legislative, regulatory, delegated and executive acts is such that the principle of legal certainty prevails: citizens cannot be bound by unpublished legislation of any kind.[81] The principle of publicity of legislation does not mean, however, that executive regulations that have no external effect towards citizens are not published and does not mean that they are invalid. The only effect of unpublished legislation or rules or regulations is that they cannot bind citizens.

For the purpose of the effect of international treaty provisions or of decisions of international organisations, the general rule is that they must be published in the

[79] Rb Den Haag, Decision of 11 March 2015, ECLI:NL:RBDHA:2015:2498.

[80] The bill and the advisory opinion of the Council of State are published in the parliamentary documents, *Tweede Kamer*, 33 939, Nos. 1–3.

[81] See also Sect. 3.4.1 for reference to relevant case law.

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Tractatenblad (the official journal in which treaties and certain decisions of international organisations are published)[82] and they are considered to have been so published as of the first day of the second calendar month after the date of issue of the relevant *Tractatenblad.* However, personal notification of the relevant treaty provisions (or provisions of decisions of international organisations) to the persons involved in order to bind them, is regarded as publication with regard to them if this binding effect is mentioned in the notification.[83]

Quasi-legislation (*beleidsregels*), that is to say executive regulatory acts without a basis in an Act of Parliament – usually instructions or guidelines concerning the manner in which a public authority shall exercise administrative discretion – can be relied on by citizens if they are published; they create the reasonable expectation that the relevant authority will act in accordance with the policy announced.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 Here, what we mentioned above applies: once either the European Court of Justice or the European Court of Human Rights has adjudicated, Dutch courts mostly apply the reasoning of the relevant European court to cases they are confronted with, but prior to that there is a distinct deference towards the legislature.[84] See also Sect. 2.8 below.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 In its advisory opinion on the approval of the ESM Treaty and the decision amending Art. 136 TFEU, the Council of State signalled that it considered the democratic control mechanisms deficient. Starting from the presumption that control mechanisms should be organised at the level of the decisions, it voiced its strong preference for a European mechanism, which national parliaments could only partially compensate for. Nevertheless, the Council of State considered the economic urgency of the matter and the choice for a common mechanism to be more important than the deficiencies that it signalled. Given the absence of involvement of the EP, the Council of State was of the opinion that there should be

[82] *Rijkswet goedkeuring en bekendmaking verdragen* (Act on the Approval and Publication of Treaties), Arts. 16–19.

[83] *Rijkswet goedkeuring en bekendmaking verdragen*, Art. 20.

[84] See Claes and Gerards 2012, p. 643, with references to relevant legal commentary.

a guarantee in national law securing the democratic control of the acts of the minister in ESM decision-making. Furthermore, it urged the legislature to foresee that an increase of the capital could only be approved after agreement by the Parliament.

The Lower House has adopted a resolution specifying that every decision to grant financial assistance outside of the pledged amount of capital will be tabled in the Lower House because the transfer of these funds directly impacts the budgetary power of Parliament. The Government has promised to respect the resolution in a policy note on how it will involve Parliament in these decisions. Any application outside of the pledged amount of capital will be agreed with the Lower House. With respect to individual applications falling within the pledged amount, the Government will closely inform the Chamber. Legal commentators have described this 'working agreement' as an empty shell, arguing that in practice and towards the other Member States, the Government will be bound by the obligation, even if the Parliament would veto it. As such, this working agreement can only have political effects.[85]

Geert Wilders, leader of the Eurosceptic and populist Party for Freedom (PVV), brought proceedings in court asking for an injunction preventing the state from approving and ratifying the ESM Treaty. At the time, the Government did not have full powers: the Government had resigned and elections were impending. The judge denied the action, holding that the claim asked him to intervene in the legislative process, which the Constitution bestows on the Government and the Parliament acting together (Art. 81 Constitution). The decision is fully in line with the very restricted role of the courts in European integration policy and political participation in the EU.[86]

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1–2.8.4 Dutch courts have never claimed jurisdiction to review the constitutionality of EU secondary law. The primacy of EU law is deeply ingrained in the minds of Dutch lawyers, and it is so on grounds of the very nature of EU law.[87] Even the very open norms of the Constitution concerning the applicability and primacy of international treaties are not considered applicable in this respect. Constitutional review of EU law is out of the question. There is no equivalent of *Solange* in the Netherlands.

More recently, scholars have spoken about the added value of the EU Charter over and beyond the ECHR. The Dutch system of fundamental rights protection is

[85] Diamant and van Emmerik 2013, p. 102.

[86] Rb Den Haag, Decision of 1 June 2012, ECLI:NL:RBSGR:2012:BW7242.

[87] See e.g. Morijn et al. 2015, p. 124.

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highly dependent on human rights treaties, mainly the ICCPR and ECHR. The Charter is viewed as an additional tool in the hands of the Dutch courts.[88] One example from the judicial practice is the case of foreigners claiming to be eligible for an asylum residence permit on grounds of their sexual orientation. The Administrative Jurisdiction Division of the Council of State, upon a preliminary reference to the ECJ, decided that if the Secretary of State holds a claimed sexual orientation for an established fact, or deems it credible, it is, according to the *X, Y and Z* decision of the Court of 7 November 2013,[89] in breach of Arts. 9 and 10 of Directive 2004/83[90] to require restraint from an applicant in giving substance to his orientation in his country of origin, even if the ECtHR seems to require restraint from an applicant if this allows him to prevent inhuman treatment.[91]

However, there has been at least one instance where a Dutch court, in this case the *College van Beroep voor het Bedrijfsleven*,[92] has applied the *Bosphorus*[93] presumption and applied only a marginal review of a decision applying EU law.[94] This approach, whereby a national court would decline to review compliance with the ECHR on the basis of the Bosphorus presumption, could threaten the protection of human rights. Such a stance, however, misinterprets *Bosphorus*, since it concerns only the review by the ECtHR itself and presumes that the national courts and the ECJ have actually applied the EU fundamental rights standards. The case pre-dates the entry into force of the Charter, and the presumption does not seem to have been applied since.

2.9 Other Constitutional Rights and Principles

2.9.1 The question whether the Dutch constitutional system has a rule of parliamentary reservation of law, e.g. that penalties (also beyond criminal law), taxes, obligations, etc., must only be imposed by a parliamentary statute, and whether this

[88] This assumption is central to e.g. Morijn et al. 2015; Barkhuysen et al. 2011, sect. 3; Van Harten and Grootelaar 2014.

[89] Joined cases C 199/12 to C 201/12 *X and Others* [2013] ECLI:EU:C:2013:720.

[90] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12.

[91] With reference to *F.G. v. Sweden*, No. 43611/11, 16 January 2014 and *M.E. v. Sweden*, No. 71398/12, 26 June 2014.

[92] The highest administrative court for social and economic matters.

[93] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, ECHR 2005-VI.

[94] Nevertheless, the court also emphasised that in a non-EU related case, and applying the normal standards, the ECtHR had not found a violation of Art. 6 ECHR, CBB, 24 April 2008, ECLI:NL:CBB:2008:BD0646. See also Rb Den Haag, 23 June 2009, ECLI:NL:RBSGR:2009:BJ0893 (where *Bosphorus* was referred to, but not applied).

rule has been affected by EU/international law, is an intricate issue which has various aspects.

Briefly, the Constitution (*Grondwet*) reserves several issues to a parliamentary legislative act, *wet*. These include the restriction of the exercise of certain fundamental rights (rules on extradition (Art. 2(3) Const – which also provides that extradition can only take place pursuant to a treaty); the right to leave the country (Art. 2(4) Const); the right to vote and to be elected (Art. 5); the right to profess one's faith or belief (Art. 6(1)), although the exercise in public places can be restricted with a view to traffic safety and to prevent disorder (Art. 6(2)) on the basis of delegation by Act of Parliament; freedom of expression (Art. 7, with the exception of 'radio and television' that can be regulated pursuant to an Act of Parliament); freedom of association (Art. 8); restriction of freedom of assembly and of demonstration for any objective, while the restriction, on the basis of delegation by Act of Parliament, can only be with a view to regulate traffic and prevent disturbances of public order). Other restrictions of constitutional rights require a basis in an Act of Parliament, but if one exists, executive authorities or decentralised authorities can also restrict the exercise of those rights. Note that there is an absolute prohibition of censorship, which cannot be introduced even by Act of Parliament.

Other matters reserved for Parliament primarily concern organisational matters, e.g. concerning kingship (permission to marry, exclusion from the succession to the throne, on appointment of a successor if there is none under the constitutional rules, regency, etc.); electoral rules; personal pay and remuneration of the king, Members of Parliament and of Government; the establishment and abolition of provinces and municipalities and other public bodies; judicial procedure, etc.

There have been no specific problems raised with regard to these in the context of European integration, except the question we already mentioned concerning the currency at the time of the approval of the Maastricht Treaty.[95] This is mainly because legislation as constitutionally required has been passed that provides a sufficient legal basis (such as the Act implementing the EAW Framework Decision discussed in Sect. 2.3 of this report).

There is another issue which does not regard the specific provisions of the Constitution, but the *general* principle of legality. In the context of criminal law this requires a prior provision in an Act of Parliament before a certain behaviour or act can be punished, as in other countries (also enshrined in Art. 16 Constitution). As a broader principle of public law, the exercise of public authority that affects the rights and duties of citizens or factually is burdensome for them, requires a basis in an Act of Parliament. There is general consensus about this.

There has been an ongoing discussion whether acts of the European Union (previously EC) are a sufficient basis. In administrative law the dominant view was and still is that a directive cannot provide such a legal basis; however, there have been differences of view as regards the question whether a regulation can provide

[95] See above n. 16.

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such a basis – in particular as regards the possibility of imposing the obligation to repay (EU) subsidies if these were disbursed without legal grounds.

The brief answer on the rather complex developments in the case law is that by and large this is now also the view of the courts. In particular, administrative courts assume that a national public authority can derive powers from primary EU law directly, although it is mainly national law that determines which national authority is competent; moreover, national law can regulate the manner in which this authority exercises its powers. Apart from certain powers being assumed or granted under EU law (which generally addresses Member States, not specific authorities), it may in practice be required that there is a national legal basis in an Act of Parliament for empowering a public authority (sometimes referred to as double legality).

With regard to secondary EU law the courts and academic doctrine hold that a directive cannot be the exclusive basis of a public authority's powers; there must be an Act of Parliament that determines which public authority can hold a power that may exist in EU law. The same view still prevails as regards regulations, but recent case law of the Council of State and the *College van bestuur voor het bedrijfsleven* (The Trade and Industry Appeals Tribunal, also known as Administrative High Court for Trade and Industry)[96] suggests that if an obligation exists under EU law, a material competence under EU law is presumed and can suffice to render an authority competent.

2.10 Common Constitutional Traditions

The particular nature of the Netherlands constitution, comprising not only the *Grondwet* but also human rights treaties that form an integral part of it – especially the ECHR and the UN Conventions – suggests that the commonality of constitutional traditions is in a sense incorporated into the constitutional body of fundamental rights norms. Nevertheless, it is useful to note that the provisions of international human rights treaties are meant as minimum norms, with the exception of the treaties that provide peremptory norms from which no derogation is possible, such as the UN Conventions on Genocide and on Torture. Specific norms contained in the Constitution with a higher level of protection are the absolute prohibition of censorship under Art. 7 of the *Grondwet*, and the right to equal financial treatment of both public and private schools (Art. 23 *Grondwet*). These are not matched by the human rights treaties nor can they be said to be common to the constitutional fundamental rights *acquis* of the other EU Member States. We can say that the supplementary role that the common constitutional traditions are assigned under Art. 6(3) TEU can contribute to the dynamics of fundamental rights protection in

[96] This is a specialised administrative court which rules on disputes in the area of social-economic administrative law, including competition law and telecommunications law.

Europe. For instance, the very restricted scope for prior permission to publish certain expressions in the case law of the ECtHR is probably inspired by the fact that this is absolutely prohibited in countries like Germany and the Netherlands. This ECtHR case law in turn translated into the ECJ taking a much more protective line than the Court of First Instance in the *Connolly* cases.[97] Similarly, changing attitudes towards equal treatment and non-discrimination, for instance on the basis of sexual orientation, leading to acknowledgment of same sex marriage – controversial as it may be – may also be an example of a certain dynamic that translates into changed conceptions of rights protection in the European and EU context. Perhaps the German understanding of the right to privacy in the sense of data protection is a more important and better example. Thus, what at one moment in time is a specific national understanding may either lead to a broader consensus translating into European and EU law, or to the ECJ picking up on it, creating a broader common constitutional tradition subsequently.

The dynamics can also go in another direction, as *Melloni* shows. The Spanish Constitutional Tribunal chose to abandon its more protective standard of a fair trial – the right to retrial after conviction *in absentia* – to the standard that the ECJ determined to be the uniform EU standard, also outside the scope of EU law.[98]

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As explained, the ECHR is of special importance in the Dutch legal system of fundamental rights protection, given the prohibition of judicial constitutional review. Review in the light of directly effective treaty provisions is the only tool in the hands of courts to review primary legislation. When conducting such review on the basis of Art. 94 of the Constitution, judges remain very well aware of another provision in the Constitution, Art. 120, which institutes a ban on constitutional review. Accordingly, the courts are reluctant to interpret the ECHR broadly and to offer higher protection than follows from the case law of the ECtHR. Indeed, Art. 94 allows courts to disapply provisions of primary legislation only when such application is incompatible with directly effective provisions. The courts feel that only the interpretation given by the ECtHR makes such application incompatible, not their own more stringent reading of the ECHR. Accordingly, the courts consider themselves bound by the interpretation of Strasbourg, and the ECHR minimum

[97] Case C-274/99 P *Connolly v. Commission* [2001] ECR I-01611, as compared to the CFI in the same case Joined cases T-34/96 and T-163/96 [1999] FP-I-A-00087; FP-II-00463.

[98] See Besselink 2014a.

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standard tends to become the national maximum standard.[99] Article 53 ECHR thus does not lead to higher judicial standards in the Netherlands. There are only a few aspects of the national constitutional human rights protection that are considered to offer more protection than the ECHR, namely with respect to constitutional provisions usually allowing restrictions on constitutional rights only if they are based on an Act of Parliament, and in some cases further limited to only a few public policy objectives, such as public order and safety in the clause on the protection freedom of religion (Art. 6(2) Constitution). Yet, this is of little avail to individuals seeking protection against primary legislation, given that the courts are prohibited from reviewing Acts of Parliament against the provisions of the Constitution, if the constitutionality depends on the compatibility of an Act of Parliament with the Constitution. Only if this is not the case, for instance when it concerns the compatibility of municipal by-laws with the more limited range of objectives for which certain fundamental rights can be restricted as compared with the ECHR, the national courts can provide more protection than the ECHR. In this regard the absolute prohibition of censorship in Art. 7 of the Constitution, which prohibits prior permission for any expression whatsoever, is also worth mentioning, as it goes further than Art. 10 ECHR. Although the latter provision does not as such prohibit censorship, the ECtHR allows for the requirement of prior permission, albeit in exceptional circumstances, whereas under the Netherlands Constitution prior permission cannot be allowed under any circumstances at all.

It is important to emphasise that Art. 53 Charter does not automatically make the ECHR minimum the maximum standard. Article 53 Charter does allow for higher protection on national constitutional grounds, unless such higher protection would amount to an infringement of EU law.

For the moment, the Charter is seen as increasing the protection of individuals in the Netherlands, rather than threatening the national protection. However, given the importance of the ECHR in the Dutch legal order, a lowering of the ECHR standards would be considered problematic. Yet, in light of Art. 52 of the Charter, the level of protection in EU law (whether in the Charter or primary or secondary EU law) should never fall below the minimum standard of the ECHR.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.3 Participation in the European Union, the ratification of the European (amendment) Treaties and the effect of EU law in the domestic legal order have

[99] See *Hoge Raad*, 10 August 2001, ECLI:NL:HR:2001:ZC3598; see more generally, Gerards 2010.

always been based on the general provisions concerning international treaties and international organisations. The same rules of Arts. 90–94 thus apply. Powers can be conferred on international organisations by recourse to international treaties, which require simple majority approval in Parliament, unless they deviate from the Constitution or necessitate such deviation. If that should be the case, approval requires a two-thirds majority of the votes cast. The procedure has been followed in the case of the EDC Treaty, the Treaty of 15 August 1962 with Indonesia concerning Western New Guinea and for the approval of the Statute of Rome concerning the International Criminal Court (ICC). In the latter case, the Government did not consider the treaty as 'deviating from the Constitution or necessitating such deviation', but the Council of State opined that it did. The Government tabled the Approval Act on the basis of Art. 91(3) 'to the extent necessary'. The Act did not specify to what extent the treaty deviated from the Constitution, and did not stipulate the precise provisions of the Constitution from which the treaty could supposedly deviate.

These treaties did not require prior amendment of the Constitution. In the case of a conflict between a treaty in force and the Constitution, the former takes precedence.

Given the liberal and open approach to international cooperation, there has not been a need to incorporate specific provisions in the Constitution with respect to the ECHR, NATO, the ICC or any other international organisation.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 On the basis of Arts. 93 and 94 of the Constitution, provisions of treaty law that are 'binding on anyone' can be directly applied in the domestic legal order, and must be awarded priority over all provisions of national law, including the Constitution. The case law suggests that the expression 'binding on anyone' is equivalent to 'direct effect' as we know it in EU law.

The doctrine of direct effect has as a consequence that citizens cannot be bound by international norms that do not create rights or obligations for citizens directly, and to that extent can be said to protect citizens from the mutual understandings, technical or general as they might be, that might impose obligations. This could be done either by the competent state institutions like the legislature or in some cases the executive. But compliance with international agreements could also voluntarily or unilaterally be secured through private behaviour. Thus, compliance with international technical standards by industry can be achieved without state (legislative or executive) intervention. Similarly, international or transnational understandings between non-state actors can be effectuated without recourse to state intervention – whether it be the Internet Corporation for Assigned Names and Numbers (ICANN) standards on internet domain names, or accounting standards

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issued by the International Accounting Standards Board (IASB). This has always been the case, and remains so *a fortiori* in the context of a globalising economy and social environment.

3.3 Democratic Control

3.3.1 We have to distinguish between democratic control as regards governmental activities in negotiating treaties and its contribution to decision-making within international organisations established by treaties on the one hand, and democratic control over international governance and rule-making in which either government officials are involved together with non-state actors or in which there is no involvement of the Government or its officials.

Democratic control is constitutionally exercised through parliamentary institutions over the first category of acts. The Government is under the obligation to inform Parliament of the treaties it negotiates under the Act on the Approval and Publication of Treaties (Art. 1), and does this periodically by submitting a list of instruments that have been negotiated with an indication of the objective and whether they concern a politically sensitive or important matter. The practice of both the Lower House and Upper House as to the scrutiny of this list leaves much to be desired; often there is no more (and often less) than a superficial consultation between a committee of the House with the Minister of Foreign Affairs.[100] As was mentioned in Sect. 3.1, both Houses have to approve each treaty.

As regards the scrutiny of decision-making within international organisations other than the European Union, there is hardly any systematic parliamentary activity, even though decisions can be directly effective and then have priority over any conflicting legislation.

As regards the second type of activity, that is to say international governance and rule-making beyond the state, it may be useful at the outset to recall the consociationalist tradition of the Dutch constitutional tradition, in which democratic institutions had broad and deep foundations in society and its structures, well beyond the state as such (see Sect. 1.3 above). This has meant that certain democratic institutions, such as political parties and the media, have traditionally not been associated, let alone identified, with the state. 'Self-regulation' by sectors of the economy and non-state public actors, such as trade unions and employers organisations, both by themselves and together have been regarded as equivalent to state regulation. This has been officially promoted for instance in the fields of labour relations, wages, targets for employment of disadvantaged groups such as women or persons with disabilities, and in some cases sanctioned by state institutions, such as the legislature and the Government. Informal forms of governance beyond the state are an old phenomenon in the Netherlands. Resources of legitimacy have thus

[100] For a critical analysis, see Besselink 2007.

traditionally not been identified with the state, and this might contribute to a relative openness to globalisation and its legitimacy, which suits the Netherlands well in as much as its economy is one of the most exposed to the international financial, social, technological, fiscal and trade environment.

There is obviously a potential problem with this approach that can be put in terms of the medieval canon law adage *quod omnes tangit ab omnibus approbari debet*, that can already be found in the *Codex Iustiniani*,[101] where it applied within private law, but was extended to the public sphere by the conciliarist canon lawyers in the eleventh and twelfth centuries: who are the *omnes* that are affected and must approve? What standard of being affected should apply? Are 'all that are affected' only the direct 'stakeholders' that are actually affected, or should this include those who are potentially affected? Or are in a democracy all citizens stakeholders, and all citizens to be considered as actually or potentially affected?

The broadest democratic understanding of globalisation would require parliamentary involvement in the scrutiny of international decision-making in which the Government or its officials are involved, but parliamentary involvement might also be required with regard to the forms of rule-making and governance beyond the state, at any rate when Government or its functionaries are involved in making them, that is to say in hybrid forms of informal rulemaking and governance. This, however, is requiring more than a parliament like the States General of the Netherlands at present is aware of. Hence, globalisation has lead on the one hand to the appeal of certain scholars in the field of public administration to abolish the Parliament.[102] On the other hand, there are pleas for more parliamentary awareness and attention to systematic scrutiny of international governance and decision-making in the ever denser and less transparent web of ministers, diplomats and civil servants in formal and informal networks, which should be paired with a more systematic parliamentary follow-up of the work that is already done by parliamentary delegations to such institutions as the World Bank and the IMF's Parliamentary Network,[103] the Netherlands parliamentary delegations that every year form part of the delegation to the United Nations, and the delegations that are members of the NATO and Council of Europe Parliamentary Assemblies.[104]

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[101] 'CJ.5.59.5.2: *Imperator Justinianus. Tunc etenim, sive testamentarii sive per inquisitionem dati sive legitimi sive simpliciter creati sunt, necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur*.' ([On guardianship.] Emperor Justinian. For in such cases [acts of guardianship that dissolve the guardianship] the guardians, whether testamentary statutory or appointed with or without inquiry, must all give their consent, so that what touches all, must be approved by all.) Translation by Fred Blume, http://uwdigital.uwyo.edu/islandora/object/wyu%3A45047#page/284/mode/2up/search/5-59.

[102] In 't Veld, R. (2002, March 22). *Volksvertegenwoordiging moet worden afgeschaft* (Parliament should be abolished). NRC Handelblad.

[103] See http://www.parlnet.org/about.

[104] See Besselink, above n. 98, part III.

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3.4 Judicial Review

3.4.1 Here also we distinguish between forms of international law that exist under treaty law and informal international or transnational law that is made by non-state actors.

Public international law: educational sanctions against Iran As regards the first, a good example of the Dutch courts taking a 'constitutionalist' approach to international law is when they adjudicated the implementation of UN sanctions against Iran under Security Council Resolution 1737. This Resolution under Chapter VII of the UN Charter contains a paragraph in which the Council '[c]alls upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems'. The EU adopted a Common Position on 27 February 2007 which provides that the Member States shall, in accordance with their national legislation, take the necessary measures to prevent specialised teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and to the development of nuclear weapon delivery systems.[105]

This was implemented by a sanctions measure which prohibited access to data and locations mentioned in a list, and the provision of specialised, nuclear proliferation sensitive education to Iranian nationals, with the exception of academic undergraduate studies, unless exempted by the Minister. Perhaps this very strict sanctions regime was inspired by the fact that in the early 1970s, Abdul Qadeer Khan was trained in the Netherlands and put his expertise into developing the nuclear bomb for Pakistan. He also offered the designs to other states, allegedly Libya, North Korea, Iran and China, as well. However that may be, in the Iranian sanctions case the courts struck down the finding that the measure unlawfully discriminated between Iranian students and non-Iranian students unnecessarily and in an unjustified manner that is contrary to Art. 26 ICCPR and the ECHR (Art. 14 in connection with Protocol no. 1, Art. 2 and Protocol no. 12). The *Hoge Raad* held that the Security Council Resolution as well as the EU Common Position were binding and directly effective on the basis of Art. 94 Constitution, but indicated that the sanctions had to be in conformity with national law. It left an amount of discretion as to how to achieve the aims of the Resolution, thus necessitating acting in conformity with such international obligations as are contained in the ECHR and ICCPR.

[105] Article 6, Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran, [2007] OJ L 61/49.

The *Hoge Raad* explicitly referred to the Court of Justice's judgment in *Kadi I*,[106] as the courts of lower instance had done. This confirms again that Dutch courts are prepared to take constitutionalist concerns into account by relying primarily on international human rights sources, in particular if they can find some precedent in the case law of the European Courts or other authoritative international bodies.

Informal international law: technical standards Many informal standards and rules that have been developed in a transnational context by non-state actors are of a technical nature, whatever the field of application of those standards.[107,108] Many of the standards in the field of finance are turned into hard law via EU law, for instance the Basel Committee's standards on banking solvency, the International Organization of Securities Commission's (IOSCO) standards on trading in stock and financial trading instruments and the IASB standards on accounting have found their way into the EU Capital Requirement Directive, the Prospective Directive, the Markets in Financial Instruments Directive and the International Accounting Standards Regulation. These are then implemented or directly applied domestically.

As far as the informal international output is not mediated through EU law, the constitutional rules determining the position of formal international law in the national legal order are not really applicable in as much as these relate to treaty or treaty based law. Yet, these informal standards are applied also in law, even in the case law of the highest courts, although often this is most evident in the opinions of the Advocate General to the *Hoge Raad*. None of these cases have concerned in any manner a conflict between domestic law and the applicable standard, but have always involved the application of an international standard in order to determine the appropriate, but open or vague domestic legal norm.[109]

Finally, we may refer to the Dutch case law on the principle of publicity of legislation[110] of standards that are developed by private actors (often based on international standards or agreements) to which national legislation refers, thus rendering the private standard binding on everyone. This illustrates the approach

[106] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-06351.

[107] *Hoge Raad* 14 December 2014, ECLI:NL:HR:2012:BX8351.

[108] On private and hybrid standard setting in the Netherlands (and its elation to international and European standard setting by the ISO and ESO), Stuurman 1995; Evers 2002; Evers 1999, pp. 1814–1815; Stuurman and Wijnands 2002.

[109] For a case study on the Netherlands with regard to standards issued by the Basel Committee, IOSCO and IASB, see Besselink 2012b. Case law applying standards in this field is *Hoge Raad*, 25 November 2005, LJN: AU2275; *Hoge Raad* 24 April 2009, LJN: BG8790; references, sometimes elaborately, by the Advocate-General in HR 13-11-2009, LJN: BG5866; HR 16-11-2007, LJN:AZ7371. A case concerning the liability of the DNB as successor to the supervisory agency Verzekeringskamer, is *Hoge Raad*, C04/279HR 13-10-2006, LJN: AW2077, in which it concludes to a marginal form of review, taking into account the discretion of the supervisor. The Advocate-General in this case explicitly referred to the first of the Basel Committee's 'Core Principles for Effective Banking Supervision', concerning 'legal protection' for the supervisors as a starting point for the assessment of liability.

[110] See also Sect. 2.5 above.

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taken to private regulation. In the leading case on this matter, *Knooble*,[111] the issue was that a technical standard that was legally binding on architects and builders was available only after payment of a considerable sum of money to the standardisation institute involved, the Netherlands Standardizaton Institute (NEN), whose major income derives from such payments. Knooble complained in court that by legislative reference to the relevant NEN-standards, these became binding on private citizens; however, these have not been published in conformity with the Constitution and organic legislation on the publication of legislative acts, and hence were not binding on it. At first instance the District Court of The Hague held that indeed the relevant standards became legislation and hence would need to be published in accordance with the relevant constitutional and legislative provisions, in the absence of which they could not be binding. On appeal, the Court of Appeal of The Hague reversed this judgment. The reversal was upheld by the *Hoge Raad*. It considered that the references in the applicable legislation did not render the standards binding legislation: the NEN-standards have not been set by a body pursuant to a legislative power attributed or delegated to it by the Constitution or an Act of Parliament, and are hence not legislative acts which need to comply with the applicable rules on publication and accessibility of legislative acts.[112,113] Significantly, the *Hoge Raad* added that although the standards are not legislative in character, they are indeed 'norms' that are generally binding on private parties.[114] This confirms the view that citizens can be bound both by official legislation as well as by privately established norms that are generally binding by reference to them in official legislation.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 The Netherlands has a set of social rights provisions in the first chapter of the Constitution, and is a party to all human rights instruments that guarantee social rights, both in the UN and European contexts. However, the legal status of these rights is quite weak. Neither the national constitutional nor the international social rights provisions are deemed enforceable in court and they are generally considered to not be directly effective. In the political discourse, with few exceptions, these rights do not play a prominent role, and usually only play any role at all in a rather distant background.

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[111] District Court The Hague 31 December 2008, ECLI:NL:RBSGR:2008: BG8465; Court of Appeal The Hague 16 November 2010, ECLI:NL:GHSGR:2010:BO4175; Hoge Raad [Supreme Court] 22 June 2012, ECLI:NL:HR:2012:BW0393 respectively.

[112] Ibid., para. 3.8.

[113] The Netherlands *Raad van State* [Council of State] reached a similar conclusion in a case decided on 2 February 2011, ECLI:NL:RVS:2011:BP2750.

[114] HR 22 June 2012, para. 3.12.

One exception might be the debate in 2014 and 2015 on the most minimal support for illegal migrants that have lost the right to remain and are supposed to leave the country, the so-called 'bed, bath and bread' facility, which even nearly led to a cabinet crisis in 2015.

In decisions of the European Committee of Social Rights, the supervisory committee of the European Social Charter (published 1 November 2014), in two cases brought by the *Council of European Churches v. the Netherlands* (No. 90/2013) and the *European Federation of National Organisations working with the homeless (FEANTSA) v. the Netherlands* (No. 86/2012), the Committee held that withholding food, water, housing and clothes from aliens who are not lawfully residing in the Netherlands is an infringement of Art. 13(4) and 31 of the European Social Charter.

Although these provisions of the European Social Charter are not directly effective in the sense of Art. 94 Constitution, nor are the views of the Committee legally binding, the *Centrale Raad van Beroep*, the competent highest administrative court, decided that the views of the Committee must be taken into account in its interpretation and application of Arts. 3 and 8 ECHR. On that basis it gave an injunction to provide for a basic arrangement of facilities, to wit a shower, a bed for the night, breakfast and an evening meal ('bed, bath and bread') during a period of two months in relevant cases.[115] This case law necessitated a policy change for the Government of the day, which nearly collapsed under the divergences within the coalition over the details of arranging for the minimum facility, which was overcome by a political compromise, the details of which remain unclear in practice, but which gives municipalities leeway to provide minimum support.

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[115] *Centrale Raad van beroep* 17 December 2014, ECLI:NL:CRVB:2014:4259.

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The Constitution of Luxembourg in the Context of EU and International Law as 'Higher Law'

Jörg Gerkrath

Abstract The Constitution of Luxembourg (1868) is characterised in the report as rather a historic and political document than a truly normative one. Its style and wording are typical of a 19th century document, and thus there is a difference between the written document and the 'living constitution'. The chapter on fundamental rights is relatively brief and fragmentary, with some widely recognised principles missing; the standards do not go beyond the standards of the ECHR. Luxembourg has embarked on a process of adopting a new Constitution, which is broadly set to continue the evolutionary constitutional tradition. In the Luxembourgish legal order, international law is regarded as 'higher law', a doctrine that is expected to be formalised in the new Constitution. The powers and history of the Constitutional Court, which started its work in 1998, are described as rather limited compared to other European constitutional courts; the proposed new Constitution envisages its abolition, to be replaced by the Supreme Court. EU and international measures are immune from constitutional review, and there has never been a challenge to national measures implementing EU law. However, some reservations with regard to the European Arrest Warrant have been expressed by the *Conseil d'État*. Luxembourg's approach to extradition for offences of political nature is more protective than elsewhere.

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Constitution of Luxembourg (Constitution) falls within the category of constitutions tending to be more 'evolutionary' in nature.[1] Although it is clearly part of the positive law in force, it is at the same time considered rather a historic and political document than a truly normative one. It has developed over the last 200 years in response to political change and historic events. The country, of which its international status as a Grand Duchy, independence and current borders were established by international agreements (Final Act of the Vienna Conference in 1815 and the Treaties of London of 1839 and 1867), suffered through a little over 50 years of constitutional instability before it settled, in 1868, into its current Constitution. Although it was revised 34 times between 1919 and 2009, Luxembourg's Constitution is thus one of Europe's oldest written constitutions remaining in force.[2] Many of its provisions even date back to Luxembourg's first liberal constitution of 1848, which itself was greatly inspired by the Belgian Constitution of 1831. Its style and wording are thus typical of a 19th century document.

Consequently there is quite a difference between the written document and the 'living constitution', for instance regarding the relations between the main political organs of the state. A constitutional court with limited powers was established only in 1997. It does not have the power to invalidate legislative acts, which can only be submitted to it by ordinary courts through a preliminary ruling procedure.

Luxembourg has embarked on a process of modernising its Constitution more generally. A proposal to amend the Constitution deposited with the *Chambre des Députés* (the unicameral Parliament of Luxembourg, hereinafter *Chambre*) on 21 April 2009 (hereinafter 2009 Revision Proposal)[3] is expected to be finalised and submitted to referendum in early 2018. This revision will result in a widely amended and restated Constitution, to be adopted in accordance with the current revision procedure, continuing Luxembourg's evolutionary tradition. At the time of

[1] The text of the Luxembourgish Constitution in French can be accessed at: http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution_gdl.pdf.

[2] For further developments see: Gerkrath and Thill 2014; and Gerkrath 2012.

[3] *Proposition de révision portant modification et nouvel ordonnancement de la Constitution* of 21 April 2009, doc. parl. No. 6030. Cf. Gerkrath 2013, pp. 449–459.

writing (February 2016), the Revision Proposal is still being discussed within the Parliamentary Committee on Institutions and Constitutional Amendment, in the form of a revised working draft prefiguring the future Constitution of 2018 (hereinafter Working Draft).

Due to its historical relationships with the Netherlands and Belgium, Luxembourg's constitutional tradition has been strongly influenced by the constitutional traditions of these countries. The first advisory opinion of the *Conseil d'État* (State Council with advisory powers, also highest administrative court until 1996) on the 2009 Revision Proposal makes frequent reference to the Belgian and Dutch Constitutions.[4]

1.1.2 The role of the Constitution has never been subject to extensive theoretical debate in Luxembourg. In a very pragmatic manner, the long-standing leading handbook on the Constitution describes its objective as 'to determine the constitutional basis of the state, to guarantee the rights and freedoms of the citizens and to organise the public powers'.[5] Divided into 13 chapters and 125 articles, dedicated mostly to institutional and organisational aspects, the Constitution does not include a preamble, which could provide information about its leading rationale. Compared to other constitutions, the part on fundamental rights appears to be neglected, whereas the rules on the functioning of the state and on the exercise of the powers by the institutions are developed in greater detail. The Constitution of the Grand Duchy does not contain a special chapter on international relations; neither does it contain any provision on EU membership.

Luxembourg's Constitution establishes the principles on which the state is based, regulates the powers of state organs and guarantees fundamental rights. With respect to the sovereignty and organisation of Luxembourg, the Constitution makes it clear that the Grand Duchy is a democratic, free, independent and indivisible state headed by a constitutional monarch and governed by a system of parliamentary democracy. Sovereignty resides in the Nation but is exercised by the Grand Duke in accordance with the Constitution and national law (Art. 32(1)).

The Constitution specifically mentions the executive, legislative and judicial branches of Luxembourg's system of government, as well as the *Conseil d'Etat,* the main advisory organ, which understands its proper role as 'guardian of the Constitution'[6] and exercises a moderating function within the parliamentary procedure similar to that of a second chamber.

Although not specifically mentioned in the Constitution, the rule of law is undoubtedly present in Luxembourg's constitutional system (see more in Sect. 2.1.3). However, any perceived lack in the current Constitution is expected to be rectified in the restated Constitution, as the second unnumbered paragraph of

[4] Opinion *Conseil d'Etat* 6 June 2012, No. 48.433, doc. parl. No. 6030/06.

[5] See Majerus 1983, p. 42.

[6] http://www.conseil-etat.public.lu/fr/historique/index.html.

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Art. 2 of the 2015 Working Draft includes an express recognition that Luxembourg is founded on the principle of the rule of law and on respect for human rights.[7]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 With regard to EC/EU membership, Luxembourg has pursued a strategy of minimal adjustments. The Grand Duchy ratified the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the Treaty instituting the European Defence Community (EDC Treaty) in absence of any constitutional provision on the transfer or delegation of powers to international organisations. Contrary to the opinion of the Government, which thought that the Constitution implicitly allowed such a transfer, the *Conseil d'État* assumed that the Constitution did not. Regarding at least the ECSC Treaty, the *Conseil d'État* believed that ratification was possible on the basis of customary constitutional law, without however indicating the exact origin and content of these customary rules. It must be inferred that it had in mind the prior participation of Luxembourg in the *Zollverein*, the German Confederation and the Benelux Union, which had also occurred in the absence of any written constitutional clause.

For reasons of expediency, the *Conseil d'État* did not oppose the legislature's approval of both treaties, but urged an immediate constitutional amendment to correct the perceived lacuna. Although the *Chambre* approved the ECSC Treaty on 23 June 1952 and the EDC Treaty on 24 April 1954, respectively, it took another two years for the necessary constitutional amendments to be adopted.

Thus, on 25 October 1956, the Constitution was amended to add Art. 49*bis,* which allows for 'the exercise of powers reserved by the Constitution to the legislative, executive, and judiciary branches to be temporarily vested, by treaty, in institutions of international law'. Simultaneously, Art. 37 was modified to require such treaties to be approved by a law meeting the voting requirements established for a constitutional amendment in Art. 114. The regrettable wording of Art. 49bis, allowing only 'temporary' transfer of competences, is to be modified in the course of the current revision procedure. In the past this provision has always been construed very widely and has not hampered any ratification of subsequent EC/EU founding, revision or enlargement treaties. A proposal made in 2009 to introduce an entire new chapter on the European Union was ultimately withdrawn without debate.

Only two subsequent constitutional amendments have been adopted, in 1994 and 1999, to address Luxembourg's obligations under the EU treaties. Nothing in the amendments refers explicitly to the EC, the EU or to European integration.

[7] In absence of any official English version, all translations of the original French legal and constitutional texts and judgments are those of the author.

First, at the moment the Maastricht Treaty was signed and ratified, the Constitution explicitly reserved voting rights or candidature in national and municipal elections for Luxembourgers (Arts. 9 and 107). However, Art. 114 – on constitutional revision – required dissolution of the *Chambre* in order to amend the Constitution. As voting rights for EU citizens were not considered to be self-executing but requiring the adoption of secondary EU legislation and in order not to slow down the ratification of the Maastricht Treaty, the *Conseil d'État* opined that an immediate constitutional amendment was not obligatory. Thereafter, over the next two years, discussion revolved around the compatibility of the Constitution with the Maastricht Treaty and the adequacy of the Art. 114 amendment procedure with regard to European integration. Without modifying Art. 114 at that stage, Arts. 9 and 107 were finally amended by a revision Act of 23 December 1994, permitting the law to confer by exemption the right to exercise political rights on non-Luxembourg nationals.

Secondly, the Constitution initially reserved access to public employment to Luxembourg citizens (Art. 10bis(2), formerly Art. 11(2)). In the aftermath of a judgment of the European Court of Justice (ECJ) from 2 July 1996,[8] the Constitution had to be revised.

Following its previous and invariable case law since 1980, the ECJ indeed held that the general prohibition for non-Luxembourgers to work in the public service exceeded the limits of the exception provided for in Art. 48(4) EC. In not complying with its obligation 'to open the areas in question to nationals of other Member States by restricting application of the nationality condition to only those posts which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities', Luxembourg failed to fulfil its obligations under the Treaty.

In reaction to a draft revision, the *Conseil d'État* did not agree in the first place that a revision was necessary because the Constitution did not formally restrict the access of non-Luxembourgers to employment in the public service and, hence, would not contradict Art. 48(4) of the (Maastricht) Treaty.

However, in the context of the delivery of its opinion on the bill opening the public service to EU citizens, the *Conseil d'État* accepted the argument that this proposal would require the revision of Art. 10bis(2) (formerly Art. 11(2)). As a result, Art. 11(2) was then revised in April 1999, stating that the law determines the eligibility of non-Luxembourgers for public employment.[9]

1.2.2 Until 2003, under the original rigid amendment procedure (Art. 114), there were three major constraints to amending the Constitution. First, the requirement to

[8] Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-03207.

[9] The effective opening of Luxembourg's public service results from the Law of 18 December 2009 and a Grand Duchy Regulation of 12 May 2010 which lists the employment positions that 'involve direct or indirect participation in the exercise of public power' and which are, therefore, reserved for nationals.

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dissolve the *Chambre* after the vote of a declaration to amend nominated provisions of the Constitution and to re-elect the *Chambre*, which then had the power to amend these provisions. Secondly, the assent of the Grand Duke (even though this became a formality after 1919) and, thirdly, a positive vote from two-thirds out of a quorum of three-quarters of the 60 Members of Parliament (MPs) being present. This, in practice, set the required majority at 30 out of at least 45 members present. Consequently, the main constraint was not this so-called 'double qualified majority', but the preceding phases of the declaration to amend, i.e. the dissolution and re-election of the *Chambre*.

The rigidity of the initial procedure was considered to hamper the desired general overhaul of the Constitution as well as quick adaptations to EU requirements. All of the above-mentioned EU-related amendments were, however, adopted successfully – although sometimes with some delay – under the initial procedure.

In the context of the 1994 revision, regarding the voting rights of EU citizens, there was a rather heated discussion of the need to change the single constitutional amendment procedure in favour of a so-called 'dual' procedure. An attempt had been made to modify the constitutional amendment procedure to provide for two alternative constitutional amendment procedures: a less rigorous (and faster) procedure for amendments needed to ensure conformity with treaty obligations and a more rigorous (and somewhat slower) procedure for all other constitutional amendments. The *Conseil d'État* opposed the creation of such a dual system, preferring to retain a single procedure. The 2003 amendment conserved the single process but shortened the time needed to complete the process, by discarding the requirement for dissolution of the *Chambre* between the first and second votes on a constitutional amendment.

Today any revision thus requires two consecutive votes of the *Chambre* by a majority of at least two-thirds of its members. Voting by proxy is not permitted. There must be an interval of at least three months between the two votes. If within two months of the first vote more than one quarter of the 60 members of the *Chambre* or 25,000 voters submit a petition, the text adopted at first reading is put to a referendum. In this case there is no second reading in the *Chambre*, and the revision is passed if it receives a majority of valid votes. As any revision of the Constitution takes the form of a law, the bills and proposals for constitutional reform follow the normal legislative procedure, unless otherwise specified.

Article 114(2) requires a majority of two-thirds of the members of the *Chambre*, without providing a quorum, but also without permitting proxy voting. Thus, the qualified majority required for the adoption of revision Acts was extended to two-thirds of all members of the House, in total 40 members. This is still a relatively high majority, maintaining the solemnity of constitutional revision and, thus, the rigidity of the Constitution. In practice, most revision Acts are adopted unanimously. Note that since the 2003 amendment, the *Chambre* is clearly the sole holder of revision power. The ability to submit a text adopted on first reading to a referendum is to be regarded as a safeguard in this regard and has not yet been used.

In practice, the formal distinction between constitutional amendment Acts and ordinary legislative acts is blurred by the existence of specific acts, which can only

be adopted in accordance with the special majority requirement of Art. 114(2). The Constitution provides for four such cases: ratification of treaties transferring sovereign competences (Art. 37 in combination with Art. 49bis); declaration of war (Art. 37); determination of the number of MPs to be elected in each district (Art. 51); and a nationality condition for mayors and their deputies (Art. 107).

1.2.3 As mentioned in Sect. 1.2.1, the two EU-related amendments adopted in 1994 and 1999 aimed to eradicate explicit conflicts between the wording of the Constitution and the requirements of EU law. Both can be considered as minor amendments, as they simply allowed the legislator to provide for the necessary adaptations allowing nationals of other Member States to exercise rights stemming from EU law in Luxembourg.

No obstacles other than the requirements of the amendment procedure have been encountered, and no external advice from legal scholars or experts has been sought.

1.2.4 Constitutionalising Luxembourg's EU membership has been put on the agenda by the opinion of the *Conseil d'État* of June 2012 on the pending constitutional amendment proposal from April 2009. Although the Grand Duchy is one of the founding states of the European Union, its present Constitution does not contain any reference to this membership or to its constitutional foundations and implications.

A previous parliamentary proposal made by an MP in 2009 to introduce a completely new chapter on the European Union has never been discussed in substance. It was withdrawn from the registry of the *Chambre* without explanation when the Committee on Institutions and Constitutional Amendment started working on the more general proposal of restatement of the Constitution in November 2009.

In its opinion of June 2012, the *Conseil d'État* recommends constitutionalising Luxembourg's participation in the process of European integration via a new Art. 5. Furthermore, the *Conseil d'État* suggests further insertions: a reference to the voting rights of European citizens, an adoption of the ECJ's formula with respect to access to public employment, and codification of the Grand Duke's power to adopt regulations in order to assure compliance with the legal instruments adopted by the European Union, rather than proceeding by parliamentary statute. As previously mentioned, the 2009 Revision Proposal has yet to come to fruition, but a version thereof is expected to be approved sometime in 2018.

The Working Draft as it stands in February 2015 contains a total of five proposals for EU-related amendments. The new Art. 5 reads: 'The Grand-Duchy of Luxembourg participates in European integration. The exercise of powers of the state may be transferred to the European Union and to international institutions by an Act of Parliament adopted by qualified majority.' Article 10, on the political rights of Luxembourg citizens, would be supplemented by a second paragraph stating: 'The law organises the exercise of political rights by citizens of the European Union.' Article 11 contains a reference to the ECJ's well-established case law regarding access to public employment. It provides that: 'The law determines access to public employment. It may reserve for Luxembourgers public employment including direct or indirect participation in the exercise of public authority and

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in the functions having as their object the safeguard of the general interests of the state.' Article 49(3) allows the Grand Duke to 'adopt the necessary regulations for application of the legal acts of the European Union'. Finally, Arts. 90 and 98 provide for the *ex ante* control (through consultative opinions of the *Conseil d'État*) and *ex post* review (by binding decisions of the courts) of Acts of Parliament and regulations with regard to 'higher law', namely the Constitution, international treaties, EU legislation and the general principles of law. According to Art. 98, '[t]he courts shall apply Acts and regulations only in so far as they conform to the norms of higher law'.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Since its amendment in 1956, the Constitution authorises the temporary transfer of the exercise of legislative, executive and judicial powers to institutions established under international law (Art. 49bis). The ratification of such treaties needs to be approved by the *Chambre* following the special two-thirds majority requirement applicable to constitutional amendments (Art. 37).

The Constitution does not contain any explicit rule on the legal value of international or European Law within the domestic legal order. Nonetheless, according to well-settled case law and the position of the *Conseil d'État* as well as Luxembourgish scholars, self-executing international treaties enjoy full primacy with regard to the provisions of internal law, including the Constitution itself.[10]

The case law on this point was developed from the early 1950s when first the *Cour de cassation* (the highest civil court) and subsequently the *Conseil d'État* (as the former highest administrative court) reversed the previous position that judicial control of the compliance of Acts of Parliament with international treaties was not possible because of the principle of separation of powers.[11]

According to the reference decision of the *Conseil d'État* in 1951, 'an international treaty incorporated into domestic law by a law of approval is law of superior essence having a higher origin than the will of an internal organ. It follows that in the case of conflict between the provisions of an international treaty and those of a subsequent national law, international law must prevail over national law.'[12]

The wording of this decision is clearly very wide, as the judgment states without distinction that an international norm prevails over the will of any internal organ. It will be noted, however, that in 1956 the *Chambre* expressly rejected a

[10] Kinsch 2010, p. 399.

[11] *Cour de cassation, arrêts des 8 juin 1950*, Pasicrisie lux. 15, p. 41, et 14 juillet 1954, *Chambre des métiers c. Pagani,* Pasicrisie lux. 16, p. 151; JT 1954, p. 694, note Pescatore 1962.

[12] *Conseil d'Etat*, (*Comité du contentieux*), 28 *juillet* 1951, *Dieudonné c/Administration des contributions*, Pas. lux. t. XV, p. 263.

governmental constitutional amendment bill, which provided that '[t]he rules of international law are part of the national legal order. They supersede all other law and national provisions.' According to this draft, primacy would have encompassed constitutional provisions.

The *Conseil d'État*, however, implicitly accepted such a general primacy in an opinion of 26 May 1992 on the draft Act Approving the EU Treaty. Indeed, it considered that

> [i]t should be borne in mind that under the rule of the hierarchy of legal norms, international law takes precedence before national law and, in the case of conflict, the courts shall dismiss domestic law in favour of the Treaty. As it is important to avoid a contradiction between national law and international law, the *Conseil d'État* insists that the related constitutional amendment take place within due time to prevent such a situation of incompatibility.

In the case of conflict of an international or European engagement with the Constitution or legislative acts, national standards should be subject to a constitutional revision or amendment before the international commitment is approved by the competent national authorities. Once approved, the respective international norms enjoy, in the pure monistic tradition, full primacy over rules of domestic law, even of constitutional value.[13]

This rule also applies to the secondary legislation of the European Union.[14] All (civil and administrative) courts have accepted the full supremacy and direct effect of EU law in the very terms of the ECJ's case law, to which they regularly refer.

Acts of the *Chambre* approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95*ter*(2)). In Luxembourg, this is considered as a consequence of the primacy of international treaties. In effect this means that cases such as *Lisbon* and *ESM* in Germany cannot arise in Luxembourg. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's competence. Until now, no such Act has, however, been submitted to the Constitutional Court as a preliminary question by an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing secondary EU legislation.

1.3.2 Luxembourg's Constitution has never been based on a conception of absolute sovereignty. In the absence of any clause on the transfer or delegation of sovereignty, the *Conseil d'État* stated already in 1952 that '[a] state may and must renounce certain parts of its sovereignty if the public good, the ultimate purpose of the state's organisation, requires it'.[15] As the Constitutional Court may not review

[13] *Cour d'appel, arrêt du 13 novembre 2001*, No. 396/01 V, *Annales du droit luxembourgeois*, 2002, éd. Bruylant, p. 456. *Cour supérieure de justice (assemblée générale), arrêt du 5 décembre 2002, No. 337/02, Annales du droit luxembourgeois*, 2003, éd. Bruylant, p. 683.

[14] Conseil d'Etat, 21 novembre 1984, Pasicrisie lux. 26, p. 174.

[15] Opinion on the Ratification of the ECSC Treaty, doc. parl. No. 395/2, p. 3.

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the constitutionality of Acts approving international treaties, there is no pertinent case law from this court.

One of the particular characteristics of Luxembourg's domestic legal order lies in the fact that its very existence results from international law. Established as an independent state by the Final Act of the Congress of Vienna of 9 June 1815, the Grand Duchy's independence was confirmed by the Treaties of London of 19 April 1839 and 11 May 1867. Therefore, far from constituting a threat to national sovereignty, international law is understood in Luxembourg as a 'vital guarantee of the existence and survival of the state'.[16] Moreover, Luxembourg's courts have had no difficulty in recognising the pre-eminence of international law and the primacy of EU law, including in respect of a constitutional provision.[17] This state of affairs also explains why it was not considered necessary to write a provision into the Constitution that would more explicitly authorise transfers of competences to the Union.

In Luxembourg, the Constitution long ago ceased to be the only supreme law. At the time of ratification of the Maastricht Treaty, some criticised the 'suspension' of the Constitution which occurred, in that ratification of the Treaty took place before the constitutional amendment giving citizens of the Union the right to vote in municipal elections.[18] There is now a consensus about the existence of a set of norms ranked as supra-legislative and designated by the term 'higher law', comprising the Constitution, international law and the general principles of law. It is within the remit of the *Conseil d'État* to monitor the compliance of draft bills and draft regulations with these rules of higher law. The amended Act of 12 July 1996, reforming the *Conseil d'État*, states in its Art. 2(2) that '[i]f it considers a draft bill to be contrary to the Constitution, to international agreements and treaties, or to the general principles of law, the *Conseil d'État* shall state this in its Opinion. It shall do the same, if it considers a draft regulation to be contrary to a rule of higher law.'

1.3.3 There are no limits *ratione materiae* with regard to the extent to which powers can be transferred to the EU, as there are no such limits to constitutional amendments in general. Neither the text of the Constitution nor case law nor constitutional commentary refer to such limits under Luxembourgish law.

The Grand Duchy is an 'independent' state (Art. 1). The same statement appeared in the previous constitutional texts of 1848 and 1856. These earlier constitutions, however, very clearly put this independence into perspective by going on to declare that Luxembourg was 'part of the German Confederation'. The 1856 text went even further by stating that the Grand Duchy 'participates in the rights and obligations arising from the Federal Constitution. These rights and these obligations cannot be derogated by the internal legislation of the country.'

Be it a matter of the past within the German Confederation or of the present within European integration, the constitutional proclamation of independence has

[16] Cf. Wivenes 2002, p. 267 et seq.

[17] Cf. Pescatore 1962, p. 97 et seq.; Wivenes 2002, p. 21; Kinsch 2010, p. 399.

[18] Cf. Bonn 1992.

never stopped the Grand Duchy from participating in integration exercises with a constitutional dimension. Moreover, at no time has the preservation of the independence of the state ever been seriously discussed as a possible limit to Luxembourg's participation in the European integration process.[19]

Its successive incorporation in the German Confederation (1815–1866), the '*Zollverein*' (1842–1918), the Belgo-Luxembourg Economic Union (from 1921) and the Benelux Union (from 1944) have, on the contrary, enabled Luxembourg to acquire indispensable experience for being prepared for the legal implications of its membership of the European Communities and Union.

The unfortunate wording of Art. 49*bis* allowing transfers of such powers to international institutions only temporarily has been interpreted very widely and has not in practice prevented any transfer of competencies to the EC or the EU, which are known to be based on treaties concluded for unlimited duration.

Article 5 of the pending Working Draft will thus remove this inconsistency, stating: 'The exercise of state powers can be transferred to the European Union and international institutions by a law adopted by qualified majority.'

1.3.4 The Constitution is silent about its status as supreme law in the national legal system. The Constitutional Court can be asked through preliminary questions from the ordinary courts to review the constitutionality of legislative acts (Art. 95ter). However, its judgments have only declaratory value. An Act declared contrary to an article of the Constitution will have to be set aside by the ordinary court that raised the question and all other courts that intervene in the same case. It will, however, remain in force unless the *Chambre* adopts an Act to modify or abrogate it. In practice, the *Chambre* has decided in several such cases to amend the Constitution in order to abolish the inconsistency, rather than to modify the legislative act. Finally, as a consequence of the supremacy of the Constitution, none of its provisions may be suspended (Art. 113).

Legislative acts approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95ter (2)). This is understood in Luxembourg as a consequence of the primacy of international law.

More than an EU-friendly interpretation, the Luxembourgish courts have adopted an attitude of deference towards international law in general and EU law in particular, often echoing the case law of the ECJ word for word. Indeed, since the 1950s they have confirmed that international treaties enjoy primacy over domestic law because they are considered as higher law in essence.

1.4 Democratic Control

1.4.1 Luxembourg's Constitution does not contain specific amendments concerning the rules governing the participation of the *Chambre* in EU affairs. Although Prime

[19] Cf. Wivenes 2002, p. 267 et seq.

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Minister Juncker suggested such an amendment in the course of the ratification procedure of the Lisbon Treaty in 2009, the *Chambre* did not accept his proposal. It allegedly feared that it was not sufficiently staffed to face this responsibility.

Thus it is a simple 'Memorandum on Cooperation between the *Chambre* and the Government of the Grand Duchy of Luxembourg in the Field of EU Policy', which is annexed to the rules of procedure of the *Chambre,* that governs the rights and duties of both institutions in this respect.[20] Introduced on 7 May 2009, this memorandum contains in particular rules on the right of the *Chambre* to be informed on issues of European policy.

The Lisbon Treaty recognises the right of national parliaments to contribute actively to the good functioning of the Union (Art. 12 TEU). From the review of official documents of the European institutions to the transposition of directives into national law, the action of the *Chambre* in the political sphere of the European Union is thus manifold.

National parliaments are indeed involved by monitoring the activity of their respective national governments on the European level. In the Grand Duchy of Luxembourg, a parliamentary committee invites the ministers to its sessions before and after Council meetings.

The *Chambre* contributes to the monitoring of respect of the subsidiarity principle laid down in the Treaty of Lisbon.[21] Beyond these two main powers, the *Chambre* participates in inter-parliamentary cooperation within the Union. Inter-parliamentary meetings are held mainly within the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) and the Conference of Presidents of Parliaments of the European Union. Information on the analysis of EU documents is transmitted between national parliaments through the platform for EU Interparliamentary Exchange (IPEX) database.

The control exercised by the *Chambre* over the Government in the field of European affairs appears altogether rather modest compared to practices in other Member States. There are no elements of this control that merit recommendation more widely as a best practice.

1.4.2 Direct democracy only plays a limited role in Luxembourg's parliamentary system. Introduced in 1919 for legislative matters (Art. 51(7)) and in 2003 for constitutional amendments (Art. 114), referendums have only been organised three times: in 1919 on the dynastic question and on economic union to be concluded with France or Belgium; in 1937 on a bill allowing dissolution of the Communist party; and in 2005 on the Treaty establishing a Constitution for Europe. An Act of 4 February 2005 lays down the more detailed rules on the organisation of referendums.[22]

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[20] *Aide-mémoire sur la coopération entre la Chambre des députés et le Gouvernement du Grand-Duché de Luxembourg en matière de politique européenne*.

[21] See Gennart 2013.

[22] *Loi du 4 février 2005 relative au referendum au niveau national*, Mémorial A, No. 27 of 3 March 2005, p. 548.

The very first referendum on constitutional amendment will most likely be organised in early 2018 on the currently pending Revision Proposal. On 7 June 2015, three questions regarding the debated elements of the future Constitution were put to a consultative referendum. One question related to granting voting rights to foreign residents in national elections, while the other two were on reducing the minimum age for voting and limiting the duration of ministerial mandates. All three proposals were rejected.

The only referendum related to EU matters was held on 10 July 2005 on the ratification of the Treaty establishing a Constitution for Europe.[23] As a result, 56.52% of the voters said 'Yes'. Luxembourg is indeed regarded as one of the EU's most enthusiastic Member States, and most prominent political figures supported the Constitution for Europe, with both the governing coalition and the main opposition parties campaigning for a 'Yes' vote. On 28 June 2005, the *Chambre* had already approved the ratification of the treaty at its first reading. The poll was consultative in nature, but Parliament agreed to abide by the people's majority vote. The then Prime Minister Jean-Claude Juncker said he would resign if the referendum resulted in a 'No' vote.

In connection with this referendum, the question arose whether EU citizens other than Luxembourgish citizens should be allowed to vote, which was finally decided in the negative.[24] The statement of reasons of the Act on the basis of which the referendum was organised does not refer to any specific rationale as to the constitutional procedure chosen to approve the Treaty establishing a Constitution for Europe. However, the draft Act concerning this referendum notes that:

> While the referendum is, from the legal point of view, of advisory character, the legislature will nevertheless feel politically bound by the popular verdict. Therefore, it is necessary to measure the challenges raised by the consultation to be held on 10 July 2005. Due to the exceptional nature of referendums in our history, the results will leave a lasting imprint on the political life of our country.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 As mentioned above (Sect. 1.2.1), EU-related amendments have been limited to the strictly necessary in order to overcome constitutional provisions that had become contrary to EU law achievements: namely the right of workers from other

[23] *La loi du 14 avril 2005 portant organisation d'un referendum national sur Traité établissant une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004*. For discussion concerning this referendum see Dumont et al. 2012.

[24] P. 3 of the *Projet de loi portant organisation d'un référendum national sur le Traité établissant une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004*, parl. doc. No. 5443.

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Member States to have access to employment (Art. 45 TFEU) and the right of citizens of the EU to vote and to stand as a candidate in European Parliament and municipal elections.

1.5.2 The absence of EU amendments is characteristic for such a very small Member State, founded by international treaties and in which integration into the EU is perceived as a question of national interest.

The rigidity of the initial constitutional revision procedure certainly dissuaded Luxembourg from passing constitutional amendments that were not considered absolutely necessary. Twice, in the 1950s and in the 1990s, Luxembourg tolerated what were most likely unconstitutional treaty ratifications in order not to slow down the entry into effect of the ECSC and Maastricht treaties. A prior constitutional amendment would indeed have required the dissolution and re-election of the *Chambre*.

Luxembourg's constitutional culture, which may be summarised as pragmatic and somewhat deferent to international and European law, also explains to some extent the sentiment that EU-related amendments are superfluous. In addition, the level of public support for the EU has always been one of the highest throughout the Union and is shared by all political parties in Parliament. European integration has never been conceptualised in Luxembourg as a threat to constitutional rules, principles or values. Thus, only constitutional rules that have become explicitly contrary to requirements of EU law have been amended.

In the past, several scholars have underlined the fact that the current Constitution has to some extent become obsolete and urgently needs to be adapted in order to eradicate all the 'fictions' stemming from a wide difference between the old written document and the current constitutional practice.[25] It was not, however, until the advisory opinion of the *Conseil d'État* of June 2012 on the pending Revision Proposal that the introduction of EU related amendments were put on the agenda. The initial revision proposal as tabled in April 2009 by the Committee on Institutions and Constitutional Amendment only addressed internal constitutional issues.

Concerns with regard to 'waning constitutionalism' that have indeed been expressed in Luxembourg were in fact never linked to missing EU clauses but to the growing difference between the text and practice of the Constitution. As direct effect and primacy of EU law have never been put into question in the Grand Duchy, it was rather argued that the introduction of specific constitutional clauses with regard to the EU was unnecessary.

1.5.3 Within the EU, the far-reaching exercise of powers at supranational level requires a set of constitutional rules ensuring that these powers are exercised according to shared constitutional values and in the respect of a common standard of fundamental rights. This set of rules can only result from 'European

[25] See the explanatory memorandum to the 2009 amendment proposal, doc. parl. 6030/01 and the included references.

constitutional law' understood here as a combination of the Member States' national constitutions, the 'EU constitution', the ECHR and the Charter of Fundamental Rights of the EU. The harmonious coexistence of these different legal sources and their complementary relation needs to be organised by clauses of reciprocal reference and mutual respect. In this understanding, 'Europe clauses' in the national constitutions have an important role to play, as it is shown for instance by Art. 23 of the German Basic Law. It is important to amend the national constitution in order to contribute to ensuring that the exercise of delegated powers on the Union level observes the same standards as exercise on the national level. Amendments should at least include a general clause on membership within the EU, a clause on the transfer of powers and its limits and a clause on the participation of the national parliament in EU affairs.

Luxembourg's experience as one of the founding members shows, however, that it is also possible to participate successfully in the process of European integration for more than sixty years without any amendment of the Constitution referring explicitly to the EU or EU law and on the foundation of a constitutional provision that allows only temporary delegation of powers to international institutions. The absence of a Europe clause has never been considered as a lacuna endangering constitutional values or fundamental rights standards. The intended amendments within the current revision procedure are rather seen as a commitment to European integration and an overdue adaptation of the Constitution to the legal reality.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Constitution contains Chapter II 'On public freedoms and fundamental rights' (Arts. 9 to 31). This chapter has been construed progressively through different constitutional amendments. It is relatively brief and combines different types of safeguards (acquisition of citizenship, human rights, political rights, economic and social rights) without, however, embracing a clear structure. Some widely recognised principles such as a general prohibition of discrimination or a general requirement of fair trial are missing. On the whole, compared to other domestic constitutional or international documents dealing with fundamental rights, Chapter II of the Luxembourgish Constitution appears fragmentary.

The general principles referred to above are not expressed as such, although the principle of legal certainty transpires through several specific constitutional safeguards such as the right to a judge, the principle *nulla poena sine lege* and the prohibition of unlawful expropriation. Moreover, the principle of proportionality is

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anchored in the current draft of the 2009 Revision Proposal as one of the parameters to be taken into account when restrictions to fundamental freedoms are envisaged.[26]

The 2009 Revision Proposal appears more ambitious, as it introduces a wider range of safeguards and their better organisation. Having said that, while the suggested changes to the organisation have been inspired by the Charter of Fundamental Rights of the European Union[27] (Charter), this draft has been already criticised because some safeguards that are typically anchored in international human rights instruments are missing.[28]

The most relevant fundamental rights and public freedoms are discussed in Sects. 2.3–2.5.

The judicial enforcement of the constitutional safeguards is primarily a matter for the domestic ordinary courts, as opposed to the Constitutional Court, the competence[29] (and history)[30] of which are rather limited compared to other European constitutional courts. It can only review Acts of Parliament upon a preliminary request made, in a given proceeding, by an ordinary court. Private parties are not allowed to file individual complaints. Moreover, the Constitutional Court has not been endowed with the competence to assess the relation between the Constitution and international law, including such instruments as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In this respect also it was for the ordinary courts to set the standard, which they did when the *Cour d'appel* (Court of Appeal) confirmed that the ECHR takes precedence over domestic rules, including the Constitution.[31]

Within its limited scope of action, the Constitutional Court has 'progressively' interpreted Art. 14 of the Constitution in particular[32] and extended the narrowly

[26] See above Sect. 2.1.2.

[27] See the explanatory memorandum to the initial draft of the Constitution revision: 'For Chapter 2 on civil liberties and fundamental rights, the Commission on Institutions and Constitutional Revision proposes a new structure arranged like the Charter of Fundamental Rights of the European Union, around the terms dignity, equality and freedom. The guarantees in the social and economic field as well as in the environment, and the rights that citizens can claim when facing the public administration are organised under the terms solidarity and citizenship'. Doc. parl. No. 6030, p. 6.

[28] See Spielmann 2011, p. 582, referring to the opinion of the *Commission européenne pour la démocratie par le droit* (*Commission de Venise*), Opinion No. 544/2009, CDL-AD(2009)059.

[29] See Gerkrath 2008, p. 9.

[30] The Luxembourgish Constitutional Court started its work in 1998, and as of February 2015 has issued 116 judgments.

[31] CSJ (appel corr.), 13 November 2001, No. 396/01, see Friden and Kinsch 2001. On the relation between the Luxembourgish Constitutional Court and the ECHR, see Ravarani 2001, pp. 37–42.

[32] Spielmann 2011, p. 578 and p. 583. For the interpretation of Art. 14 of the Constitution, see judgments of the Constitutional Court, No. 12/02 of 22 March 2002, Mém. A – 40 of 12 April 2002, p. 672; (on this judgment see Braum 2008, p. 77); No. 23/04 and 24/04 of 3 December 2004, Mém. A – 201 of 23 December 2004, p. 2960; No. 41/07, 42/07 and 43/07 of 14 December 2007, Mém. A – 1 of 11 January 2008, pp. 2–8.

drafted principle of equality beyond the text of the Constitution: while the text of the Constitution reserves this principle for Luxembourgish citizens only, the Constitutional Court has extended it to foreigners,[33] holding that the principle of equality 'is applicable to each individual concerned by Luxembourgish law, if rights or personality are concerned'.[34] On the other hand, commentators have noted the restrictive approach embraced by the same Constitutional Court in respect of citizenship (*nationalité*). According to some, this case law is at odds with the approach embraced by the European Court of Human Rights (ECtHR).[35]

As the constitutional restatement intends to abolish the existing Constitutional Court, it will be up to a new supreme court to ultimately decide on the conformity of Acts of Parliament with the Constitution and international treaties. Provisions that are declared contrary to the Constitution or international treaties would then become invalid after the publication of the judgment (Art. 98(2)). The main reason for abolishing the Constitutional Court seems to be the wish to unify the judicial system under one Supreme Court and the resulting possibility for that court to merge review of conformity with international treaties and review of conformity with the Constitution.

2.1.2 The Constitution does not foresee a provision equivalent to Art. 31(3) of the Polish Constitution. However, the latest Constitutional Working Draft contains a new disposition which reads as follows:

> Any limitation on the exercise of fundamental rights, civil liberties and the rights of the person subject to legal proceedings as provided for by the Constitution must respect their essential content. In accordance with the principle of proportionality, limitations may be made only if they are necessary in a democratic society, and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others.

Concerning limitations to the principle of equality (Art. 10bis) by legislative acts, the Constitutional Court has developed a specific doctrine. According to its jurisprudence, legislative acts may submit certain categories of persons to different legal regimes as far as this difference proceeds from objective disparities, is rationally justified, adequate and proportionate to its aim. This formulation will be codified within Art. 16 of the Constitutional Working Draft.

2.1.3 The concept of the rule of law does not appear as such in the text of the Constitution. As noted above, the Constitution nevertheless contains specific expressions of the principle of legality, such as safeguards in the context of criminal proceedings (Arts. 12 to 14), and the prohibition of expropriation without statutory basis, fair compensation and for reasons other than for a public cause (Art. 16).

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[33] *Cour constitutionnelle*, 13 November 1998, No. 2/98.

[34] See also the judgment of the Appeal Court (4th ch.) of 6 November 2013: '[T]he constitutional principle of equality is applicable to all individuals affected by Luxembourgish law, and violation of this principle can be raised by a foreigner.' For a comment, see Kinsch 2014, pp. 84–85.

[35] Spielmann 2011, p. 585.

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The notion of the rule of law (*État de droit*) appears in the current Working Draft which foresees the following new wording of Art. 2 of the Constitution: '[Luxembourg] is based on the principles of the rule of law and respect for human rights.'[36]

Article 13 of the Constitution guarantees the right of a person not to be reassigned, against the person's will, to a court other than that designated by law. Article 86 of the Constitution spells out another aspect of the regular administration of justice by foreseeing that no court can be established otherwise than by law, and by prohibiting the establishment of extraordinary courts.

As regards the enforcement of constitutionally guaranteed rights, it should be noted that private parties do not have direct access to the Constitutional Court. However, the ordinary courts have the possibility to seize the Constitutional Court with a preliminary ruling request concerning the constitutionality of an Act to be applied in the pending proceedings. More specifically, when a party raises a question as to the conformity of a law with the Constitution before a court, the latter has to seize the Constitutional Court unless it considers that a decision on such a question is not necessary, the question is unfounded or that the Constitutional Court has already ruled on it.[37]

Also, '[c]ourts and tribunals may apply general and local decisions and regulations only in so far as these comply with the laws' (Art. 95). The notion of 'laws' has been given a broad meaning, encompassing also the domestic Constitution and international treaties.[38] In this way, the ordinary courts can reach out to the constitutional safeguards as well as to international safeguards related to fundamental rights, with the latter taking precedence over the former.

The rule that only published laws can be valid is anchored in the Constitution: 'Any law, order or regulation of general or municipal administration is not binding until it has been published in the form determined by law' (Art. 112). Further details on the requirement of publication of laws are provided in Sect. 2.5.

The principles of legal certainty and non-retroactivity, and the principle of *nulla poena sine lege* are anchored in Arts. 12 and 14 of the Constitution. However, these provisions do not explicitly contain some of the specific aspects of these principles mentioned above, such as the applicability of these principles to administrative matters or a general prohibition of retroactivity.

[36] See in this respect Ergec 2009, pp. 180–184.

[37] See Art. 95ter of the Luxembourgish Constitution and Act dated 27 July 1997 *portant organisation de la Cour Constitutionnelle* (creating the Constitutional Court).

[38] *Cour adm.* 8 December 2011, No. 28818 C.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 The balancing of fundamental rights with economic free movement rights has not raised any constitutional issues in Luxembourg to date. No relevant case law has been developed on this question before or after the ECJ's judgments in *Schmidberger* and *Omega*.[39] In the Expert's view, the domestic courts would give precedence to free movement rights guaranteed by the EU treaties over fundamental rights enshrined in the Constitution unless consistent interpretation were possible.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The EAW and the Presumption of Innocence

2.3.1.1 The European Arrest Warrant Framework Decision[40] (EAWFD) was introduced in Luxembourg by virtue of the *Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre États membres de l'Union européenne* (Act of 17 March 2004), published in Mémorial A No. 39 of 22 March 2004, and modified later with the *Loi du 3 août 2011* (the Act of 3 August 2011).

The *Conseil d'État* is considered to be the 'Guardian of the Constitution' with an advisory function to control *a priori* all proposals and bills referred to it by the Grand Duke and the Government. As an advisory organ, the *Conseil d'État* was called to give its Opinion regarding the compatibility of the EAWFD bill with the 'norms of higher law', that is, the Constitution, international treaties and the general principles of law.[41]

No specific references or concerns regarding the principle of the presumption of innocence are found in the Opinion. Neither have the national courts had the opportunity to address this principle in the context of the European Arrest Warrant (EAW). According to the legal commentary, the principle of the presumption of innocence constitutes a general principle of Luxembourgish law, which draws its content from Art. 6(2) ECHR and Art. 14(2) of the International Covenant on Civil and Political Rights.[42]

There is considerable discussion in the Opinion on the nature of the legal instrument (a framework decision) which was selected to address and regulate, on

[39] Case C-112/00 *Schmidberger* [2003] ECR I-05659 and Case C-36/02 *Omega* [2004] ECR I-09609.

[40] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[41] Opinion *Conseil d'État* of 19 December 2003, doc. parl. No. 5104/1.

[42] Penning 2013, p. 103.

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the EU level, an issue closely linked to the exercise of state sovereignty. Specifically, the *Conseil d'État* considered whether the EAWFD would affect Luxembourg's international obligations under other international treaties on extradition. After examining the relevant provisions, the *Conseil d'État* concluded that there is no incompatibility between them and the EAWFD.[43]

According to the *Conseil d'État*, the EAWFD does not raise any difficulties in Luxembourg's constitutional order, because the Framework Decision was adopted by unanimity and had no binding effect until it was transposed into national law.[44] The legal instrument of the EAWFD is justified for a number of reasons: it is of a general nature and does not seek to introduce a specific procedure for prosecuting certain forms of criminality; the objective of creating a European area of justice imposes the obligation to reduce obstacles to cooperation on criminal investigations or the enforcement of penalties between the judicial authorities of Member States as much as possible. Even though the EAWFD may resemble an EU directive, it still constitutes an instrument of intergovernmental cooperation.

The *Conseil d'État* has emphasised the traditional character of extradition requests between sovereign states and underscored the special interest that a country of the size of Luxembourg has in the issue of extradition. It is not surprising that extradition was the subject of an early domestic Act incorporating the provisions of international treaties on extradition. Luxembourg was among the states to sign and ratify the European Convention on Extradition of 13 December 1957, and the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962.

Following this tradition, the *Conseil d'État* is of the view that the simplification of the rules and procedures on the extradition mechanism is compatible with the efforts on the European level to intensify the collaboration between Member States. The *Conseil d'État* recognises, however, that the EAWFD has caused a rupture between the extradition law based on international conventions and the new European area of justice.[45] It is no longer the executive organs that decide whether it is appropriate to grant an extradition request, but the judicial authorities that decide to extradite a person by applying a European arrest warrant. The Government, through the Ministry of Justice, intervenes only when there is a conflict between a European arrest warrant and a request for extradition by a third state.

The relevant constitutional provisions are the following: 'No one may be prosecuted except in the cases specified by the law and according to the prescribed procedure. No one may be arrested or detained except in the cases specified by the law and according to the prescribed procedure. Every person must be informed without delay of the means of legal recourse they have at their disposal to recover their freedom' (Art. 12). 'No one may be deprived against his will of the judge that

[43] Opinion No. 5104/1, n. 41, p. 3.

[44] Ibid.

[45] Ibid., p. 2.

the law assigns to him' (Art. 13). 'No penalty may be established or applied except by virtue of the law' (Art. 14).

According to the 2009 Revision Proposal, the new relevant provisions introduce some minor additional safeguards to the aforementioned articles. According to Arts. 18, 19 and 20 of the new draft, no one may be prosecuted, arrested or deprived of his liberty except in the cases provided by law and in the form prescribed. No one can be arrested except by a reasoned order of a court, which must be served at the time of the arrest or at the latest within 24 hours. Everyone shall be informed promptly of the reasons for his arrest or deprivation of liberty, the charges against him and the legal remedies available to regain their freedom. Everyone has the right to have his case brought before a court established by law. No penalty may be established or applied except by virtue of the law.

Finally, it is worth mentioning that the Act of 17 March 2004, which transposed the EAWFD in Luxembourg, provides in Art. 18 that if the issuing authorities intend to prosecute the surrendered person for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, they are obliged to submit a request for consent to the Luxembourgish authorities. Consequently, Luxembourg preserved its entitlement to the 'speciality' rule referred to in Art. 27, and no consent on behalf of Luxembourg can be presumed if the surrendered person is prosecuted (or sentenced or detained) for an offence other than the offence providing grounds for the EAW.

2.3.1.2 Because of the general character of the crimes listed in the EAWFD, the *Conseil d'État*, quoting the example of the Belgian legislator, proposed in its Opinion that the judicial authorities in Luxembourg, upon receiving a European arrest warrant, should exercise a judicial review in order to assess whether the facts of the case fall within the definition of the crimes listed in the EAWFD.

However, the Legal Committee of the Parliament decided not to follow the suggestion of the *Conseil d'État*.[46] The reasoning was that such a judicial review, provided in law, might be interpreted by the courts as a thorough and substantial judicial review of an extradition request.[47] According to the Committee's reasoning, even if the law does not expressly provide for a judicial review, the judicial authorities in Luxembourg would still exercise some kind of judicial review. The exercise of such judicial review would not provoke any difficulties, because the general concepts of the crimes listed in the EAWFD are already recognised and have a common connotation in Luxembourgish law. The Parliamentary Committee underlined that in any case, the judicial authorities in Luxembourg would still have the possibility to submit a request for a preliminary ruling to the Court of Justice of the EU, in case of difficulties in interpretation.

Article 7 of the Act of 17 March 2004 provides for the procedure for execution of an EAW. When the requested person is arrested, the executing judicial authority

[46] *Rapport no 5104/4 de la Commission Juridique de la Chambre des Députés* of 3 March 2004, hereinafter the 'Report'.

[47] Ibid., p. 7.

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shall inform the person of the European arrest warrant and of its contents, of the possibility of consenting to surrender to the issuing judicial authority and also of his or her right to be assisted by legal counsel and by an interpreter, if necessary. Within 24 hours of his or her arrest, the requested person is brought before a judge, who controls the person's identity. A hearing takes place on the issue of detention, where the judge takes into consideration both the facts mentioned in the EAW and the person's statements. The requested person may at any time submit a request for his or her release to the *Chambre du Conseil du tribunal d'arrondissement.* The latter shall order his or her release only if the procedure of arrest has been irregular, and this irregularity has brought about a grave violation of his or her human rights, or if there are safeguards from which the requested person will not benefit if surrendered to the issuing state.

According to the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), the role of the executing judicial authorities is not to deliver a judgment on the innocence of the requested person, but to apply the Act of 17 March 2004 and review whether all the legal requirements have been met for his or her surrender after the issue of an EAW.[48] The review does not constitute a review of evidence but a review of the legal conditions for the applicability of the law.

According to research conducted by the Service of Legal Documentation of the *Parquet General* (Public Prosecutor's Office) in Luxembourg, as at 26 January 2015 there have been five cases brought before the *Tribunal d' Arrondissement de Luxembourg* (District Court) regarding extradition requests in the context of the EAWFD. None of them have involved a claim of innocence by the arrested person.

There was one case in which the *Procureur General d'État* (Attorney General of the State), by virtue of Art. 5(6) of the Act of 17 March 2004, refused to extradite a person who was born in Luxembourg because execution of the sentence in Luxembourg was deemed more appropriate given the person's links to Luxembourg.[49] In another case, the arrested person resorted to the Luxembourgish court claiming health reasons in order to avoid extradition to another Member State. The claim was not accepted by the court, as health reasons do not constitute a legal obstacle to extradition under the EAWFD regime.[50]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 In its Opinion on the bill transposing the EAWFD in Luxembourg, the *Conseil d'État* clearly stated that the abolition of the rule of double criminality in the context of the EAWFD would not affect the principle of legality of crimes. According to the Opinion, even if the act committed within the territory of the

[48] Interview with the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), Jeannot Nies, conducted on 27 February 2015.

[49] No. Judoc: 99864977, *Tribunal d'Arrondissement de Luxembourg*, 109/19.01.2007.

[50] No. Judoc: 99864974, *Tribunal d'Arrondissement de Luxembourg*, 2369/12.12.2006.

issuing state may not constitute a criminal offence in the state being asked to execute the extradition, the criminal prosecution of the perpetrator does not violate the principle of *nullum crimen sine lege* (or the principle of *nulla poena sine lege* in the case of a European arrest warrant for enforcement of a custodial sentence), because of the principle of territoriality of criminal law. The reasoning is that the person concerned, when committing the act, was on the territory of the issuing state and was required to respect the laws of that state, even if they differ from those of the state of execution of the European arrest warrant.[51] However, in its conclusion, the *Conseil d'État* expressed some reservations with regards to the crimes listed in the EAWFD in a generic way, as such a general list may contribute to legal uncertainty.

The Legal Committee of the Parliament provided a detailed analysis on the rule of double criminality in the context of the EAWFD. According to the Report, the text of the Framework Decision is a compromise between two different approaches: the first approach calls for a mechanism of mutual recognition of all the judgments in criminal matters rendered by the Member States' judicial authorities; the second approach focuses on the prior harmonisation of criminal law at the EU level before the systematic recognition of the decisions of the Member States. The mutual recognition of judicial decisions without prior harmonisation of the relevant criminal legislation presupposes abandonment of the rule of double criminality.

The Parliamentary Committee recalled that the principle of double criminality does not require the elements of a particular offence to be the same in the two states concerned or to fall under the same qualification. In order to reconcile the conflicting positions of individual Member States, some of which are in favour of the complete abolition of the principle of double criminality while others seek to maintain what they consider as an elementary procedural guarantee, the EAWFD maintains the rule of double criminality except in the case of 32 offences set out in a generic list. According to the Report, the rule of double criminality is not abolished between Member States, except for with regard to offences that are considered to be particularly serious. The system in place is a 'variable geometry system'.[52]

There is no case law dealing with the principle of legality of crimes or the abolition of the rule of double criminality in the context of the EAWFD. The relevant constitutional provision is Art. 14, which has been transposed *mutatis mutandis* in Art. 20 of the new draft Constitution: 'No penalty may be established or applied except by virtue of the law.'

[51] Opinion No. 5104/1, n. 41, p. 4.

[52] Report No. 5104/4, n. 46, p. 3.

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2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 No constitutional issues regarding *in absentia* judgments have been raised. National courts have not had the opportunity to revisit the standard of protection for *in absentia* judgments in the context of the EAWFD.

The right to have access to the courts is provided in Art. 13 of the Constitution and in the new Art. 19 of the draft Constitution. The national courts have not dealt with the protection of this right to date. According to legal commentary in Luxembourg, the national courts would likely apply Art. 6 ECHR as such, and not the general principles of EU law regarding the protection of this right.[53]

Article 19 of the Act of 17 March 2004 provides that where the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned had not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives adequate assurance that the person who is the subject of the European arrest warrant will have an opportunity to apply for a retrial of the case in the issuing Member State, and to be present at the hearing. The *Conseil d'État* did not have any observations regarding this provision that transposes Art. 5 (1) of the EAWFD.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The issue of surrender of nationals was raised both in the discussions of the *Conseil d'État* and of the Legal Committee of the Parliament in the process of adopting the Act of 17 March 2004. Luxembourg had made a reservation to the European Convention on Extradition of 13 December 1957, stating that there would be no extradition of Luxembourg citizens (and residents with strong links to Luxembourg) to other states. Article 7(1) of the Act of 20 June 2001 on extradition incorporates this reservation by stating that Luxembourg shall not extradite Luxembourg nationals. In the context of the EAWFD, the *Conseil d'État* pondered on whether such a rule is out of date, and underlined the political reluctance to abandon this rule. Both the *Conseil d'État* and the Legal Committee of the Parliament have recognised that the obligation to extradite nationals constitutes a necessary step for the creation of the European Area of Freedom, Security and Justice.

However, Art. 20 of the Act of 17 March 2004 provides that where a person who is the subject of an EAW for the purposes of prosecution is a national of Luxembourg, surrender may be subject to the condition that the person, after being heard, is returned to Luxembourg in order to serve the custodial sentence or detention order passed against him in the issuing Member State. The same applies

[53] Wivenes 2000.

for residents of Luxembourg who have established links with the country. This provision enacts the requirements of Art. 5(3) of the EAWFD.

The *Conseil d'État* has emphasised that the requirements of Art. 12 of the Constitution need to be taken into consideration upon an arrest in the context of the EAWFD. Article 12 refers to the right to liberty and to protection from illegal arrest. According to the *Conseil d'État*, the type of hearing that would be granted to the arrested person when brought before the national court was not clear in the proposed bill. Although verifying the identity of the arrested person is considered appropriate, it is hardly conceivable that the national judge could conduct an investigation on the facts and the charges against the requested person. The judge is limited in principle to asking the person whether he intends to make any statements about the facts which form the basis of the European arrest warrant and to acknowledging and registering these statements, thereby complying with the provisions of Art. 14 of the Framework Decision.

Pursuant to this proposal, Art. 8 of the Act of 17 March 2004 provides that the arrested person should be brought before an investigative judge within 24 hours of the arrest. The investigative judge registers any statements the arrested person may declare and provides a hearing regarding his or her detention. The investigative judge decides whether the arrested person will be held in detention on the basis of the arrest warrant, by taking into consideration the circumstances of the case and the statements of the arrested person.

As underlined by the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), travels expenses are always covered by the issuing authority, while the assistance of a lawyer and of an interpreter, if necessary, is provided by Luxembourg during all proceedings taking place in Luxembourg.[54]

2.3.4.2 According to the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), the executing judicial authorities in Luxembourg do not follow up on cases of people who have been extradited, as these cases fall outside of Luxembourg's jurisdiction.[55]

Article 8 of the Act of 17 March 2004 provides that if a person held in Luxembourg on the basis of an EAW is surrendered to the issuing authority and is acquitted or dismissed in the issuing state, his or her detention in Luxembourg does not give right to compensation under the Law of 30 December 1981 on Inoperative Preventive Detentions.

The data regarding extradition requests and surrenders in Luxembourg is summarised in Table 1, which was compiled on the basis of the (incomplete) annual reports of the Ministry of Justice of Luxembourg on judicial activities for the period 2004–2013:

[54] According to his estimate, no (or only a few) Luxembourgers have ever been extradited from Luxembourg. Interview with the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), Jeannot Nies, conducted on 27 February 2015.

[55] Ibid.

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Table 1 Data on extradition requests issued and executed in Luxembourg in 2004–2013 on the basis of the annual reports of the Ministry of Justice of Luxembourg

Judicial year	Extraditions	*EAW Ministère Public/Parquet Général of Luxembourg*	*EAW Parquet Général* of Diekirch Issued/received
2004–2005	2	35 received	7/3
2005–2006	25	15 received	5/2
2006–2007	–	–	1/7
2007–2008	–	–	–
2008–2009	–	–	1/7
2009–2010	–	–	2/3
2010–2011	–	–	0/4
2011–2012	–	–	0/2
2012–2013	–	–	7/3

Source Author, on the basis of annual reports of the Ministry of Justice of Luxembourg

Table 2 Data on extradition requests issued and executed in Luxembourg in 2005–2009

	EAW issued in Luxembourg	EAW executed in Luxembourg
2005	42	24
2006	35	22
2007	44	15
2008	40	22
2009	46	26

Source European Commission 2011 Report (2011 Report of the EU Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, p. 12.)

The aforementioned numbers in Table 1 may, however, be inaccurate due to a lack of sufficient information specifically regarding EAWs in the annual reports. According to the 2011 Report of the EU Commission, 207 European Arrest Warrants were issued and 109 were executed in Luxembourg from 2005–2009.[56] The EAWs issued and executed in Luxembourg during this period are summarised in Table 2.

[56] http://www.europaforum.public.lu/fr/actualites/2011/04/comm-mandat-arret-europeen/index.html.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 Luxembourg is party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and has made a reservation to this convention. According to this reservation, Luxembourg applies the following legal requirements when executing requests for search and seizure of property (letters rogatory for search and seizure):

(a) the offence underlying the request must be punishable both under the law of the requesting Party and of the executing Party;
(b) the offence underlying the request must give rise to extradition from the requested country;
(c) the execution of the request must be consistent with the law of the requested Party.

More precisely, Luxembourg has declared that any requests rogatory for search or seizure will be executed in so far as they relate to facts which give rise to extradition under the European Convention on Extradition, and if a national court has authorised the execution in accordance with its law.

The *Conseil d'État* has underlined that the EAWFD is designed to replace the provisions of the European Convention on Extradition vis-à-vis relations between EU Member States. In its Opinion, the *Conseil d'État* emphasised the new legal regime under the EAWFD. The *Conseil d'État* declared that even in the absence of an express link between the EAWFD and the European Convention on Mutual Assistance in criminal matters, the risk of the EAWFD having an impact on the reservation made by Luxembourg cannot be completely ruled out. The *Conseil d'État* argued that the reference to the European Convention on Extradition regarding the requirement of dual criminality becomes inoperative in relations with other EU Member States, and that any reference to the provisions of this Convention must now be understood as a reference to the provisions under the new regime. Therefore, the *Conseil d'État* deemed the reservation made by Luxembourg in favour of the new legal regime to be inoperative.

The *Conseil d'État* did raise some constitutional concerns regarding the EAWFD. The Framework Decision does not enumerate offences of political nature among the grounds for refusal to execute a warrant.[57] Admittedly, Art. 1(3) of the EAWFD,[58] by its reference to Art. 6 TEU, affects neither the law on asylum nor the right of a state to refuse to execute an EAW when the surrender is sought for

[57] Opinion No. 5104/1, n. 41, p. 5.

[58] 'Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be

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political purposes. However, both the Act of 20 June 2001 on extradition and the European Convention on Extradition (Arts. 3(1) and (2)) distinguish requests for extradition which are related to political offences from extradition requests which pursue a political goal. According to the *Conseil d'État*, this distinction and rule do not have a constitutional value.[59] The *Conseil d'État* refers to the cautious position that Luxembourg took with regards to the European Convention against terrorism, where Luxembourg did not make any reservation regarding its obligation to extradite because of the political nature of the offence. However, Luxembourg does not accept or apply in a generic way the principle laid down in Art. 5 of the European Convention on the Suppression of Terrorism,[60] namely that no offence may be regarded by the Member State as a political offence, as a fact connected with such an offence or as an offence inspired by political motives. A similar stance is to be expected by Luxembourg regarding refusal to execute a warrant if the offence for which the warrant was issued was of political nature.

Regarding the abolition of the exequatur in civil and commercial matters, an empirical study of the exequatur orders issued by the District Court of Luxembourg in the period of 2008–2009 (that is before the period that the abolition of the exequatur became effective by virtue of Regulation 1215/2012) has been conducted.[61] In statistical terms, the District Court of Luxembourg declared executory on the territory of Luxembourg the totality of the decisions presented in the exequatur orders. The speed with which the exequatur orders were rendered is impressive: 80% of the orders were rendered within a week. Only 4.4% of the enforcement orders were subject to appeal before the Luxembourg Court of Appeal, of which only two (0.6%) were successful. In the first case the request in *exequatur* was found inadmissible *ratione materiae,*[62] and in the second case the court found that the defendant's rights were violated as he had not been duly notified about the case against him in the first place.[63]

2.3.5.2 Apart from the discussion on the suitability of the legal instrument (Framework Decision) in the *Conseil d'État*, no discussion on the appropriateness of mutual recognition on criminal law matters has been raised in Luxembourg. The *Conseil d'État* has underscored the importance of the goal of establishing an Area of Freedom, Security and Justice in Europe.

2.3.5.3 No concerns regarding any change in the role of national courts have been expressed in Luxembourg. In general, it is safe to argue that there is a strong commitment to the EU mechanisms.

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prejudiced for any of these reasons.' Recital (12), Council Framework Decision 2002/584/JHA, n. 40.

[59] Opinion No. 5104/1, n. 41, p. 6.

[60] Concluded at Strasbourg on 27 January 1977.

[61] Muller and Cuniberti 2013, p. 6; see also Cuniberti and Rueda 2010.

[62] Judgment CA Luxembourg, 7 January 2010, No. 34658.

[63] Judgment CA Luxembourg, 10 February 2011, No. 35005.

2.3.5.4 Article 3 of the Act of 17 March 2004 provides for a proportionality test applicable upon both the issuance and the execution of an EAW. Specifically, an EAW may be issued only for offences punishable by law with a custodial sentence or a detention order for a maximum period of at least twelve months, or when a custodial sentence or a detention order has been imposed for sanctions prescribed for a period of at least four months.

Regarding the execution of an EAW, Art. 3(3) provides for a proportionality test even for the offences which escape the rule of double criminality. Consequently, the Luxembourgish authorities shall review whether the 32 enumerated offences are punishable in the issuing state with a custodial sentence or a detention order for a maximum period of at least three years.

The introduction of these proportionality tests was the object of analysis in the Opinion of the *Conseil d'État* and in the Report of the Parliamentary Committee.[64] Drawing analogies from the French *Conseil d'État,* both the *Conseil d'État* and the Parliamentary Committee emphasised the necessity for the issuing state to provide proof that the offence for which an arrest warrant is issued is punishable under the national law with a custodial sentence or a detention order of a specific threshold of severity. This condition responds to the requirements of the constitutional order. Therefore, it is not sufficient that the offence for which an EAW is issued falls within the scope of the exhaustive list of the 32 offences which escape the review of dual criminality, but the offence must also be sufficiently serious for the authorities in Luxembourg to execute the EAW.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

To the Expert's knowledge no further constitutional issues have arisen in Luxembourg's case law and legal commentary, or do arise in his view in relation to European criminal law in the Grand Duchy.

2.4 The EU Data Retention Directive

2.4.1 According to the Constitution: 'The home is inviolable. No domiciliary visit may be made except in cases and according to the procedure laid down by the law' (Art. 15); 'The secrecy of correspondence is inviolable. The law determines the agents responsible for the violation of the secrecy of correspondence entrusted to the postal services. The law determines the guarantee to be afforded to the secrecy of telegrams' (Art. 28).

[64] Opinion *Conseil d'Etat* of 19 December 2003, doc. parl. No. 5104/1, p. 9 and Report No. 5104/4, n. 46, p. 6.

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However, no constitutional issues have been raised in Luxembourg with regard to the implementation of the Data Retention Directive[65] (DRD) or with regard to its application by the courts. The retention of data had already been allowed in Luxembourg before the adoption of the Data Retention Directive on the basis of the 'Privacy and Electronic Communications Act' of 30 May 2005.[66]

The national implementing act of the DRD of 13 July 2010 has not been challenged in the national Constitutional Court nor in any other court on grounds of the legality of the Directive.

There is no previous jurisprudence as regards the constitutionality of data retention in Luxembourg. There is also little case law of the national Constitutional Court and no cases involving a clear definition of the right to privacy versus law enforcement measures. It is therefore not possible to derive whether or not a court, when dealing with a national measure comparable to the DRD, would raise a constitutional issue or – as this is possible in the Luxembourgish legal order – directly in view of the ECHR. If asked to speculate (not based on previous case law), from a Luxembourgish perspective it is rather unlikely that a comparable measure would be struck down in its entirety.

While the transposition of the DRD in the Luxembourgish legal system does not seem to have raised particular issues,[67] it is noteworthy that, following the ECJ judgment annulling the DRD, Luxembourg decided to amend its national law and has in the meanwhile launched the legislative procedure in this respect. On 7 January 2015, the Ministry of Justice filed a proposal which modifies both the domestic Code of Criminal Procedure and the domestic Act implementing the DRD, i.e. the Act of 30 May 2005 laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector (Privacy and Electronic Communications Act 2005) (hereinafter Proposal).[68]

The Proposal concerns both traffic data (Art. 5 of the Privacy and Electronic Communications Act 2005) and location data other than traffic data (Art. 9 of the Privacy and Electronic Communications Act 2005), and brings four main amendments to the existing domestic rules. The Proposal also foresees that a grand-ducal decree will be adopted in order to lay down detailed enforcement rules to ensure the

[65] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[66] *Loi du 30 mai 2005 relative aux dispositions spécifiques de protection de la personne à l'égard du traitement des données à caractère personnel dans le secteur des communications électroniques et portant modification des Arts. 88-2 et 88-4 du Code d'instruction criminelle*, Mémorial A-73, 7 June 2005, p. 1144.

[67] In this respect, see Cole and Boehm 2012.

[68] Doc. parl. No. 6763 *Projet de loi portant modification du Code d'instruction criminelle et de la loi modifiée du 30 mai 2005 concernant la protection de la vie privée dans le secteur des communications électroniques.*

integrity and confidentiality of the data. The Proposal provides for access for law enforcement bodies to the retained data on the basis of an exhaustive list of criminal offences, which carry a sentence of at least one year (previously the crimes concerned were not listed). The Proposal further stipulates that the retained data must be irrevocably and without any delay deleted upon expiration of the retention period. Electronic communication providers are no longer permitted to store the data in an anonymised form after the expiration of the retention period. Finally, the Proposal foresees that data shall be stored on the territory of the European Union and increases the penalties in case of non-compliance with the Privacy and Electronic Communications Act 2005 to a sentence of six months to two years of imprisonment.

2.5 *Unpublished or Secret Legislation*

2.5.1 To the Expert's knowledge, the issue of unpublished EU legislation has not arisen as such in domestic case law or in the public debate. As the Luxembourgish language is not an official language of the EU and French is the official legal language in Luxembourg, no issue of EU legislation unpublished in the national language could arise in any case.

The main rules to be referred to in this context are Arts. 112 and 36 of the Luxembourgish Constitution. According to Art. 112, '[a]ny law, order or regulation of general or municipal administration is binding only once published in the form determined by law'. In 1901, *la Cour* observed that '[a]t all times and in all legislation, there has always been the immutable principle that no law shall become mandatory without being published'.[69] Statutory and regulatory acts generally enter into force four days following their publication in the *Mémorial*, i.e. the Luxembourgish official journal.

Given that, in the Luxembourgish legal system, international treaties ratified by Luxembourg take precedence over domestic law including the domestic Constitution, the requirements as to publication apply to international agreements. In this context Art. 36(3) indeed prohibits the existence of 'secret treaties'. Acts approving international treaties are published in the *Mémorial* together with the text of the international treaties concerned.

With regard to EU secondary legislation, the publication obligation can be satisfied in Luxembourg by referring to the publication of the given act in the Official Journal of the EU.

[69] *Cour*, March 9 1901, Pasicrisie luxembourgeoise 6, p. 297.

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2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 No standard of protection issues have apparently ever been raised in Luxembourg with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality in relation to EU measures. Again, the far-reaching understanding of primacy of EU law, the lack of competence of the Constitutional Court and the rather underdeveloped standards of fundamental rights in the Constitution may explain this finding.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 (a) Luxembourg's commitment to the European Financial Stability Facility (EFSF) amounts to 1.947 billion EUR. The ESM capital subscription made by Luxembourg amounts to 1.753 billion EUR, of which 0.2 billion is as paid-in capital. The total participation of Luxembourg in the European Stability Mechanism (ESM) and EFSF amounts to 3.753 billion EUR.[70] The GDP of Luxembourg in 2013 has been estimated at approximately 45 billion EUR[71] and the Luxembourgish budget for 2015 (expenses) is foreseen at approximately 15.658 billion EUR.[72]

The constitutionality of the commitment under the ESM has not been put into question although some objections to the laws approving the respective aspects related to the ESM[73] amendment of Art. 136 TFEU were voiced during the legislative procedure.[74]

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[70] See *Rapport de la Commission des Finances et du Budget*, 22 June 2012, doc. parl. No. 6334/2, p. 2 and p. 8.

[71] See http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=1434&IF_Language=fra&MainTheme=5&FldrName=2&RFPath=22.

[72] See http://www.budget.public.lu/#!/bleck.

[73] *La loi portant approbation de la décision du Conseil européen du 25 mars 2011 modifiant l'article 136 du traité sur le fonctionnement de l'Union européenne en ce qui concerne un mécanisme de stabilité pour les Etats membres dont la monnaie est l'euro; loi portant approbation du traité instituant le mécanisme européen de stabilité, signé le 2 février 2012 à Bruxelles; loi relative à la participation de l'Etat au mécanisme européen de stabilité*. For the text of these legislative acts see: Mémorial A-135, 5 July 2012, p. 1706. http://www.chd.lu/wps/PA_RoleEtenduEuro/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/129/168/112687.pdf.

[74] For an overview of the position of Luxembourg on the euro crisis and its management as well as on the legislative discussion, see Kroeger 2014.

The *Conseil d'État* has also expressed several objections.[75] It has pointed out the absence of a *fiche financière*, i.e. a financial statement that has to be associated with all Acts burdening the state budget. Also, the *Conseil d'État* has expressed some perplexity as to the specific features of the ESM, its adjustments having preceded its actual launch, which leaves the impression that the EU Member States are following rather than shaping economic realities. Interestingly, the *Conseil d'État* has expressed the position that the ESM must evolve as a part of the EU institutions and must not drift towards the intergovernmental method that some of the Member States seem to favour. Moreover, the *Conseil d'État* has questioned the arguably insufficient size of the capital of the ESM (700 billion EUR) in the light of the real needs of the Member States in difficulty as well as the needs of European banks. Finally, the *Conseil d'État* has expressed its general regret with regard to the unsatisfactory management of the public debt in the eurozone and the systemic nature of the financial crisis therein. It its view, the statement of reasons of the legislative proposal could have been more analytical and could have spelled out the position that Luxembourg should defend in the context of the ongoing discussion in Europe.

(b) See the reply in (a) above.

(c) In Luxembourg, debate on the unconditional nature of the commitments does not seem to have arisen.

2.7.2 No debate on other proposed measure seems to have taken place in Luxembourg. This may also be due to the fact that Luxembourg has not been subject to any austerity regime and, rather to the contrary, benefits from the presence of the ESM on its territory. In this respect, it is noteworthy that the predecessor of the ESM, the European Financial Stability Facility (relevant for financing programmes pre-existing the establishment of the ESM), was not an international organisation but a private law entity (*société anonyme*) established under Luxembourgish law. For this reason the *Conseil d'État* criticised the initially broad scope of the immunity of jurisdiction and execution granted to the EFSF (which was suggested to be similar to that granted to the ESM) as contrary to Art. 6 ECHR and Art. 10bis of the Constitution.[76] In response to this critique, the draft Act regarding Luxembourg's participation in the ESM was modified.

2.7.3 The question on bailouts is not applicable to Luxembourg. Economic issues have been dealt with recently by Luxembourg, but their nature cannot be compared with those that have been tackled in relation to austerity programmes. The unsatisfactory competitiveness of Luxembourg has been pointed out. As of 2013,

[75] See Opinion of *Conseil d'Etat* dated 6 March 2012, on *Projet de loi portant approbation de la décision du Conseil européen du 25 mars 2011 modifiant l'article 136 du traité sur le fonctionnement de l'Union européenne en ce qui concerne un mécanisme de stabilité pour les Etats membres dont la monnaie est l'euro*, doc. parl. No. 6334/1.

[76] Complementary Opinion *Conseil d'Etat*, doc. parl. No. 6406/3, 12 June 2012, p. 2.

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Luxembourg has modified its system of pensions and the system of automatic wage increases has been limited in order to bring such increases in line with the economic reality.[77]

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 (a) There are unfortunately no reliable statistics available in Luxembourg concerning the number of cases in which the applicants have requested preliminary rulings with regard to the validity of EU measures. In the time frame since 2001, only two cases were identified after a thorough research of the case law of the respective civil, social and administrative courts.

First, in a case brought to the *Conseil supérieur des assurances sociales*, the applicant challenged the validity of Regulation 1408/71 (on the cooperation between social security systems) with regard to former Art. 48(2) EC (now Art. 45 (2) TFEU) on the free movement of workers. It was argued that the application of the residence clause in Art. 71 of that Regulation constitutes indirect discrimination on grounds of nationality with regard to unemployed frontier workers.[78]

Second, in a case brought to the *tribunal administratif*, the applicants challenged the validity of Directive 2003/87/CE (of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community) based on the ground that the Directive would not sufficiently take into account the specific situation of the steel industry within global competition.[79] The courts did not submit a reference for a preliminary ruling to the ECJ in either of these cases.

(b) From 2006 to the end of 2014, Luxembourgish courts sent 26 preliminary ruling requests to the ECJ. All of them were interpretative questions, and not a single one contested the validity of an EU measure.

2.8.2 In the Expert's view, it does not seem that the standard of judicial review by the EU courts is considered lower than that of the domestic courts from a Luxembourgish point of view. Moreover, the domestic courts commonly give the impression that they share the standards of review applied by the EU courts, to which they refer quite extensively.

2.8.3 The approach of the Constitutional Court reviewing the constitutionality of legislative acts could be considered – at least statistically – as rather vigorous. In almost one-third (36) of its currently (by 20 February 2015) 116 decisions, it has declared provisions of legislative acts contrary to articles of the Constitution. Its

[77] Cf. Kroeger 2014, point I.1.

[78] *Arrêt du 3 décembre 2007*, ADEM 2006/0094.

[79] *Arrêt du 5 avril 2006*, nos. 20372 et 20373 du rôle.

control is, however, very limited in scope, as it can only review the constitutionality of such provisions in response to preliminary questions from ordinary judges that must precisely indicate the contested provisions and the relevant articles of the Constitution. It has furthermore been shown that the Constitutional Court apparently recognises a wider margin of appreciation for the legislator in the field of economic and social law that in the field of civil and family law.[80]

If the Constitutional Court declares a legislative provision contrary to the Constitution, the ordinary judges who have to decide on the case are obliged to disregard that provision, which, however, remains formally in force.

The *Conseil d'État* also plays an important role as a guardian of the Constitution. Its function is to assess *ex ante* the conformity of all draft legislative acts and grand-ducal decrees with norms of higher law, comprising the Constitution, international treaties and the general principles of law. The *Chambre* in general follows its opinions.

Unfortunately, there are no further reliable statistical data available on the proportion of challenges to the validity of a domestic Act of Parliament that have led to annulment of the Act in question.

2.8.4 On the one hand, the Constitutional Court is not entitled to review legislative acts approving international treaties. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's competence. Until now, no such Act has, however, been submitted to the Constitutional Court in the context of a preliminary question from an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing EU legislation. No legislative act implementing EU legislation has ever been submitted to the Constitutional Court.

On the other hand, the ordinary courts may not review the constitutionality of legislative acts at all and, regarding the conformity of the latter with international law, they usually apply the principle of primacy very strictly. Thus, no judgment reviewing national measures implementing EU legislation against national or ECtHR standards of protection of rights could be identified.

2.8.5 To the Expert's knowledge no concern has been expressed in Luxembourg about a gap in judicial review resulting from an allegedly lower standard of review by the ECJ. As the fundamental rights guaranteed by the Luxembourgish Constitution do not go beyond the standard of the ECHR in many respects, the accession of the EU to the ECHR does not raise concerns about a potential gap in judicial review either.

2.8.6 The issue of equal treatment of individuals falling within the scope of EU law and those falling within the scope of domestic protection of constitutional rights has only been raised once when the *Chambre* adopted the measure implementing

[80] Cf. Kinsch 2008 at p. 89.

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Directive 2004/38 on the free movement of citizens of the EU.[81] In order to avoid any situations of 'reverse discrimination', Art. 12 (3) of the Act of 29 August 2008 on free movement of persons and immigration contains a clause stating that '[f]amily members of a Luxembourgish citizen … are equated with family members of a citizen of the EU'.

2.9 Other Constitutional Rights and Principles

2.9.1 No other significant issues have arisen in Luxembourg with regard to constitutional rights or the rule of law in relation to EU law.

The transposition and implementation of EU measures by grand-ducal decrees is undeniably seen as a way to increase the speed of implementation, as well as the Grand Duchy's ranking on the European Commission's scoreboards. Every year, the Government as well as the *Chambre* proudly announce the progress made in this respect. The matter is currently determined by an Enabling Act (*loi d'habilitation*) adopted by the *Chambre* in 1971, which is criticised because of technical insufficiencies and its limited scope, but is considered indispensable in principle. The Working Draft of the current constitutional amendment procedure foresees the addition of an article to the Constitution that will explicitly give the executive power the competence to transpose and implement EU measures by grand-ducal decree.

Acts of Parliament will thus lose some of their importance in national legislation because of the perceived need to streamline the procedures for the transposition and implementation of secondary EU legislation. In so far as ever more important sections of national legislation are directly conditioned by Union law and legislators face strict deadlines for the transposition of directives, the *Chambre* has adopted an Enabling Act conferring the competence to proceed on the executive exercising its regulatory competence.[82]

This Act, however, is limited in scope and has not really proven an 'appropriate and effective response' to the problems encountered.[83] The inclusion of a new Art. 45 in the Constitution, set out in the 2015 Working Draft and which obligates the

[81] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77.

[82] Act of 9 August 1971 (as amended) 'on the execution and sanctioning of decisions and directives and the sanctioning of regulations of the European Communities in the economic, technical, agricultural, forestry, social and transport spheres'.

[83] Cf. Schmit 2013, p. 5 and Weirich 1986, p. 966.

Head of State to adopt all the necessary regulations for the application of legally binding acts of the European Union, will eradicate a number of legal uncertainties in this area.

2.10 Common Constitutional Traditions

2.10.1 In the Expert's view, 'common constitutional traditions' is a very broad and rather vague concept that has helped the ECJ to legitimise its jurisprudence that introduces fundamental rights as general principles of law in the EU legal order. This concept may certainly encompass the constitutional rights and principles addressed in the Questionnaire as well as the rights and principles enshrined in the ECHR or within the Charter of Fundamental Rights of the EU. However, in the Expert's view, the broadness of the concept does not allow for the deduction of a precise normative substance and a clear-cut scope of these rights and principles that would be shared by all of the Member States.

It appears difficult to infer the existence of a 'common constitutional tradition' from an element considered in a single Member State as an element of its constitutional identity. To be considered as a 'common constitutional tradition', such a right or principle does not need to be part of a Member State's identity. It would be sufficient that it has been recognised as an element of constitutional law by the Constitution itself or any relevant case law.

2.10.2 For reasons of uncertainty regarding their content and scope, it seems difficult to envisage how these 'common constitutional traditions' could become a more direct and relevant source of EU law. Within the judicial dialogue between national judges and the ECJ, there might, however, still be merit in invoking these traditions at least in so far as it would be possible to establish the existence of a commonly shared standard based on a serious study of comparative case law stemming from a large group of Member States. The question is whether this is reasonably feasible for national courts when sending a preliminary ruling reference to the ECJ.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 There has been no discussion in Luxembourg on whether the Court of Justice was justified in setting the standard of protection of Charter rights at the level of the ECHR. There are no constitutional rights or principles protected under the Luxembourgish Constitution or by the national courts where a significantly higher level of protection can be identified in comparison with the standards set by the ECtHR.

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In the Expert's view, higher standards at national level and a greater deference to national constitutional or supreme courts should be allowed by the ECJ whenever the courts of the relevant Member State can reasonably argue that this higher standard is an element of its constitutional identity as protected under Art. 4 TEU. The national courts should, however, also seek to avoid conflicts between supposedly different standards by seeking to interpret the relevant national constitutional rights and principles, as far as possible, in the light of the corresponding provisions of the ECHR and the Charter, even in cases which do not fall within the scope of the latter.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 (a) There has been no significant public deliberation on constitutional rights in Luxembourg, neither at the time of adoption nor at the time of national implementation of the EAWFD. The debate was exclusively held within the *Conseil d'État* and the *Chambre* during the legislative implementation procedure. No objection based on the safeguards for constitutional rights was raised.

(b) The same applies with regard to the adoption and implementation of the DRD.

2.12.2 From a Luxembourgish point of view, no important constitutional issue has ever been raised at the stage of implementing EU law. For the reasons already explained, the domestic system of constitutional review has never experienced a challenge made to national legislation implementing EU law.

In the Expert's view, the members of the national governments should raise such important constitutional issues when deliberating new EU legislation within the Council of Ministers. In order to be aware of such issues before the final adoption of an EU act, Member States should establish internal advisory procedures alerting the Government of any foreseeable constitutional implications of an envisaged EU act. In Luxembourg such a preliminary opinion could be prepared by the *Conseil d'État*. A wider consultation including the *Chambre* and other bodies and NGOs would probably be difficult to accomplish within the usual time constraints.

2.12.3 The Expert would indeed support a recommendation to suspend the application and carry out a review of EU measures, if important constitutional issues have been identified by a number of constitutional courts, even though some Member States' constitutional courts do not review the constitutionality of EU measures or national implementation acts of these measures. A Member State like Luxembourg would indeed be excluded from such a mechanism for the time being.

The problem would be to define what an 'important' constitutional issue exactly is, and what number of national constitutional courts would be considered sufficient to initiate such a suspension procedure. Another practical problem would arise from the fact that such issues might be raised over a long period after the adoption of the

EU measure according to the features of the national systems of constitutional review providing for *ex ante* review, *ex post* review or a combination of both.

The Expert would not support a general recommendation to recognise as a defence on the part of a Member State in an infringement proceeding that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the one hand, such a defence would not be applicable to Luxembourg and, on the other hand, it should be strictly limited to infringement proceedings that concern the implementation of an EU measure that is considered in the particular Member State as contrary to an element of the constitutional identity of that Member State.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 From a Luxembourgish point of view (but also as a general position), the Expert does not share the concerns of an 'overall reduction' in the standard of protection of constitutional rights and the rule of law in the context of EU law. With regard to the standard of protection under Luxembourgish constitutional law, it might even be argued that there has been an overall increase of the standard of protection of fundamental rights due to the combined influence of the case law of the ECtHR and of the ECJ. The alleged reductions in the standard of protection linked in particular to the EAWFD and the DRD cannot be confirmed with regard to the Grand Duchy.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 As outlined in Sect. 1.3.1, although Art. 49bis provides only for temporary transfers of powers, it has been interpreted broadly in order to be compatible with the accession of Luxembourg to the EU Treaties.

In 1956, the *Conseil d'État* considered it more appropriate to retain the temporary character of the delegation of powers, as it emphasised the precariousness of any consented devolution to international institutions.[84] No other limits to the transfer of powers are provided for in the Constitution. However, Art. 1 of the Constitution postulates the values upheld in Luxembourg in general and not in the

[84] Doc. parl. No. 25 (516), p. CCIV.

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specific context of international cooperation: democracy, liberty, independence and the indivisibility of the state.

Regarding the ratification of international treaties, Art. 37 of the Constitution provides that treaties are operative after having been approved by law and published in the form specified for the publication of laws. Secret treaties are abolished. International treaties that transfer powers to international institutions need to be approved by Parliament, according to a special majority requirement of two-thirds of the members, similarly to the constitutional amending procedure as provided by Art. 114. Reservations to international treaties by Luxembourg require legislative approval as well.[85] Article 95ter(2) explicitly prohibits the Constitutional Court from reviewing Acts of Parliament which transpose international treaties in the domestic legal order.

There is no reference to international customary law in the Constitution or in the draft text of the Constitution which is under consideration.

Luxembourg is a founding member of the United Nations, NATO and the International Criminal Court (ICC). Article 118 of the Constitution provides that its provisions do not constitute an obstacle to the approval of the ICC Statute and to the exercise of Luxembourg's obligations under the ICC Statute.[86] The draft text of the Constitution contains a similar provision in Art. 107. Luxembourg also accepts the jurisdiction of the International Court of Justice as compulsory, *ipso facto* and without the requirement of reciprocity, in any disputes arising after 1930, regarding situations or facts subsequent to its signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement.[87]

3.1.2 Article 49bis was introduced in 1956 by a constitutional amendment. This provision essentially raised two controversial questions: the position of the article in the Constitution's structure and its content. Regarding the first question, the *Conseil d'État* opined that this provision needs a distinct position in the Constitution because it introduces a derogation to the exercise of the sovereign powers (executive, legislative and judicial) that are also regulated in Arts. 33–49. Moreover, this provision deals with the exercise of a new type of power, which is also linked to sovereignty. For these reasons the *Conseil d'État* proposed the addition of a new Article, 49bis, instead of incorporating a new paragraph in the existing provisions. As for the choice of the wording 'institutions of international law', the *Conseil d'État* had originally proposed the phrase 'international institutions'. This proposal, however, was not retained by the Parliamentary Committee, which opted for the

[85] 'Approbation des traités' in Besch 2005, p. 143.

[86] Original French text: *'Les dispositions de la Constitution ne font pas obstacle à l'approbation du Statut de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998, et à l'exécution des obligations en découlant dans les conditions prévues par ledit Statut.'*

[87] See http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=LU.

term 'institutions of international law' in order to encompass not only international but supranational institutions as well.[88]

Drawing inspiration from the Belgian Constitution of 1831, Art. 37 was last modified by the 1956 constitutional amendment. During the revision, Art. 37 was at the centre of a debate between the Government and the *Conseil d'Etat*. The Parliament declared its intention to systemise and integrate all the constitutional provisions on international relations in one chapter, while the Government proposed the addition of a series of new articles to Art. 37 in order to exhaustively consolidate all the constitutional provisions on international relations. These proposals were weighed with care by the *Conseil d'Etat*, which opted for the solution of adding only a new Art. 49bis, leaving the structure of the Constitution intact.

The amendment of 1956 did not alter the principle of the approval of international treaties by Parliament. The constitutional amendment only specified the form that this approval would take, by adding the requirement of approval by a law. In its Opinion of 10 July 1956, the *Conseil d'État* underlined the distinction between the enforceability of the approving law and of the international treaty. They are two different procedures, which may take place simultaneously or separately, but both need to be compatible with the corresponding constitutional provisions. The *Conseil d'État* adopted, finally, one formal requirement, that of the publication of the approving law.

Article 48 of the proposed draft Constitution contains a similar provision to Art. 37 regarding the ratification of international treaties. Instead of naming the Grand Duke, the provision states that the 'Head of State' shall be responsible for concluding international treaties. The draft provision includes a reference to the procedure for the termination of an international treaty, similar to the procedure foreseen for the conclusion of a treaty, which is not included in the current version of Art. 37. The new draft article also states explicitly that the Head of State shall adopt all necessary regulations for the application of EU law in Luxembourg.

Article 118 was introduced in 2000 to allow for the approval of the ICC Statute and the participation of Luxembourg in the ICC. The *Conseil d'État* emphasised the principle of complementarity of the ICC vis-à-vis the national courts. The ICC was considered as advancement for the international protection of human rights, but the relevant constitutional amendment provoked difficulties. In its Opinion of 4 May 1999, the *Conseil d'État* stated that the non-recognition of immunity for state officials might not be consistent with Art. 4 of the Constitution, which provides for the inviolability of the Grand Duke, with Arts. 68–69 on the immunity of Members of Parliament and with Arts. 82 and 116, which deal with the criminal responsibility of ministers. However and contrary to the position of the French Constitutional Court, the *Conseil d'État* in Luxembourg concluded that the ICC Statute was not incompatible with the Constitution, because the ICC Prosecutor's investigation procedure is based on consultations with the state authorities concerned. The *Conseil d'Etat* did not consider it appropriate to revise all the relevant constitutional

[88] Doc. parl. No. 25 (516), p. CCIV.

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provisions concerning the immunity of state officials. According to the *Conseil d'Etat*, Art. 118 intended to neutralise any obstacle that the Constitution might pose to the creation and function of the ICC.[89] The Parliamentary Committee accepted the opinion of the *Conseil d'Etat*. Article 118 was considered the necessary step for the adaptation of the Luxembourgish constitutional legal order to the ICC Statute.[90] Since the approval of the ICC Statute has already taken place and is no longer relevant, the new draft Art. 107 provides that the Constitution shall not hamper Luxembourg's obligations under the ICC Statute.[91]

All these amendments and the current Constitution revision process constitute an expression of Luxembourg's commitment to European integration and its long-standing deference to international law.

3.1.3 Article 49bis, which provides for the transfer of powers to international institutions only temporarily, is to be modified in the course of the current revision procedure.

3.1.4 In the Expert's view, the relevant constitutional provision, Art. 49bis, regarding the temporary limits of the delegation of powers to international institutions, indeed requires amendment. However, there seems to be a consensus not to include any other limits to such delegation. Furthermore, an explicit reference to the status of international law vis-à-vis the national legal order may also be in order. However, the constitutional revision procedure is still ongoing and the protection of constitutional rights is included in the discussions.

3.2 The Position of International Law in National Law

3.2.1 In the Constitution, there is no express reference to the legal status of international treaties in domestic law. However, as discussed in Sect. 1.3.1, the *Conseil d'État* as well as the *Cour de cassation* have firmly confirmed that in the case of conflict between a rule of domestic law and a rule of international law that has direct effect in the domestic legal order, the rule of the international treaty shall prevail.[92]

Regarding Art. 37 of the Constitution, there is jurisprudence clarifying the following issues: types of international treaties, procedure for the promulgation of international treaties, interpretation and suspension of international treaties, the

[89] Doc. parl. No. 4634/1, p. 1.

[90] *Rapport de la commission des Institutions et de la Revision constitutionnelle du 6 juillet 2000*, doc. parl. No. 4634/2.

[91] Original French text: *'Art. 107 Les dispositions de la Constitution ne font pas obstacle aux obligations découlant du Statut de la Cour pénale internationale.'*

[92] *Conseil d'Etat*, 28 July 1951, Pasicrisie 15, p. 263. See also *Cour de Cassation*, 8 June 1950, Pasicrisie 15, p. 41 and *Cour de Cassation*, 14 July 1954, Pasicrisie 16, p. 151.

conflict between an international treaty and national law and the power of the Grand Duke to delegate his authority to conclude international treaties.

Regarding types of international treaties, in 1960 the *Cour de Cassation* decided that the procedure used for the conclusion of an international treaty does not affect the determination of its legal status domestically, because the procedure, the type of obligations and even the terminology used for a treaty are determined on the international level by diplomatic means. Despite their diversity, all international treaties are equipped with the same binding effect in Luxembourg.[93] Furthermore, the jurisprudence has confirmed that no specific form of international treaty is required for the regularity of an international instrument duly approved by law.[94]

Regarding the procedure, as early as in 1949 the national courts declared that international treaties are not enforceable or judiciable unless approved by Parliament and published in the *Mémorial*.[95] Interestingly, in 1889, the court in Luxembourg declared that international arrangements which have not been the subject of a published Act or of a general administrative measure would not create any obligations for Luxembourgers.[96]

3.2.2 The traditional distinction between monist and dualistic approaches to international law is outdated. When researching the issue of the interaction between the international and domestic legal orders, a strictly dualistic approach is not effective in capturing the perplexity of the different normative structures set in place for the protection of fundamental rights or the different levels of international obligations of states. Even using the term 'different legal orders' has a dualistic connotation and refers to a more enclosed system of hierarchical legal orders. Such an enclosed system of hierarchical legal orders, however, does not correspond to reality, given the international protection of human rights regime and the case law of both the Court of Justice of the European Union and the European Court of Human Rights.

No legal commentary exists on the applicability of monism and dualism in Luxembourg. Luxembourgish institutions and courts have adopted a progressive view on the position of international law in the national legal order, following a somewhat monistic approach, should this term still be considered relevant.

3.3 Democratic control

3.3.1 (a) As regards constitutional rules on parliamentary involvement with regard to the initial negotiations and ratification of international treaties, the *Chambre* is not involved in the negotiation of treaties but intervenes prior to ratification. The

[93] *Cour*, 3 December 1960, Pasicrisie 18, p. 223.

[94] *Cour de Cassation*, 21 Décembre 1961, Pasicrisie 18, p. 424.

[95] *Trib.Lux.*, 21 December 1949, Pasicrisie 15, 25.

[96] *Cour*, 2 August 1889, Pasicrisie 3, p. 123.

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approval of an international treaty by the Luxembourgish legislator and the subsequent publication of the approving Act are indeed the necessary conditions that have to be fulfilled so that the international treaty can be ratified internationally[97] and so that it can produce domestic legal effects[98].

An international treaty is approved by a legislative act (see Art. 37 of the Constitution) and follows the same rules as approval of an Act of Parliament dealing with domestic affairs (except for treaties conferring the execution of legislative, executive or judicial powers temporarily to an international body; in such case the special majority requirements under Art. 114(2) of the Constitution related to constitutional amendments are to be followed). The legislative act is a purely formal measure by which the national legislator approves the treaty and possible reservations to the treaty.[99] Due to the requirements related to the publication of Acts approving international treaties, it seems that simplified (executive) international agreements cannot produce legally binding domestic effects (unless submitted to the publication procedure).[100] While the legislature can block the ratification of an international treaty by not approving it, legislative approval does not oblige the executive power to proceed with the ratification on the international plane.

(b) Under the Constitution, and apart from the EU-specific rules on the involvement of national parliaments based on the principle of subsidiarity (see Sect. 1.4.1), the *Chambre* is not endowed with any post-ratification monitoring/implementation powers as regards international treaties that have been ratified by Luxembourg (and internally approved and published). However, as a matter of practice, the Luxembourgish legislator is present through its delegations within various international and European fora, such as NATO, Benelux and the Interparliamentary Conference on Common Foreign and Security Policy and Common Security and Defence Policy.

3.3.2 As noted in Sect. 1.4.2 above, referendums in Luxembourg have remained rare and have only been used three times to date (February 2015), including in 1919 on the economic union to be established with France or Belgium. For EU-related referendums, see Sect. 1.4.2.

No constitutional ban applies to referendums concerning international treaties.

3.4 Judicial Review

3.4.1 The relationship between domestic Luxembourgish law and international law is determined by a strong deference to international law. The best illustration of this

[97] Kinsch 2010, pp. 403–404.

[98] *Trib. Lux.*, 21 December 1949, Pas. 15, p. 25.

[99] Kinsch 2010, p. 402.

[100] Ibid., p. 403.

approach is Art. 95ter(2) of the Constitution that explicitly prohibits the constitutional review of Acts of Parliament approving international treaties by the Constitutional Court. To the Expert's knowledge, the domestic courts have not challenged international law norms in order to protect domestic legal standards. However, the domestic tribunals are likely to insist on the requirement that only international treaties that have been published as required can produce legal effects in the domestic legal system. Also, the Luxembourgish tribunals have engaged in the analysis of the direct applicability of specific international treaties referred to in cases pending before them. This analysis has been flawed with some inconsistency. Legal scholars have referred, in this respect, to the evolution of the stance taken by the Luxembourgish *Cour de cassation* (as well as by lower domestic courts) on the direct applicability of the International Covenant on Civil and Political Rights.[101]

3.5 The Social Welfare Dimension of the Constitution

3.5.1 To the Expert's knowledge, the above concerns have not been translated into a significant constitutional discourse.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 As was discussed in greater detail in Sect. 2.3.5.1, the *Conseil d'État* has raised some constitutional concerns regarding the EAWFD, which does not allow for refusal to execute a warrant where the offence is of political nature.[102] However, both the Act of 20 June 2001 on extradition and the European Convention on Extradition (Arts. 3(1) and (2)) distinguish requests for extradition which are related to political offences from extradition requests which pursue a political goal. In the context of the EAWFD and its relation to other international law instruments, the *Conseil d'État* has underlined that it may seem surprising at first that a framework decision based on Art. 34 TEU provides for rules which substitute rules resulting from Member States' international treaties elaborated within the framework of the Council of Europe, such as the European Convention on Extradition and the Additional Protocols and the European Convention on the Suppression of Terrorism. Regarding the European Convention on the Suppression of Terrorism, Luxembourg has not made any reservation to its obligation to extradite a person even when the relevant offence may be of political nature. Article 5 of the Convention against Terrorism provides that it shall not be interpreted 'as imposing

[101] Ibid., pp. 403–405.

[102] Opinion *Conseil d'Etat*, 19 December 2003, doc. parl. No. 5104/4, p. 5.

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an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Art. 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'. However, according to the *Conseil d'État,* Luxembourg does not accept or apply broadly the principle laid down in Art. 5 of this Convention. A similar approach is to be expected by Luxembourg regarding any refusal to execute a warrant if the offence for which the warrant was issued is of political nature.

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The Role of the Danish Constitution in European and Transnational Governance

Helle Krunke and Trine Baumbach

Abstract The Danish Constitution originates from 1849. Its human rights catalogue, which stems from 1953, is described in the report as old and not very comprehensive; in many cases the ECHR goes further in protection. Denmark does not have a constitutional court, and courts take a deferential approach to judicial review; up until 2015, only one Act had been annulled on the grounds of unconstitutionality. The Danish concept of democracy builds on a strong Parliament and reluctant courts, which are careful not to act in a 'political' manner. Regarding constitutional amendments, the Danish Constitution has not undergone changes in relation to EU membership. This is partly attributed to the difficult amendment procedure involving two (different) referendums and a high turnout requirement. In practice, Danish parliamentary control over Government in EU decision-making has widely come to be regarded as one of the strongest in Europe. However, with regard to domestic implementation, in 2015 Parliament expressed concern that the

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executive had implemented EU directives by administrative acts in nine out of ten cases. Other constitutional issues that have arisen include considerable debate regarding the *Laval* line of cases, given the strong Scandinavian welfare system and the tradition of ordinary collective agreements. Another concern that has been raised by the Danish Supreme Court is that the use of teleological interpretation in a number of ECJ cases has affected legal certainty and foreseeability, which are at the centre of the Danish understanding of the rule of law.

Keywords The Constitution of Denmark · Absence of EU amendments Difficult amendment procedure involving two referendums · Danish Supreme Court · Judicial review · ECHR · Deference of courts · Implementation of EU law by governmental regulations · *Laval* and impact on collective action, posted workers and the Scandinavian welfare system · European Arrest Warrant and extraditions · Data Retention Directive · Teleological interpretation, legal certainty and foreseeability of law

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1–1.1.2 The Danish Constitution falls within the evolutionary category. The original Constitution from 1849 was influenced by the Enlightenment and French philosophers such as Montesquieu. Hence, focus was on the ideas of separation of powers and human rights. However, in Denmark it was a 'peaceful' revolution. The Danish King chose to cede power to the people, and this way Denmark changed its form of state from an absolute monarchy to a constitutional monarchy. In the first phase after the adoption of the Constitution the King still had several competences, for instance he appointed and dismissed the Government. However, this was changed, and since 1901 Denmark has had negative parliamentarianism – first as a constitutional convention and since 1953 with a legal basis (Art. 15) in the Constitution. Until 1915, many groups in society, including women, did not have the right to vote. However, in 1915 the Constitution became a 'democratic' constitution providing women, servants, people living in poverty, criminals and the mentally ill with the right to vote. While the Danish Constitution is concerned with both the organisation of the state and rights, more provisions concern the organisation of the state (institutions, competences, etc.). It is interesting that the first Articles of the Constitution concern the Danish territory, the form of government and separation of powers. Human rights are regulated in Chap. 8 of the Constitution (Arts. 71–85). The Constitution has a total of 89 provisions.

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1.2 The Amendment of Constitutions in Relationship to the European Union

1.2.1 The Danish Constitution has not been amended in relation to EU membership.

1.2.2 The amendment procedure in Art. 88 of the Constitution is characterised by being extensive and by involving the people twice. After Parliament has adopted an amendment bill, an election must be held. The new Parliament must adopt the same bill, and within 6 months a referendum on the bill must take place. In this referendum a majority of those voting and at least 40% of those entitled to vote must vote in favour of the bill, which takes effect upon signature by the King. It is quite difficult to change the Danish Constitution, and the requirement of 40% is especially difficult to obtain.[1]

1.2.3 Not applicable.

1.2.4 Since the Danish Constitution does not mention EU membership, the Constitution would provide the reader with a more realistic picture of the competences and allocation of powers if the EU were mentioned in the Constitution. Such a development has taken place in the other Nordic EU Member States (Sweden and Finland). Furthermore, it might be relevant to write down some of the procedures connected to national decision-making processes, for instance the existence of the European Policy Committee and the mandate procedure. Some countries such as Germany, France and Portugal have strengthened the role of the national parliament in the constitution in connection with ratification of the Lisbon Treaty.[2] Denmark could consider whether this would be desirable in order to re-establish the power balance between the Parliament and the Government in light of EU cooperation. Another question which could be considered is the criteria for calling a referendum when Denmark wants to enter a new EU treaty. According to Art. 20, a referendum must be held if the accession to a treaty involves the transfer of powers granted to Danish authorities by the Constitution and fewer than five-sixths of the members of Parliament support such accession. As will be seen in Sect. 1.3.1, transfer of sovereignty is regulated in Art. 20 of the Constitution. This means that quite technical treaties such as the Amsterdam Treaty and the European Patent Convention have been subject to a referendum, whereas the Lisbon Treaty which entailed institutional changes that affected the democratic structure of the EU required no referendum. Hence, one might ask whether Art. 20 reflects the importance of the treaties, especially in the eyes of the electorate.[3] These are examples of issues which could be considered in a revision of the Constitution.

[1] For more details on constitutional change in Denmark, see Krunke 2013, pp. 73–92.

[2] See for instance Piris 2010, p. 126.

[3] Krunke 2013, pp. 542–570, especially pp. 569–570.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Two constitutional provisions regulate Denmark's participation in international cooperation:

> **Art. 19** Subsection 1: The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing [Parliament], the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation the fulfilment of which requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, denounce any international treaty entered into with the consent of the Folketing.
>
> **Art. 20** Subsection 1: Powers vested in the authorities of the Realm under this Constitutional Act may, to such an extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.
>
> Subsection 2: For the enactment of a Bill dealing with the above, a majority of five sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referendums laid down in Section 42.[4]

Article 20 entered the Constitution during the last revision in 1953. Inspired by the Coal and Steel Union, it was foreseen that Denmark might want to join some form of supranational cooperation in the future. By introducing Art. 20 into the Constitution it would not be necessary to amend the Constitution following the Art. 88 procedure in order to enter a supranational organisation. The procedure in Art. 20 is not as extensive as the Art. 88 procedure. Obviously, in a country with EU sceptic voters but a majority of politicians in favour of EU cooperation, there might be a political interest in entering into EU treaties through the simplest possible procedure.

1.3.2–1.3.3 Since the 1953 Constitution allows for the transfer of sovereignty to supranational organisations, the Constitution is not based on an absolute sovereignty line of thinking. The system in the Constitution is very much related to procedure: the more intense the international cooperation, the more complex a procedure must be followed to enter it. This is reflected in the degree of involvement of Parliament and the electorate in the decision-making process. If it is 'normal' international cooperation, the Art. 19 procedure will be sufficient. If sovereignty is transferred, then the Art. 20 procedure is necessary and, if the cooperation is even more intensive and the transferred competences are not specified, the Art. 88 procedure will be required. This means that the transfer of competence is primarily a question of procedure.

[4] All quotes from the Constitution are from the translation of the Danish Constitution at the homepage of the Danish Parliament: https://www.thedanishparliament.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx.

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There are few limits to the extent to which powers can be delegated to the EU through the Art. 20 procedure. As mentioned, the transferred competences must be specified according to Art. 20. All legislative, executive or judicial power cannot be transferred.[5] Neither can the power to change the Constitution[6] nor the power to transfer sovereignty in Art. 20.[7] The power to decide the age of voting can probably not be transferred.[8] Provisions on national elections and on the competence of the Court of Impeachment are also excluded from transfer.[9] Powers that are not held by any Danish authority can also not be transferred; for instance, human rights protection must be respected.[10] The latter was also emphasised by the Supreme Court in the *Maastricht* judgment.[11] It also follows from this judgment that Denmark must remain an independent state, which is a constitutional precondition for a transfer of powers under Art. 20. However, even if Denmark should want to enter a treaty which falls outside what is possible according to Art. 20, it would be possible to enter such treaty through an amendment of the Constitution. The Constitution of Denmark has no eternity clauses.

1.3.4 Denmark has a dualistic system. This can be interpreted from Art. 19 and from case law.[12]

The *Maastricht* judgment and the *Lisbon* judgment have contributed to the interpretation of Arts. 19 and 20. The legal question in the *Maastricht* judgment was whether the Art. 20 procedure was sufficient when Denmark entered into the Maastricht Treaty. The legal question in the Lisbon Judgment was whether the Art. 19 procedure was sufficient when Denmark entered into the Lisbon Treaty. As regards the question of supremacy of EU law, the Supreme Court has not accepted supremacy in relation to the Danish Constitution.

In the Lisbon case the Supreme Court stated the following:[13] 'In the Maastricht judgment, the Supreme Court found, among other things, that *it is for the Danish courts to decide whether EU acts exceed the limits to the surrender of sovereignty which has taken place under the Accession Act*'. Paragraph 9.6 of the judgment thus reads:

> 9.6. … By adopting the Accession Act, it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold than an EC act is inapplicable in Denmark *without the*

[5] See Zahle 2006, p. 414.

[6] See Zahle 2006, p. 413 and Andersen 1954, p. 497.

[7] See Zahle 2006, p. 413.

[8] Ibid.

[9] Ibid. For a different perspective, see Jensen and Jensen 1991.

[10] See Zahle 2006, pp. 413.

[11] See U 1998.800H.

[12] See for instance Rytter 2012, p. 189, U 2006.700H, U 2010.1035 and U 2010.1547H.

[13] Supreme Court judgment of 20 February 2013, Case No. 199/2012, p. 15, U 2013.1451H, p. 1518. See translation of the judgment at the homepage of the Danish Supreme Court: http://www.hoejesteret.dk/hoejesteret/nyheder/ovrigenyheder/Documents/199-12engelsk.pdf.

> *question of its compatibility with the Treaty having been tried by the EC Court of Justice*, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the surrender of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in s. 20(1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for surrender of sovereignty determined by the Accession Act. Therefore, *Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act. Similarly, this applies with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.* [Author's italics]

The Court further stated that:

> … the Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Treaty of Lisbon was *based on a constitutional assessment* that it will not imply delegation of powers requiring application of the s. 20 procedure, and the Danish authorities are obliged to ensure that this is observed. *… if an act or a judicial decision which has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act, as amended, this may be made subject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on such application of the Treaties with reference to the Charter of Fundamental Rights*. [Author's italics]

In general The Supreme Court shows deference when reviewing the constitutionality of legislation. This means that the Court will only rule an Act unconstitutional if it is in clear violation of the Constitution. This practice has also been followed in relation to legislation on Denmark's accession to EU treaties.

Furthermore, Danish courts will normally try to interpret Danish legislation in conformity with EU law.

1.4 Democratic Control

1.4.1 The EU is not mentioned in the Constitution and neither is the role of the Parliament in the EU decision-making process. The involvement of the Danish Parliament is mentioned in the Danish Act on Accession to the EU, Art. 6, part 2, according to which the Government must inform the European Policy Committee on proposals in the Council which will have direct effect in Denmark or which will require the participation of Parliament for implementation. However, in practice Parliament has significant influence. Among others, a mandate procedure has been

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Table 1 EU related referendums

Date of referendum:	Referendum concerning:	Outcome:
2 October 1972	Danish accession to the EC	63.4% in favour
27 February 1986	Single European Act	56.2% in favour
2 June 1992	Maastricht Treaty	50.7% rejected
18 May 1993	Maastricht Treaty with Danish exceptions	56.7% in favour
28 May 1998	Amsterdam Treaty	55.2% in favour
28 September 2000	Third stage of the Economic and Monetary Union (one of the Danish exceptions stemming from the accession to the Maastricht Treaty)	53.2% rejected
25 May 2014	The Unified Patent Court	62.5% in favour
3 December 2015	Justice and Home Affairs Opt-Out	53,1% rejected

Source The Danish Parliament, EU Information Centre, https://english.eu.dk/en/denmark_eu/eu-referenda.

established according to which the Government will not vote in favour of a proposal in the Council if a majority in the European Policy Committee is against it.[14] These developments of the Committee's control over EU Policy are written down in a number of Committee reports. Hence, even though the Danish parliamentary control system is often said to be one of the strongest in Europe, it has very little formal basis in legislation and none in the Constitution. Put in very general terms, the success of the Danish European Policy Committee lies in (1) the mandate procedure, which is respected by the Government (and is considered legally binding by some legal experts whereas others only consider it politically binding on the Government), (2) the early involvement of the Committee in the decision-making process, and (3) the Government keeping the Committee updated if a proposal changes along the way in the EU decision-making process.[15] One further important factor is the Danish tradition of minority Governments, which naturally strengthens Parliament.

1.4.2 Denmark has held a number of referendums on (1) accession to the EC, (2) EC/EU treaties and (3) exceptions from the treaties. These are summarised in Table 1.

[14] It is not possible to go into details about the control process. For more information on the Danish Parliament's control of EU Policy, see for instance Krunke 2007, pp. 335–348, and Krunke 2008–2009, pp. 105–107.

[15] See also Krunke 2008–2009, pp. 105–107.

The most interesting referendums and certainly the best known outside Denmark are the two referendums on the Maastricht Treaty (of which the second included a number of Danish exceptions from the Treaty).[16]

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Not applicable.

1.5.2 As mentioned, Denmark has not amended its Constitution in relation to the EU. One might ask why this is. In answering this, it might be useful to make a distinction between legally necessary amendments on the one hand, and amendments which are not legally necessary but driven by other purposes.

Several reasons can be given why amendments have not been legally necessary. In 1953 (i.e. the time of the last amendment of the Constitution), the Constitution was designed in such a way that it would be possible for Denmark to enter into and take part in supranational co-operation without having to amend the Constitution. According to Art. 20, powers which rest with Danish authorities can to a specific extent be transferred to an international organisation. There are few constitutional constraints on the content of Danish legislation. Therefore, there are also few constraints on the legislative competence which can be transferred according to Art. 20. Article 20 leaves some room for interpretation. Political institutions play an important role in interpreting the Constitution. The courts are traditionally careful when performing judicial review – only clear violations are viewed as violations of the Constitution.

What other potential purposes could amending the Constitution due to EU membership serve? One such purpose could be to design the Constitution such that it reflects the actual allocation of political power in the light of EU membership, and to thus formulate a Constitution which ordinary citizens can read and understand. Furthermore, there could be a desire to change the national power allocation as a result of EU membership – for instance to strengthen the national Parliament in new ways or to give constitutional effect to parliamentary control functions which already exist in political practice. Thirdly, there could be a desire to alter the provisions on transfer of sovereignty (Art. 20) in light of the experiences of the past 40 years of EU membership. For instance, as mentioned above, one might ask whether Art. 20 reflects what is important to the citizens. In which situations should a referendum be held? Or is the provision clear enough? Finally, one purpose could be to strengthen/renew the democratic legitimacy of the Constitution through a constitutional revision process which involves the electorate (the last time the electorate voted on the content of the Constitution was in 1953).

Given these purposes, why have such amendments not been made? Several reasons can be given. To date, no political majority has been in favour of a general

[16] Krunke 2005, pp. 339–356.

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revision. Such a revision would naturally initiate a debate on possible provisions on EU membership. Another reason is the complicated amendment procedure in Art. 88, in which the electorate must be involved twice (election and referendum). Thirdly, Art. 20 functions in practice, and it might be difficult to design a legally better functioning provision (only a different provision). Fourthly, reasons of a more political nature probably exist. Quite a far-reaching transfer of power is possible under Art. 20 (also without involving the electorate) – a large majority of politicians have thus far been in favour of Danish EU membership. As regards a general revision of the Constitution, this would raise public and political debate over a number of sensitive political questions. Fifthly, there has not been enough pressure from the electorate and/or a majority in Parliament for more influence on EU-matters in the Constitution. Finally, Denmark has a tradition of strong parliamentary involvement in EU affairs (mandate procedure, etc.) and minority Governments.

According to Hjalte Rasmussen, the absence of EU amendments in the Constitution has even resulted in a process of 'waning constitutionalism'. He states that the Constitution has been fossilised and marginalised 'because of the unavailability of any real amendment procedure, coupled with the application of judicial hands-off policy which precludes alternative routes to the document becoming a centrepiece of a living constitutionalism, as well as the absence of a constitutional theory'; as a result of this, 'the constitutional limits to transfers of sovereignty have turned into rules that provide for a political essential discretionary assessment'.[17] On the one hand, it is probably true that the Supreme Court could in some cases have interpreted Art. 20 in a less restrictive manner, leaving less room for the political institutions' interpretation of Art. 20 while still staying within the limits of a traditional constitutional interpretation of the provision.[18] However, on the other hand, the Supreme Court is in general traditionally careful when interpreting the Constitution and leaves much room for the political institutions' interpretation of the Constitution.

1.5.3 In the context of enhanced EU cooperation and international cooperation in general, the national constitutions have played an important role in safeguarding democratic participation and decision-making as regards this cooperation. As regards many constitutions which are not often amended, it might be worth considering whether the electorate and/or the Parliament should have an increased role in relation to EU cooperation and other international cooperation. The institutional balance between the national institutions has been drastically pushed in many

[17] Rasmussen 2008, p. 155.

[18] In relation to the Danish Lisbon judgment, see Krunke 114b, pp. 542–570. As shown in the case note, it would have been possible for the Supreme Court to interpret Art. 20 in a less restrictive way, leaving less room for the political institutions' interpretation of the provision. This was actually done by the High Court in its Lisbon judgment. However, even if this had been done, the Danish Lisbon judgment would not (necessarily) have had another outcome since a less restrictive interpretation of Art. 20 would not necessarily have resulted in the finding of a violation of Art. 20 in the case.

Member States as a result of the ever closer EU and international cooperation. Such co-operation is not a negative thing – in fact it can help solve many global problems. However, it is important to secure as much democratic participation and decision-making as possible. The national constitutions can also play an important role in relation to defining a nation's constitutional identity, values and rights. As we shall return to later, constitutional dialogue between national institutions and EU institutions, for instance dialogue between national courts and the Court of Justice of the European Union (CJEU), requires a clear notion of national constitutional identity and a clear way of communicating it. Although some courts contribute to such a definition and communication of national constitutional identity, a broad debate in society on national identity, values and rights is also important. No one could have foreseen such a development in globalisation, and national constitutions need to be adjusted to fit this new reality as regards democratic, institutional and rights perspectives. In some countries – such as Denmark – the need for a strengthening/renewal of the democratic legitimacy of the Constitution through public debate and a new Constitution based on this debate seem unavoidable in light of the changed globalised reality. Some specific potential areas for amendment are outlined in Sect. 1.2.4.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Human rights are regulated in Chaps. 7 and 8 of the Danish Constitution. The Constitution protects the traditional political freedoms: freedom of speech (Art. 77), freedom of association (Art. 78) and freedom of assembly (Art. 79). Furthermore, classical rights such as the right to property (Art. 73), the right to personal liberty (Art. 71), the right to privacy (Art. 72) and freedom of religion (Arts. 67, 68 and 70) are protected. The Constitution protects certain social rights (Arts. 75 and 76). Finally, some provisions outside the chapters on protection of human rights should be mentioned. The Constitution has no provision on the right to a fair trial. However, according to Arts. 3 and 64 the courts are independent, and according to Art. 63, the courts can review administrative decisions. According to Art. 65 the administration of justice must be public and oral. The human rights catalogue is old and not very comprehensive according to a modern standard. The protection provided by the European Convention on Human Rights (ECHR) has become increasingly important, and in many cases the Convention and the practice of the European Court of Human Rights (ECtHR) go further in protecting human rights than the Constitution.

In general, the provisions on human rights in the Constitution are enforceable in courts. Only in a few cases has the general assumption been that part of a provision

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is so general that it does not contain an independent legal content/right which could be enforced in courts. One example is the first sentence of the provision on the right to property in Art. 73, '[o]wnership is inviolable'. However, it should be mentioned that part of the legal literature does not agree with the general assumption that Art. 73, part 1, first sentence, is not enforceable, and at least one judgment seems to support such an interpretation.[19] Another example is part 2 of the provision on protection of social rights in Art. 75, which provides that '[a] person who is unable to support himself or his dependents, and whom no one else is under an obligation to support, is entitled to assistance from the State, while accepting the obligations that the Act relating to such assistance imposes.' However, in a ground-breaking judgment from 2006,[20] the Supreme Court introduced that a private party could invoke a right based directly on Art. 75, part 2 (and not only on rights according to social legislation). This means that Art. 75, part 2 is now enforceable in courts.

Denmark does not have a strong tradition of codifying general principles of law in the Constitution. The general principles of law are often unwritten principles which are enforced by the courts and mentioned in legal literature and/or underlying considerations, presumptions and values which implicitly lie behind constitutional and legislative provisions. Danish courts have a rather pragmatic approach, which means that they often apply legal principles without making direct references to them and without specifying whether the principles have constitutional rank. All of these factors contribute to a somewhat unclear picture of which legal principles exist and whether they have constitutional rank. In general, the unclear character of a 'legal principle' as an independent legal source or a source of interpretation obviously adds to this picture.

The principle of legitimate expectations is not explicitly codified in the Constitution. Nevertheless, a protection of legitimate expectations is indirectly reflected in for instance the provision on protection of property in Art. 73. In the case law, legitimate expectations are often used as legal arguments in relation to Art. 73.[21] In at least one case from the High Court legitimate expectations have been treated as an independent source of law.[22] This seems to support the idea of a general constitutional principle of legitimate expectations with constitutional rank.[23]

The principle of equality as an abstract norm is not codified in the Constitution. Nevertheless, the protection of equality is reflected in a number of specific constitutional provisions, for instance Art. 70 on protection against discrimination

[19] Berlin 1939, pp. 388–390; Larsen 1940, p. 60; Ross 1966, p. 665; Krunke 2010, pp. 211–223. See also U 1958.595H.

[20] U 2006.770H.

[21] Krunke 2010, pp. 101–117. On legitimate expectations see also UfR 2011, p. 1365 and Mørup 2005.

[22] Unpublished judgment from the High Court of 24 June 2004 (B-1626-01).

[23] Krunke 2010, pp. 106–107 and 115–117.

based on religion or origin in relation to civil and political rights. The case law is not clear in this field.[24]

The principle of proportionality is not codified in the Constitution. However, according to legal theory the principle of proportionality must be interpreted together with constitutional rights provisions when possible.[25] One might say that the principle thus indirectly gains constitutional rank at least in relation to a number of rights (see below Sect. 2.1.2).

The definition of the concept of legal certainty is not entirely clear.[26] A very general definition would emphasise that (1) legal certainty concerns the relationship between the individual and the authorities, (2) that the individual must not be subject to arbitrary abuse of power and (3) that the state of the law must be predictable for the individual.[27] However, a broader definition could include the legislative process and the content of legislation including respect of fundamental rights.[28] Neither is the distinction between the principle of legal certainty and the principle of the rule of law clear. A recent attempt to identify the content of the two principles emphasises that the principle of legal certainty has the personal freedom of the individual, including the rights of minorities, as its main focus, while the principle of the rule of law has the separation of powers and the legality of the administration as its main focus. Furthermore, it has been stated that the rule of law is a precondition for legal certainty, and legal certainty legitimises the rule of law.[29] At the FIDE congress in 2014, the then Danish Supreme Court President, Børge Dahl, stated the following on the principles of the rule of law and legal certainty:

> The concept of the rule of law implies a number of things. One aspect is the principle of equality before the law. Another aspect is the principle of legal certainty: Without legal certainty there can be no rule of law.
>
> In its strictest sense, legal certainty means the elimination of arbitrariness. This again implies that the courts must act in a way that makes it possible for the citizens to plan their activities and foresee the legal consequences of their actions. In this regard, the principle of legal certainty is synonymous with a minimum degree of clarity and foreseeability in the legal system.[30]

The Constitution does not have a general provision on protection of legal certainty. Nevertheless, the principle of legal certainty and the principle of the rule of law are reflected in a number of more specific provisions in the Constitution: Art. 3 on separation of powers; Art. 22 on promulgation; Art. 43 according to which taxes

[24] Two interesting judgments which perhaps support the existence of a general principle of equality are U 1960.33 H and U 1989.148/2 H.

[25] Jensen 1994, p. 335.

[26] Henrichsen 1997, Chap. 1. For instance legal certainty can be seen from an administrative law point of view or from a constitutional law point of view.

[27] See Henrichsen 1997, pp. 83–84.

[28] Ibid., p. 63.

[29] See Dansk Center for Menneskerettigheder og Advokatsamfundet 2012, p. 7.

[30] See Dahl 2014, p. 27.

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must have a legal basis in an Act; Art. 62 according to which the courts must be independent of the Government and the public administration; Art. 63 on review of administrative decisions; Art. 64 according to which judges shall be governed solely by the law; Art. 65 according to which all proceedings shall to the widest possible extent be public and oral in the administration of justice; protection of personal liberty in Art. 71; the right to privacy in Art. 72; and the political freedoms set out in Arts. 77–79.

Furthermore, legal certainty is applied and sometimes referred to in case law. However, often it is not clear whether the principle is applied as a source of interpretation when interpreting legislation or whether it is applied as an independent source of law. Furthermore, it is not clear whether the principle has constitutional rank. However, a number of particularly interesting judgments which might indicate the existence of an independent principle of legal certainty and a rank above normal legislation will be mentioned here.

Two judgments from the past decade seem to indicate that not only does a principle of legal certainty exist but it also has a higher rank than normal legislation. The Supreme Court has ruled that a video tape containing an examination of a child could not be played during the trial against her foster father who was accused of abusing her sexually.[31] Although such evidence was normally allowed according to the Administration of Justice Act, Art. 877, part 3, the Supreme Court would not allow it based on considerations of legal certainty. The reason was, among other factors, that the defendant had not been able to consult with his defence lawyer before the examination of the child or to view the video tape afterwards together with his defence lawyer.

In the second judgment it becomes even more clear that the rank of the principle of legal certainty is higher than that of normal legislation. The case concerned a Tunisian citizen who had planned to kill one of the so-called Muhammad cartoonists. Based on the Danish Aliens Act the Danish Immigration Service decided to permanently deport him because he was a danger to the state,[32] and the police detained him. According to Art. 37, the courts can review the legality of such a detention. The Supreme Court stated that the review of such detention must include at least some review of the factual foundation that determines whether a foreign citizen must be considered a danger to the state. The authorities must make this possible by submitting sufficient documentation in court with the possibility for the defendant to raise objections.

In recent case law, the Supreme Court has expressed concern whether certain interpretations of EU law by the European Court of Justice have violated legal certainty. This was clear in a case from 2014 in which the Supreme Court determined whether the employer or the employee should carry the risk of the employee becoming sick during his vacation.[33]

[31] See U 2000.1751H.

[32] See U 2008.2394H.

[33] See U 2014.914H.

In other words, can an employee request a new vacation period for the days he was ill? The Danish Holidays Act from 2000 was very precise on this matter, leaving the risk to the employee. The legal question was whether it was possible to interpret the Act in accordance with Directive 2003/88[34] and thereby in such a way that the employer should carry the risk. The Supreme Court stated that the duty to interpret national law in accordance with EU law does not apply if this would violate general principles of law such as the principle of legal certainty and non-retroactivity. Neither does this duty apply if this would lead to a *contra legem* interpretation of national law. The Supreme Court concluded that according to the Danish legal principles of interpretation, it was not possible to interpret the Danish Act in compliance with Directive 2003/88. This would be *contra legem*, which the EU principle regarding the duty to interpret national law in accordance with EU law does not require. According to the Supreme Court, such an interpretation would also constitute a violation of legal certainty and predictability which must be required when applying the law in relation to the Holidays Act from 2000 with regard to the employer. When the Supreme Court refers to legal certainty, it is not entirely clear whether it refers to it as a legal principle in EU law and/or in Danish law. The exception from the duty to interpret national law in conformity with EU law is related to the general principles of EU law.[35]

Another example is a Supreme Court decision from 2014,[36] in which the Supreme Court decided to request a preliminary ruling from the CJEU in a case on age discrimination. The main question was whether an unwritten EU principle prohibiting age discrimination must prevail over a contradictory written provision in national legislation which provides a private party with a legal basis to not pay severance pay. In the preliminary questions to the CJEU, the Danish Supreme Court referred to the principle of legal certainty and the related principle of legitimate expectations. The Supreme Court asked whether it would be in accordance with EU law if the Supreme Court ruled that the principle of legal certainty must prevail over the unwritten EU principle of the prohibition against age discrimination. The latter two cases also relate to the rule of law (see below Sect. 2.1.3).

Finally, there are some Acts which provide for legal certainty in specific areas such as social policy and the administrative use of force.[37] In conclusion, legal certainty is without doubt a Danish legal principle, and the case law described above seems to support that the principle has a higher rank than does normal legislation (see for instance U 2008.2394H). This points in the direction of a constitutional principle with constitutional rank.

As regards the principle of the rule of law, see below in Sect. 2.1.3.

[34] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, [2003] OJ L 299/9.

[35] Case C-80/86 *Kolpinghuis Nijmegen* [1987] ECR 03969, para. 13.

[36] Supreme Court decision of 22 September 2014, case 15/2014, 1. Afdeling.

[37] See LBK nr. 983 af 08/08/2013 and Lov nr. 442 af 09/06/2004.

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A democratic form of government is an underlying value which is reflected in a number of articles, for instance on the right to vote in elections and referendums and political freedoms. In U 1999.1798 H, the Supreme Court, borrowing from the wording of the case law of the ECtHR but relating them to the Danish Constitution, stated that freedom of speech (Art. 77), freedom of association (Art. 78) and freedom of assembly (Art. of 79) are necessary and natural preconditions for democracy. The Danish judgment on the Maastricht Treaty seems to accept the existence of a constitutional presumption of a democratic form of government.[38] Hence, one could argue that a democratic form of government is a legal principle at constitutional level.

2.1.2 Although the Danish Constitution does not have a general provision stipulating the conditions under which restrictions can be imposed on rights, the specific provisions in Arts. 67, 73 and 77–79 on particular rights do. For example, Art. 73 expressly states that restrictions can only be imposed by statute. However, this also follows from the unwritten principle of legality.[39] Therefore, restrictions under all of the mentioned articles require a legal basis in a statute. Furthermore, as mentioned, the principle of proportionality must be interpreted together with constitutional rights provisions where possible.[40] This means that imposed restrictions on (as a minimum) the rights described in Arts. 67, 70, 73 and 77–79 must be proportional.[41] Finally, an imposed restriction must have a legitimate purpose. Such purpose must follow from the specific rights provisions.[42] For instance according to Art. 67, an imposed restriction on the freedom of religion must be required by decency and public order; according to Art. 73, an imposed restriction on the right to property must be required by the common good. These requirements of a legal basis set out in a statute, proportionality and a legitimate purpose are supported by the case law of the Danish courts. Of particular interest is the Supreme Court case mentioned above on restrictions on the freedom of assembly, since the Supreme Court when interpreting Art. 79 of the Constitution, borrowing the wording of the case law of the ECtHR but relating them to the Danish Constitution, has stated that freedom of speech (Art. 77), freedom of association (Art. 78) and freedom of assembly (Art. of 79) are necessary and natural preconditions for democracy.[43]

2.1.3 The English definition of the principle of the rule of law is not entirely clear and neither is the Danish concept of the rule of law. Furthermore, the principle of the rule of law has slightly different meanings in different legal systems.[44]

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[38] U 1998.800 H.

[39] Rytter 2012, p.117.

[40] Jensen 1994, p. 335.

[41] Rytter 2012, p. 112.

[42] Ibid., p. 123.

[43] See U 1999.1798H.

[44] See for instance Koch 2008, pp. 45–63. Koch among others compares the notion ‘rule of law’ in the English and German legal systems.

The principle of the rule of law is not mentioned as a legal principle in the Danish Constitution. However, as noted in Sect. 2.1.1, several provisions in the Constitution and the unwritten principle of legality must be said to create the rule of law, although it is not possible to make a clear distinction between which constitutional provisions protect the rule of law and which protect legal certainty. Provisions such as separation of powers (Art. 3), independence of the courts (including that judges shall be governed solely by the law (Art. 64)) and judicial review of administrative decisions (Art. 63) all support the rule of law. The rule of law is furthermore ensured by judicial review of legislation by the courts. This competence of the courts is not written in the Constitution. However, it is considered to be a legal rule at constitutional level. The principle of legality is an unwritten principle which expresses a cornerstone in the protection of the rule of law.

In the contemporary literature on constitutional law, the principle of the rule of law is directly mentioned with regard to the following provisions: Art. 62 of the Constitution according to which the administration of justice must be kept separate from public administration; Art. 63 on judicial review of administrative decisions; Art. 64 regarding the independence of the courts from the Government; Art. 55 regarding the Ombudsman's control of public administration; constitutional provisions on human rights from which duties for the authorities, such as regarding administrative decisions, can be derived; and finally the rule of law is mentioned as regards the unwritten principle of legality.[45]

A search for the 'principle of the rule of law' in Danish case law shows that the rule of law is not a frequently used term. The 'principle of the rule of law' only appears in 11 judgments, and in some of them the concept appears in reference to the European Charter of Human Rights or EU legislation and EU judgments.[46]

In U 1961.1085Ø the relatives of a man who was executed during the Second World War wanted to read the authorities' files on the case. Their lawyer argued that it follows from the principle of the rule of law (and legislation) that there must be the greatest possible access to public decisions. In U 2009.426H a defence lawyer argued that in a society built on the rule of law, the evidence in that case could not lead to such a radical measure as detention. In U 2012.2874H the defendant, a ministry, argued that the legislation that prescribed compulsory attendance in a refugee camp did not violate the principle of the rule of law. In VL 2007B-1135-05 the principle of the rule of law was invoked by the plaintiff, a Danish citizen, in the Danish National Tax Tribunal but not in the High Court. However, the High Court judgment provides a summary of the proceedings in the Danish National Tax Tribunal.

[45] Zahle 2006, pp. 222 and 227, and Zahle 2001, p. 36.

[46] See U 2013.834H (as regards TEU Art. 6) and U 2013.1451H (as regards TEU Art. 10B). In OE2012.S-3494-11 the lower court's decision is mentioned, and the court states that the demand for a clear legal basis in criminal law cases must 'not least be seen in the light of the impact of the ECHR as regards the protection of the fundamental principles of the rule of law'.

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In five judgments, the 'principle of the rule of law' appears to concern the Danish terrorism provision in the Danish Criminal Act (Art. 114).[47] According to the *travaux préparatoires*, this provision must be interpreted in light of the EU framework decision on the fight against terrorism.[48] The Framework Decision refers to actions aimed as a threat against the democratic society which respects the principle of the rule of law. Thus, the plaintiffs and the defendants in the Danish judgments regarding Art. 114 have referred to the principle of the rule of law several times. As regards the Danish terrorism provision, it is also interesting that the Danish Parliamentary Committee on Judicial Matters has expressed that 'a legitimate state builds on the principle of democracy and the principle of the rule of law'.[49]

As a sub-conclusion, many applicants (private parties as well as public authorities) have presented arguments based on the principle of the rule of law in the courts.

The courts do not refer directly to this principle very often. In U 2009.1453H, the Supreme Court did so based on the fact that the *travaux préparatoires* for Art. 114 in the Danish Criminal Act refer to the principle of the rule of law. In TfK 2013.115OE, the lower court referred to the impact of the European Convention on Human Rights on the fundamental principles of the rule of law including that criminal liability must be predictable for the citizens. U 2014.914H and Supreme Court decision of 22 September 2014 (Sag 15/2014, 1. Afdeling) concerning a request for a preliminary ruling from the CJEU (referred to above in relation to the principle of legal certainty) also support the conclusion that the Danish Supreme Court defends the principle of the rule of law in relation to the effect of EU law in national law. At the FIDE Congress 2014, the former President of the Danish Supreme Court, Børge Dahl, referred to U 2014.914H as an example of how dynamic judgments from the CJEU violate the rule of law and the principle of legal certainty. He further stated:

> I have to admit that over the years the development of law through the practice of the European Court of Justice have (sic) gone beyond the limitations drawn by the notion of legal foreseeability and certainty under Danish law. Time and again, we are confronted with European judgments finding European harmonisation to have gone further than our legislator and courts had thought. Time and again, we find ourselves bound by EU law through European judgments beyond our understanding and expectations at the time of our commitment. Time and again, I find it rather difficult to foresee the decisions made by my honourable colleagues in Luxembourg. And I know from talks with fellow justices from various countries that this is a matter of growing concern in the supreme courts of the Member States.[50]

[47] See U 2008.2394H, U 2009.426H, U 2009.1453H, U 2012.256H and U 2014.1540H.

[48] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3.

[49] See Folketingstidende 2001–2002, 2. saml., L 35, tillæg B, p. 1466f.

[50] Dahl 2014, pp. 28.

The principle of the rule of law exists in Danish law, but its content is not entirely clear; furthermore the principle of the rule of law is related to the principle of legal certainty. Case law shows that the principle is normally invoked in criminal law cases either as an argument that the evidence is not clear enough or as an argument that the chosen measure is too radical. The principle has also been used as an argument in favour of public access to documents. Furthermore, the principle is referred to when it is clear that a legislative provision is based on arguments relating to the rule of law. Finally and importantly, case law from 2014 shows that the Supreme Court has recently focused on the principles of legal certainty and the rule of law in cases which concern the impact of EU law on contradictory national written law. As was the case with the principle of legal certainty, the principle of the rule of law must probably be viewed as a constitutional principle. Furthermore, it is probably at constitutional level since the Supreme Court in recent case law based its reasoning on this principle in determining that EU law should not prevail over a national legislative Act.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 The Danish report on 'The Protection of Fundamental Rights Post-Lisbon' in the FIDE 2012 proceedings expresses no concern as regards the balancing of fundamental rights and economic freedoms in EU law after *Omega*[51] and *Schmidberger*:[52]

> It has been an ongoing concern whether the ECJ would give sufficient weight to classic fundamental rights (freedoms) whenever those rights collide with EU economic freedoms, since the latter are regarded as fundamental under EU law. This concern would generally seem to be unjustified, at least today, considering the vigour with which the ECJ is (now) upholding classic rights such as those protected by the ECHR, even when this means restricting free movement in the EU.[53]

The report refers to *Omega* and *Schmidberger* and later to the EU Charter:

> The now legally binding EU Charter further underscores the need for the ECJ to keep giving due weight to classic freedoms in collision with economic interests, cf. Art. 52(3) EUC on EUC rights having the 'same meaning and scope' as parallel Convention rights.[54]

However, in the Scandinavian countries with their strong welfare systems and tradition for ordinary collective agreements (instead of legislation), cases such as

[51] Case C–36/02 *Omega* [2004] ECR I–9609.

[52] Case C-112/00 *Schmidberger* [2003] ECR I–05659.

[53] Lauta and Rytter 2012, p. 404.

[54] Ibid.

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Laval[55] have given rise to much debate. The Danish Government and Parliament have interpreted *Laval* as only requiring transparency in the way access to the Danish labour market is hindered but not as preventing Denmark from upholding its way of fixing minimum wages.[56] Following *Laval*, a new provision on the right to take collective action in respect of posted workers was added to the Danish Posted Workers Act.[57] A case similar in many ways to the *Laval* case was heard by the Danish Labour Court in 2005; however, the Court did not refer the case to the Court of Justice.[58] In the Danish context it is interesting that many of the Danish welfare rights are protected either by normal legislation or by ordinary collective agreements as regards labour rights and thus not directly in the text of the Constitution.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

By way of introductory remarks, it has to be noted that Denmark has a so-called justice 'opt-out' regarding the police and judicial co-operation in criminal matters that goes back to the Edinburgh Agreement (1992).[59] The opt-out forms part of the Lisbon Treaty in the sense that it is confirmed in the Protocol on the Position of Denmark, which is linked to the Lisbon Treaty as an annex. As a result of the Danish justice opt-outs, Denmark does not participate in the Council's adoption of measures proposed under Title V, Part Three of the TFEU, and none of the measures adopted under the above-mentioned provisions are binding on or apply to Denmark.[60]

This means, for example, that any future directives on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings[61] or on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings[62] will not be binding on or apply to Denmark.

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[55] Case C-341/05 *Laval* [2007] ECR I-11767.

[56] Neergaard and Nielsen 2010, p. 90.

[57] See Kristiansen 2013, p. 111. Neergaard and Nielsen 2010, pp. 48.

[58] See A 2005.839.

[59] The Edinburgh Agreement granted Denmark four exceptions to the Maastricht Treaty.

[60] Cf. Arts. 1 and 2 of the Protocol on the position of Denmark. With the Lisbon Treaty, Denmark was given the opportunity to replace its existing justice opt-out with an opt-in scheme (like that of the United Kingdom and Ireland), cf. Art. 8 of the Protocol.

[61] See further Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (COM (2013) 824 final).

[62] See further Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trail in criminal proceedings (COM (2013) 821 final).

Even though the EU acts adopted before the entry into force of the Lisbon Treaty under the then-applicable Title VI of the TEU still remain binding on and apply unchanged in Denmark on an intergovernmental basis,[63] Denmark does not in principle have the option to participate in the further development of this cooperation, including any future acts superseding or amending applicable acts within the area.[64]

In some cases, where a new directive only regards, for instance, a more stringent criminal law regulation, Denmark is free to align its legislation with the other EU Member States in accordance with the provisions of the directive. If the new directive supersedes a specific framework decision, it is a prerequisite that the amended legislation still meet the obligations of the framework decision.

However, in those cases where a directive builds on the principle of mutual recognition, it is not possible for Denmark to transpose the directive into Danish legislation unilaterally. In these cases, potential Danish participation in the directive requires an intergovernmental agreement – a so-called parallel agreement – between Denmark and the European Community. Whether such an agreement is possible, is not clear, since the Commission is very restrictive.[65]

2.3.1 The Presumption of Innocence

2.3.1.1 In order to reply to the questions regarding the presumption of innocence, it is necessary to take the principle of mutual recognition as a judicial phenomenon as a starting point and to bear in mind that the principle is regarded as the cornerstone of judicial co-operation within the Union. The principle is based on confidence and trust among Member States that both the substantial criminal law and the administration of justice throughout the Union are built on the same level of protection and the same respect for the rule of law – including the obligation to respect fundamental rights and fundamental legal principles, as also explicitly stated in Art. 1(3) of the Framework Decision.[66,67]

A European arrest warrant is a judicial decision issued by a Member State with a view to accomplish the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a

[63] Cf. Art. 2 of the Protocol on the position of Denmark.

[64] See further Baumbach 2013, pp. 300 et seq.

[65] See for instance the Commission's very restrictive policy in this field COM (2005) 145 def and COM (2005) 146 def where the Commission, among other things, states that a parallel agreement solution 'would have to be of an exceptional nature and apply for a transitional period only'.

[66] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[67] See further Vestergaard and Tranberg 2012, pp. 309 et seq. and Vestergaard and Adamo 2008, pp. 147 et seq.

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custodial sentence or detention order. Regarding the presumption of innocence, only the first purpose is of interest.

The principle of presumption of innocence neither follows from the Danish Constitution nor from the Danish Administration of Justice Act. The principle is, however, considered a common legal principle as it is acknowledged in Art. 48 of the Charter of Fundamental Rights of the European Union and Art. 6(2) in the European Convention on Human Rights.

In this regard – and as a principle inherent in the principle of the presumption of innocence – the Danish legal system recognises the principle of *in dubio pro reo* as a common legal principle. Likewise, the principle that the burden of proof rests with the prosecution is determined by implication by Art. 96 of the Danish Administration of Justice Act. The Danish legal system also recognises, in Art. 752 of the Danish Administration of Justice Act, the privilege against self-incrimination as recognised by the European Court of Human Rights as a standard inherent in Art. 6 of the European Convention on Human Rights.

The Danish Ministry of Justice is the competent executing judicial authority in Denmark. If the Ministry of Justice decides to extradite the person in question, the person has the right to demand that the police bring the case to court in order to have the court determine the legality of the decision.

2.3.1.2 Neither the Ministry of Justice nor the Danish Courts are seen to review cases brought before them in the light of the principle of the presumption of innocence. On the contrary, it is underlined that the competent judicial authorities are distinctly not supposed to review the evidence or to thereby themselves rule on the assumed perpetrator's guilt. That is for the issuing Member State's judicial authority to do. This was explicitly ascertained in a Danish Western High Court decision of 13 September 2005.

In this case the Lithuanian authorities had issued a European arrest warrant to have a Danish citizen extradited for the purposes of conducting a criminal prosecution against him concerning five criminal offences. The case did not concern offences enumerated in the positive list of the Framework Decision on the European Arrest Warrant and thereby not the positive list in the Danish Act on Extradition of Offenders.[68] Because of this, the principle of double criminality had to be applied. Three of the offences stated in the arrest warrant were not considered to be offences in Denmark, and extradition was therefore not possible with regard to these offences. Regarding the two offences that could form the basis of an extradition of the requested person since they were also criminal offences in Denmark, the Western High Court underlined that that Danish judicial authorities, including the court itself, were not called upon to review the evidence.

On the other hand, the Danish judicial authorities in this field are extremely particular in their rulings regarding the conditions for extradition. This is for

[68] The Act implements the positive list of the Framework Decision on the European Arrest Warrant in its exact wording. See further below Sect. 2.3.2 on *nullum crimen, nulla poena sine lege*.

instance evident in the aforementioned decision of the Western High Court regarding the double criminality requirement (the case did not regard offences from the positive list). This was also seen in the Supreme Court of Denmark's decision of 17 December 2012 where the Ministry of Justice, the municipal court and the Eastern High Court's decisions were repealed and the case remitted to the Ministry of Justice, since there was not enough information provided to establish whether the prohibition of *ne bis in idem* represented an obstacle for extradition. These rulings did not concern consideration of evidence or therefore the question of guilt, but did, however, concern legal questions closely linked to the question of guilt.

The overall assessment with regard to the principle of the presumption of innocence is that since adherence to the principle is primarily an issue in the main hearing of the case, it is not for the preliminary judicial authorities to rule on the evidence – especially not since the Framework Decision on the European Arrest Warrant is built on the principle of mutual trust. In other words, the Danish judicial authorities seem to have the appropriate trust, and since no cases have been launched by any member of the public that might dare to raise the question of trust, the non-observance of the principle of the presumption of innocence at the arrest warrant stage has not given rise to substantial considerations in legal theory or elsewhere.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle of legality does not follow from the Danish Constitution, but the principle is codified in Art. 1 of the Danish Criminal Code backed by a common legal principle regarding the prohibition of retroactivity in criminal law to the disadvantage of the accused, as set out in Art. 49 of the Charter of Fundamental Rights of the European Union and Art. 7 of the European Convention on Human Rights.[69]

As can be seen from the CJEU judgment (Case C-303/05), the actual definition of the offences set out in Art. 2(2) of the Framework Decision and the penalties applicable are those which follow from the law of the issuing Member State, which, as stated above, must respect fundamental rights and legal principles, among them the principle of legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*).[70]

The departure from the rule of double criminality in cases covered by the positive list gave rise to some principled objections on the political level when the Framework Decision was to be implemented in Danish law. In the preparatory work to the Danish Act on Extradition of Offenders that implemented the Framework Decision on the European Arrest Warrant (Art. 2(2) of the Framework Decision), the departure was justified as follows:

[69] See further Baumbach 2011, pp. 125 et seq.

[70] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, paras. 52–53.

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> A number of the offences included in the positive list are covered by EU instruments and require Member States to criminalise further enumerated offences. Furthermore, the European Council, in a statement in relation to the Framework Decision indicated that the Council has agreed in accordance with TEU Art. 31e, to continue to work on the approximation of the definitions of the offences covered by Art. 2(2) of the Framework Decision, in order to seek to achieve the same legal understanding among the Member States. Moreover, the Council statement contains qualifying remarks which more specifically defines what is meant by, *inter alia*, sabotage, extortion, racism and xenophobia.
>
> Since the offences covered by the positive list, as a starting point, would be punishable in all Member States, the importance of the Framework Decision on this point is in particular that the requesting Member State shall not carry out a thorough check of whether the offence is also punishable in the executing State.[71]

The departure from the rule of double criminality has not subsequently given rise to any theoretical concerns. Presumably, this is to some extent due to the fact that the Danish Act on Extradition of Offenders, in accordance with the optional rule in Art. 4(7) letter a of the Framework Decision, has a special legal provision (Art. 10 f (1)) that determines as a mandatory rule that extradition cannot take place if the relevant act wholly or partly was committed in Denmark and the act is not an offence according to Danish law. The same – but only as an optional rule – is true if the act was not committed in the issuing Member State, and a similar act committed outside Denmark would not be included under Danish jurisdiction (c.f. Art. 10 f(2)). In other words, an arrest warrant can be refused if the issuing Member State exercises so-called extraterritorial jurisdiction in cases where there is no similar Danish extraterritorial jurisdiction. The latter rule is in accordance with the optional rule in Art. 4(7) letter b.

It should be noted that the very fact that the alleged act is in accordance with the Framework Decision's Art. 8 letters d and e (and Art. 18 a(1) in the Danish Act on Extradition of Offenders) must be expressed in the arrest warrant so that it will be possible for the Danish executional judicial authorities to check whether the alleged act corresponds to one of the listed crimes – not in accordance with Danish law, but in accordance with a more abstract definition of the relevant crime. There does not appear to have been any case in Denmark where the issuing Member State's described act has not been considered to be one of the 32 crimes on the positive list.

With regard to cases which are not covered by the positive list, execution of an arrest warrant for the purpose of conducting a criminal prosecution requires that the act for which the European arrest warrant has been issued constitutes an offence under Danish law (Art. 10 a(2) in the Danish Act on Extradition of Offenders). In these cases the executing judicial authority in Denmark investigates rather thoroughly the condition of double criminality. Thus, the issuing Member State's description in the arrest warrant of the facts of the case are in these cases compared

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[71] Cf. *Forslag til lov om ændring af lov om udlevering af lovovertrædere og lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige (L 433/2003)*, Sect. 4.1.2.1 (Amendment of the Act on Extradition of Offenders and the Act on the Extradition of Offenders to Finland, Iceland, Norway and Sweden (Implementation of the EU Framework Decision on the European Arrest Warrant, etc.) Translation by the author.

to the relevant criminal offences in Danish law to make sure that the elements of the crime (*actus reus*) in the issuing Member State correspond with the elements of the crime in Danish law.[72] On the other hand, it is not required that the legal classification of the act be the same in both Member States. It is sufficient that the charge concerns an act which would have been considered an offence if committed in Denmark. This state of the law was explicitly stated in the preparatory work to the Danish Act on Extradition of Offenders,[73] and the Danish case law does not seem to be inconsistent with this.[74]

It is to be noticed that the rules on extradition must be considered as procedural rules with the implication that they in general are held to apply to all proceedings pending at the time when they enter into force and with retroactive effect (contrary to substantive criminal rules which are to be interpreted as not applying to situations existing before their entry into force). This appears from the Danish Act on Extradition of Offenders, the Danish case law (U 2004.2229 H) and the CJEU judgment.[75] This state of the law has not been criticised in Danish legal doctrine, since extradition cannot be put on the same footing as criminal liability with retroactive effect. This results from the fact that extradition either relates to extradition for the purpose of conducting a criminal prosecution (where possible criminal liability will be determined) or relates to extradition for the purpose of execution of a prison sentence handed down in a judgment (where criminal liability has already been determined).

The overall assessment in the field of *nullum crimen, nulla poena sine lege* is that the legal protection inherent in the principle is still fully granted the same level of protection as prior to the entry into force of the Framework Decision on the European Arrest Warrant – even though the full protection will not be implemented before the main hearing in the issuing Member State.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 With regard to *in absentia* judgments, no constitutional issues have been raised in Denmark due to the fact that the Danish Constitution does not regulate the defendant's right to participate in oral proceedings or the right of the person in question to mount his or her own defence. These rights are regulated in the Danish Administration of Justice Act. Here the main rule is that the defendant has a right

[72] See i.e. the Western High Court's decision of 13 September 2005 (U 2006.7 V).

[73] C.f. *Forslag til lov om ændring af lov om udlevering af lovovertrædere og lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige* (L 433/2003), Sect. 4.1.2.1. (Amendment of the Act on Extradition of Offenders and the Act on the Extradition of Offenders to Finland, Iceland, Norway and Sweden (Implementation of the EU Framework Decision on the European Arrest Warrant, etc.)).

[74] See e.g. the Eastern High Court's decision of 25 April 2013 (U 2013.2240 Ø).

[75] See C-399/11 *Melloni* [2013] ECLI:EU:C:2013:10, paras. 31–32.

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(and a duty) to be present at all stages of the trial and he or she has a right to have access to the case file, either personally or through a defence lawyer. These rights can be limited in special circumstances. If the person is present at the proceedings, the defendant always has the right to the last word. The Danish Administration of Justice Act also contains rules on the conditions for lodging an appeal and the conditions for a re-trial in the event of a judgment *in absentia*. The main rule is that the convicted person has full access to lodge an appeal or to petition for a re-trial if he or she was not aware of the scheduled trial in due time or there are other excusable circumstances.

When the Danish Act on Extradition of Offenders was amended in order to implement Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial,[76] in the Danish preparatory works of the amendment bill the issue of whether the European Arrest Warrant (EAW) rules on *in absentia* judgments were in breach of any fundamental rights was not called into question. Regarding the compatibility of the EAW rules on *in absentia* judgments with Art. 6 ECHR, the preparatory works only state:

> Under Art. 6 of the European Convention on Human Rights and the European Court of Human Rights case law defendants in criminal cases generally have the right to be present at trial.
>
> In the conduct of a criminal trial without the presence of the accused, in order to be compatible with Art. 6 of the Convention, the accused must be summoned to the hearings in the manner prescribed in national law, unless the accused can be assumed to have waived his right to be present, and the conduct of the criminal proceedings has sufficient procedural safeguards. According to the Court's case law it is a condition that the authorities have made reasonable efforts to make the accused aware that there are initiated criminal proceedings against the person concerned.[77]

In Danish jurisprudence the rules on *in absentia* judgments have not given rise to any fundamental considerations. The same is true for the legal theory.

The overall assessment in the field of *in absentia* judgments is that fundamental rights are not compromised, and that the national courts do not have to revisit the standard of protection in the case of *in absentia* judgments in the context of the EAW Framework Decision.[78]

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[76] [2009] OJ L 81/24.

[77] C.f. *Forslag til lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union og lov om udlevering af lovovertrædere* (L 271/2011), Sect. 3.1.3 (Amendment of the Act on Execution of Decisions in Criminal Matters in the European Union) Translation by the author.

[78] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1–2.3.4.2 According to Art. 18 b(3), taken in conjunction with Art. 14 of the Danish Act on Extradition of Offenders, the person whose extradition is sought has a right to a defence lawyer. This right exists from the very moment the Danish executing judicial authority (the Ministry of Justice) receives a European arrest warrant unless the executing judicial authority already on the basis of the arrest warrant refuses to extradite the person in question. The cost and expenses relating to the assignment of the defence lawyer and other expenses are to be defrayed by the state unless the court under extraordinary circumstances decides otherwise.

If the executing judicial authority, after an examination of the case, decides to extradite the person concerned, the police (who have conducted the examination on behalf of the executing judicial authority) are, at the person's request, obliged to bring the case to court. The court is then called upon to rule on the legality of the decision. The case is then tried by the municipal court, and the person concerned can lodge an appeal to the high court if the municipal court upholds the decision to extradite. In exceptional circumstances the case can be referred to the Supreme Court. The actual extradition cannot be executed until the final ruling has been passed.

Because of the above-mentioned rules and the practical circumstances in the event of an extradition in Denmark, there does not seem to be any need to recommend the introduction of a publicly funded state or non-governmental body to provide assistance to residents who are involved in trials abroad. This is true even though an assigned defence lawyer is released from his or her duties when the final decision on extradition has been passed, since the Framework Decision is built on the principle of mutual trust and thereby on confidence and trust among Member States regarding the same level of protection and the same respect for the rule of law, including the obligation to respect fundamental rights and fundamental legal principles – such as the right to a defence lawyer.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The overall assessment is that the legal protection inherent in the principle of effective judicial protection and the rule of law are still fully granted the same level of protection as prior to the entry into force of the Framework Decision on the European Arrest Warrant – even though the full protection takes place in two locations, namely both in the issuing Member State and in the executing Member State.

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2.3.5.2 There has not been a true debate about the suitability of transposing mutual recognition from internal market matters to criminal law and civil and commercial disputes. This is probably because the instruments built on the principle of mutual recognition were adopted on an intergovernmental basis and not on a supranational basis.[79] Because EU citizens move freely across the borders inside the EU and because criminals also exercise their right to free movement, the transposing of mutual recognition seems to be a rational consequence of cooperation in the field of the internal market.

2.3.5.3 No concerns have been expressed in Denmark about a change in the role of the courts as an implication of the Framework Decision on the European Arrest Warrant. This may be due to the fact that the role of Danish courts has not changed in principle in the proper sense of the word, and to the fact that a decision on extradition, on the requested person's demand, can be subjected to judicial review of the legality of the decision to extradite as outlined above.

2.3.5.4 On the other hand, everything is not just fine and there is significant room for improvement.

As mentioned in the questionnaire, there has been a call for the introduction of a proportionality test prior to an extradition request and prior to extradition based on an arrest warrant to avoid the extradition of citizens for a wide range of so-called 'trivial offences'. This has also been called for in Denmark.[80] Regardless of mutual recognition and trust, extradition to another country in preparation for a trial or for the purpose of executing a prison sentence handed down in a judgment is nevertheless an extremely serious matter. Such a severe measure calls for a high degree of justification. This requirement is not satisfied if the crime committed only amounts to what is classified as a minor criminal offence.

Moreover, even the European Commission has called for a proportionality test – including in jurisdictions where prosecution is mandatory. The Commission has in this regard stated that the application of the European arrest warrant has been undermined by the systematic issue of arrest warrants for the surrender of persons sought in respect of often petty offences even though there is a general agreement among the Member States that a proportionality check is necessary to prevent European arrest warrants from being issued for offences which – although they formally fall within the scope of the Framework Decision – are not serious enough to justify the measures and cooperation which the execution of an European arrest warrant requires. Against this background the Commission recommends that the issuing Member State,[81] before issuing a European arrest warrant, take not only the seriousness of the offence but also the length of the expected sentence and the principle of least burdensome means, etc., into consideration. The Commission has

[79] Criminal law cooperation as such has been vivaciously debated in Denmark and has caused, among other things, the Danish opt-out. See further Baumbach 2013, pp. 300 et seq.

[80] See e.g. Elholm 2011, pp. 28 et seq.

[81] Including those jurisdictions where prosecution is mandatory.

stated outright that there is a disproportionate effect on the liberty and freedom of requested persons when European arrest warrants are issued concerning cases for which (pre-trial) detention would otherwise be deemed inappropriate.[82]

The European Commission has urged Member States to take positive steps to ensure that practitioners use the handbook on the EAW adopted by the Council of the European Union as amended following the recommendations in the final report on the fourth round of evaluation. The handbook includes a separate chapter on the principle of proportionality.[83] It is underlined in the handbook that notwithstanding the fact that an issuing Member State is not obliged to conduct a proportionality check and the legislation of the Member States plays a key role in that respect, the competent authorities should, before deciding to issue a warrant, consider proportionality by assessing the aspects stressed above.

In this author's view a proportionality test ought to be mandatory and legally binding and ought to thereby also take precedence over any mandatory prosecution rule in the issuing Member State. In this connection it is important to bear in mind that the instrument in principle is designed to further the prosecution of more serious or more damaging crimes which may substantially justify its use or for the purposes of enforcing convictions. The European arrest warrant was adopted in the wake of the terror attacks (9/11) in the USA and must be interpreted and applied in that light. In other words, the Framework Decision on the European arrest warrant is a tool in the fight against genuine crime, not just a tool for expediency.

Another relevant issue in the context of the Framework Decision on the European arrest warrant is – in this author's view – the sometimes missing link between the offence and the country to which the individual is extradited. There seems to be no reason not to require such a link. The instrument should therefore be limited to cases where the offence is committed in, or in other legally relevant ways related to, the issuing Member State. This seems to be of particular importance in relation to cases covered by some of the offences listed in the positive list, for instance racism and xenophobia, which are defined differently in the individual Member States. Such a limitation would also be most consistent with the freedom of expression as defined in Art. 11 of the EU Charter of Fundamental Rights and in Art. 10 ECHR.

A recommendation to reinstate a judicial review in the context of extradition to ensure that the offence is sufficiently serious and that there is a sufficient link between the offence and the issuing Member State to which the individual is extradited would seem to be a suitable instrument towards a more balanced regulation of the field.

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[82] See further Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, pp. 7 et seq.

[83] Chapter 3, cf. European handbook on how to issue a European arrest warrant, Council 17195/10, COPEN 275, pp. 14 et seq.

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2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

Due to Denmark's justice opt-out, Denmark does not have further constitutional issues in relation to European Union criminal law.

2.4 The EU Data Retention Directive

2.4.1 The implementation of the Data Retention Directive[84] did not raise constitutional issues.[85]

Article 72 of the Constitution states:

> The home is inviolable. House searches, the seizure and examination of letters and other documents and breach of the confidentiality of the post, telegraph and telephone can only take place when authorised by a Court order where there is no authority in an Act for a specific exemption.

Article 72 provides procedural protection but not substantive protection of the inviolability of the home. Interference by the authorities with an individual's communication is considered legitimate in so far as it is founded on a legal basis. This follows from the unwritten principle of legality. A court order is not necessary where an Act of Parliament dispenses this requirement. The requirement of a court order set out in Art. 72 is dispensed with in 200 cases in Danish legislation.[86] The principle of proportionality is only interpreted together with constitutional provisions which provide substantial rights protection and hence not together with Art. 72 which only provides procedural protection.[87]

The legal basis for data retention is Art. 786 of the Administration of Justice Act. Data retention is therefore in accordance with the formal requirements of the Danish Constitution.

There have been no cases before the Supreme Court on the Data Retention Directive. Following the annulment of the EU Data Retention Directive by the CJEU, the Danish Ministry of Justice considered the impact of the judgment on the Danish legislation on data retention. In a memorandum dated 2 June 2014[88] the

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[84] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[85] However, the Directive has given rise to debate regarding its compliance with Art. 8 of the ECHR. See Rytter 2010, p. 195.

[86] See Rytter 2013, p. 227.

[87] Ibid., p. 114.

[88] See *Notat om betydningen af EU-Domstolens dom af 8. april 2014 i de forenede sager C-293/12 og C-594/12 (om logningsdirektivet) for de danske logningsregler, 2 June 2014.* (Memo on the importance

Ministry concluded that the Danish legislation does not violate Arts. 7 and 8 of the Charter.[89] According to the Ministry, the Danish legislation contains clear and precise rules for when the authorities can be given access to logged information and for which period such information must be stored. However, it is questionable whether the specific provisions on logging sessions can be viewed as suitable for achieving their purpose. Based on this concern, the Minister of Justice decided to annul these specific provisions.[90]

2.5 *Unpublished or Secret Legislation*

2.5.1 According to Art. 22, Acts must be made public. This is done by publishing them in a special journal *Lovtidende* (journal of laws) which is now also available on the Internet. The purpose of Art. 22 is to provide citizens with protection against secret legislation.[91] Normally, Acts do not take effect for citizens before they are published. If possible, an Act must be interpreted in such a way that even though the Act expresses the state of the law from the time it comes into force, it is not executed for instance through imposing arrest or the use of force on individuals until it is made public. However, there is no general principle prohibiting the retroactivity of Acts in Danish constitutional law. This means that if retroactivity is clearly intended by the legislator, this is not unconstitutional and must be upheld by the courts even though it is disturbing. This rarely happens in reality and the case law in this field is rather limited. The leading judgment is from 1956 (U 1958.955Ø).[92] It should also be mentioned that the debate and the U 1958.955Ø case concerned the question whether an Act can be executed in the night/early morning if the *Lovtidende* is not delivered by post until some hours later. Now that the *Lovtidende* is on the Internet, this problem seems to be at least to some extent resolved.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 These issues have not been addressed in Danish case law.

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of the CJEU judgment of April 8, 2014 in Joined cases C-293/12 and C-594/12 (on the Data Retention Directive) for the Danish rules on logging, 2 June 2014).

[89] This view has been criticised. See Mchangama 2014. According to Mchangama, the Danish legislation violates the Charter and the ECHR.

[90] See BEK nr. 660 of 19/06/2014 which replaces BEK nr. 988 of 28/09/2006.

[91] See Zahle 1990, p. 398.

[92] See Zahle 2001, pp. 307–311.

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2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Denmark is not a member of the eurozone. However, Denmark has ratified the Treaty on Stability, Co-ordination and Governance (TSCG) and takes part in the Treaty as described in Art. 14. Since Denmark is not part of the eurozone and has not suffered from the financial crisis as severely as many other countries, there has not been much debate on the TSCG. The Danish debate mainly focused on whether Denmark could ratify the Treaty through the normal procedure in Art. 19 which only requires consent from a majority of the Members of Parliament or whether the Art. 20 procedure was necessary. If ratification were to lead to a transfer of sovereignty, five-sixths of the Members of Parliament would have to be in favour of ratifying the Treaty or a referendum would have to be held under Art. 20. The Danish Ministry of Justice examined the TSCG with a special view to part III and IV and found that ratification did not require the Art. 20 procedure, since no sovereignty was transferred. Some of the Articles in the Treaty, such as Art. 7, only impact Member States whose currency is the euro and therefore do not concern Denmark. Furthermore, the Ministry of Justice does not consider that the Treaty raises other problems in relation to the Danish Constitution.[93]

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 (a)–(c) An interesting feature of the Danish system of references of preliminary questions to the CJEU is that when a party asks for a preliminary reference, the courts will seek advice from the Government's judicial committee through the state attorney before requesting a preliminary ruling. This committee, which is also the adviser to the Government on the implementation of EU law, rarely recommends a request for a preliminary ruling.[94] However, the Committee is primarily, though not exclusively, involved in cases in which the Danish state is involved. In civil cases with two private parties, the Committee is not always involved, but when it has been, it has more often recommended a reference.[95] In a survey, 69% of the Danish judges consulted answered that the most important reason for not referring a

[93] See *Notat om visse forfatningsretlige spørgsmål i forbindelse med Danmarks ratifikation af traktaten om stabilitet, samordning og styring i Den Økonomiske og Monetære Union (den såkaldte finanspagt)*. (Memo on certain constitutional issues in connection with Denmark's ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called European Fiscal Compact)), 22 February 2013.

[94] See Pagh 2008, pp. 475–511.

[95] See Rytter and Wind 2011, p. 470, n. 88.

case to the CJEU was the advice given to them by the Danish Government's attorney.[96]

It has not been possible to find data on the number of cases in which the applicants have requested a preliminary ruling with regard to the validity of an EU measure since 2001.

Since 2006, Denmark has requested a preliminary ruling in 57 cases, of which 11 cases are still pending and 46 cases are closed. None of these cases has regarded the validity of an EU measure.

2.8.2 Denmark does not have a Constitutional Court and has no prima facie review in the courts. Danish courts can only perform *ultra vires* review and only if the plaintiff has a sufficient legal interest in having the case tried before the courts. For further information on the system of review in Denmark, see Sect. 2.8.3.

To my knowledge the standard of review has not been researched in the Danish context. I do not have any statistical data on the success rate in Danish courts which could be compared to the data in the EU Courts provided by the questionnaire. However, traditionally, Danish courts do not find violations based entirely on legal principles. Normally a violation will build on a legal basis in written legislation or the Constitution (perhaps supported by a legal principle), which has been violated. Danish courts are rather positivistic in their approach. This also means that they normally do not engage in very dynamic interpretations of, for instance, rights.[97] At the FIDE congress 2014, the President of the Danish Supreme Court stated:

> Danish courts serve the law, we are not put on earth to attain more power, and we are not eagerly seeking opportunities to overrule legislation by stretching principles for their own sake. Excessive innovation and adventurism by judges is not something you will find in Denmark. Danish judges view that creative judicial activism may endanger the rule of law.[98]

Compared to the Danish legal tradition, both the CJEU and the ECtHR must be considered very dynamic in their interpretations.

Obviously, the recent development in the Danish Supreme Court which follows from U 2014.914H, the recent request for a preliminary ruling[99] and Børge Dahl's statements at the FIDE conference 2014 (see e.g. the long quote in Sect. 2.1.3) are interesting since they reflect (1) the importance of general legal principles and (2) a critique of the CJEU for not upholding the principles of the rule of law, legal foreseeability and legal certainty in its judgments. One way of interpreting this is that the standard of judicial review in the national courts is not sufficient because of the dynamic interpretations by the CJEU.

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[96] See Rytter and Wind 2011, p. 470.

[97] On Danish judicial self-restraint and the new European context with dynamic interpretations from the CJEU and the ECtHR, see Rytter and Wind 2011, p. 470.

[98] See Dahl 2014, p. 27.

[99] See Supreme Court decision of 22 September 2014 (Sag 15/2014, 1. Afdeling) and C-441/14.

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2.8.3 Danish courts in general have quite a deferential approach to review of the constitutionality/legality of legislation, regulatory acts of the executive branch and administrative action. The Danish concept of democracy builds on a strong Parliament/legislator and reluctant courts, which are very careful to not act in a 'political' manner. Politicians are viewed as having democratic legitimacy through elections as compared to judges. As mentioned, Danish courts have a positivistic approach and do not normally engage in dynamic interpretations.

Danish courts have the competence to review the constitutionality of legislation. However, this important competence cannot be found in the text of the Constitution, even though this competence was legally and politically accepted in 1953, the last time the Constitution was amended. Danish courts will normally only rule that an Act is unconstitutional if a clear violation of the Constitution can be established. The Danish Supreme Court has only once found that an Act violated the Constitution. This was in the so-called *Tvind*-case, U 1999.841H. The Supreme Court stated that the legislator had violated the separation of powers between the legislator and the courts in Art. 3 of the Danish Constitution.

2.8.4 Denmark has no *a priori* review by the courts. The Ministry of Justice considers whether new legislation is coherent with the Constitution, existing legislation, EU law and international treaties which Denmark has signed, including the ECHR.

In the Danish *Maastricht* judgment, U 1980.800H, the Supreme Court stated that the Constitution, including human rights protection, has supremacy over EU Law. The competence to legislate in a way that violates the human rights protection in the Constitution cannot be transferred according to Art. 20, since Danish authorities do not have such competence. Furthermore, according to the Supreme Court, Danish courts have the right and the duty to step in if it can be established with sufficient certainty that the EU by an act or a judgment has gone beyond the competences which Denmark has transferred to the EU according to Art. 20 of the Danish Constitution. This was confirmed in the Danish *Lisbon* Judgment.[100]

In the *Lisbon* judgment the Supreme Court found that there was no basis for concluding that Art. 20 of the Danish Constitution had been violated. However, the Court stated:

> However, a case involving an act or a judicial decision adopted or delivered pursuant to the relevant Treaty provisions and having a specific and real impact on citizens etc., would provide a better basis for hearing the dispute.[101]

And further:

> If EU acts are adopted or if the Court of Justice delivers judgments with reference to the European Convention on Human Rights, based on an interpretation of the Treaties that contravenes this constitutional assessment, it will be possible to submit this to a judicial review as stated in the Maastricht judgment (paragraph 9.6).

[100] Supreme Court decision of 20 February 2013, Case No. 199/2012, p. 16, U 2013.1451H.

[101] Ibid.

Thus, the Supreme Court can be expected to review EU acts and judgments more actively in concrete cases in the future. However, this will require that the plaintiffs have legal standing in the form of a legal interest in having the case tried before the courts.

There is no Danish equivalent to the *Solange II*[102] or *Bosphorus*[103] judgments that would assume that the standard of protection of rights in the EU is equivalent to that provided by the ECtHR or the national standard, unless the applicant proves a significant fall of standards.

2.8.5 Not relevant in the Danish context.

2.8.6 In the Danish context, the equal treatment of individuals falling within the scope of EU law and those falling outside the scope of EU law has primarily been discussed in relation to EU citizens from other EU countries who receive social benefits in Denmark and protection against 'social tourism'.[104] Furthermore, attention has been paid to cases from the CJEU on citizenship and third country nationals, for instance relating to the national competence to grant and revoke citizenship, and the competence of the Member States to exercise reverse discrimination.[105]

2.9 Other Constitutional Rights and Principles

2.9.1 In the winter/spring of 2015 discussions took place in the Danish Parliament regarding parliamentary control of the implementation of EU directives. Parliament was concerned since the executive implements EU directives by administrative acts in nine out of ten cases.[106] According to the chairman of the European Policy Committee, this means that parliamentary control is cut off.[107] The Minister of Justice on the other hand emphasised that Parliament is almost always involved in the negotiations of proposals on new EU legislation though the European Policy

[102] 19 BVerfGE 73, 339 [1986] (Solange II).

[103] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

[104] See for instance Jacqueson 2010, pp. 152–166, on the right of EU citizens to receive social welfare benefits. From the press see for instance: Pedersen, K. (2009, May 25). *Arbejdsløse EU-borgere får flere penge end danskere* (Unemployed EU citizens receive more money than Danes). Information. See also Røndbjerg-Christensen, H. (2014, March 11). *Dansk dagpenge-slagsmål adskiller sig fra børnecheck-sagen* (Struggle over Danish unemployment benefits differs from the child allowance case). Berlingske.

[105] See for instance Krunke and Schulyok 2014, pp. 107–152.

[106] See Winther, B. (2015, April 17). *Folketinget slår alarm: Vi kobles af EU-lovgivning* (The Danish Parliament raises the alarm: We are disconnected from EU legislation). Berlingske. http://www.politiko.dk/perspektiv/folketinget-slaar-alarm-vi-kobles-af-eu-lovgivning.

[107] Ibid.

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Committee. The Government writes memos to the Parliament on all proposals for new directives and proposals for important regulations, and presents these to the European Policy Committee.[108] On 7 May 2015 the Danish Parliament adopted a parliamentary resolution stating that in the future Parliament shall always be informed if a bill or an administrative act goes further in implementing a directive than requested by the EU. Furthermore, the Government is in general requested to inform Parliament when implementing EU directives and regulations.[109]

2.10 Common Constitutional Traditions

2.10.1 It seems that values such as democracy, separation of powers, independent courts and basic human rights, for instance the political freedoms, right to privacy, etc., are common values. Many of these values are already part of the common values of the EU. The Danish Constitution does not expressly mention any constitutional principles. Furthermore, the human rights charter in the Constitution is not very detailed and stems from 1953. At that time it was not possible to foresee phenomena such as massive data retention. Hence, rights of a more modern character are not touched upon. Since the courts are not especially dynamic, such rights do not follow from case law either.

The courts are normally also rather reluctant to refer to constitutional or legal principles. However, as pointed out, in recent developments the Supreme Court has emphasised the importance of general legal principles such as the rule of law, legal certainty and foreseeability as a reaction to dynamic case law from the CJEU.

The question of national constitutional identity is related to question 2.10.1. This concept and its content will probably develop in the future. At present, Danish courts have not contributed much to defining the Danish constitutional identity as compared to the German Constitutional Court's role in defining the German constitutional identity.[110] Perhaps a few very general points can be found in the Danish *Maastricht* and *Lisbon* judgments, such as the constitutional precondition of a democratic form of government and the requirement that Denmark must remain an independent state; however, constitutional identity has not expressly been mentioned.[111]

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[108] See the answer of the Minister of Justice to question No. 7 of 21 April 2015 from the European Policy Committee, annex to B52.

[109] See Resolution by Parliament on information of the Parliament regarding implementation of EU directives, regulations and administrative regulations of 7 May 2015, and Report on information of the Parliament regarding implementation of EU directives, regulations and administrative regulations by the European Policy Committee of 24 April 2015.

[110] As regards Danish national constitutional identity, see Krunke 2014a.

[111] See ibid. and Krunke 2014b, pp. 542–570.

2.10.2 Since the question is related to identifying constitutional national identity, this is also a question of how to identify national constitutional identity in the Member States. Obviously, the Constitutions and case law from the national constitutional court and/or supreme court play a role in this, and attaching relevant information on national constitutional traditions to references for a preliminary ruling, as suggested, could be a good instrument. Another place to look might be international treaties, for instance on human rights, which all EU Member States have entered into. A third suggestion could be to study how the national parliaments have used the Early Warning System, since this might reflect some common values and would also include parliaments and not just courts in defining national values and constitutional identity. Fourthly, one might search for national constitutional identity in the Member States' exceptions from the EU treaties.[112] National exceptions might indicate areas where no common European ground has been found, thus indirectly contributing to defining the values that are common.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 There has been no debate on these particular issues. Interestingly, Jens Elo Rytter presumes that no conflict between constitutional human rights and EU fundamental rights can arise, since the EU protection of fundamental rights, according to Art. 53, does not prevent a higher national constitutional standard.[113] As pointed out, the last revision of the Danish Constitution took place in 1953. The human rights charter is of a classic character, not very extensive and some would say not of a modern standard. Hence, the ECHR plays an important role in human rights protection.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Some debate took place around the time of the adoption of the European Arrest Warrant Framework Decision.[114] More public debate has followed since it is now possible to see the impact of the European Arrest Warrant Framework

[112] See Krunke 2014b, pp. 542–570.

[113] See Rytter 2013, p. 48.

[114] See e.g. Wilhjelm, P. (2002, May 23) *Den Europæiske arrestordre* (The European arrest warrant). Politiken. http://politiken.dk/debat/kroniken/ECE33513/den-europaeiske-arrestordre.

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Decision. The critique is *inter alia* based on the principle of legal certainty and existing legal principles relating to the extradition of criminals.[115]

As regards the EU Data Retention Directive, some debate took place at the time of the national implementation and included critique related to the principle of proportionality.[116] Since the judgment of the CJEU, more public debate has followed.

2.12.2 As mentioned in Sect. 2.8.2, Denmark does not have a Constitutional Court and no *a priori* review in the courts. Furthermore, Danish courts can only perform *ultra vires* review if the plaintiff has a sufficient legal interest in having the case tried before the courts.

The question of suspension has both a democratic dimension and a legal dimension. As regards the democratic dimension, the question is about allowing room for public debate at the national level. Public debate is of course a cornerstone of democracy and should be supported and encouraged not only by national politicians but also by the EU. Hence, sufficient time should be given for this. However, there must also obviously be a time limit for such public debate, as otherwise it would be very difficult to legislate in an international organisation consisting of 28 Member States.

It also has a legal dimension since the core of this question is the legal relationship between EU law and national law. As is well known, according to EU Law, EU law is superior to national law, including the national constitutions. However, according to many national constitutional systems, the Constitution is superior to EU law. This has been expressed by a number of national courts, including the German Constitutional Court and the Danish Supreme Court. If one follows EU law viewed from a purely legal angle, implementation cannot be delayed because a case is pending in a constitutional court, since EU law has supremacy over the national constitutions. The principle of supremacy and the principle of direct effect are important EU principles built on efficiency and equality arguments. However, under national constitutional law suspension would make more sense, since many national constitutional systems do not accept the principle of supremacy.

2.12.3 As mentioned, this question on suspending the application of an EU measure touches upon the premise of the supremacy of EU law. Obviously, viewed from the angle of many constitutional systems, this would make sense since EU law cannot violate the national constitution. One might also put forward that if, according to a number of constitutional courts, an EU measure violates national general legal principles and rights, then this would be a good reason for the EU to reconsider the

[115] See e.g. Mchangama J. (2011) *Den Europæiske arrestordre er en trussel med retssikkerheden* (The European arrest warrant is a threat to legal certainty). CEPOS, 2 March 2011.

[116] See e.g. Gjerding, S. and Andersen, P. (2012, April 28). *Minister kan ikke svare på, hvad internet-logning bruges til* (Minister cannot answer what internet logging is used for). Information. http://www.information.dk/299538. This refers to critique raised in 2007.

measure regardless of the principle of supremacy, since EU cooperation builds on democratic values, human rights, etc.

However, not all Member States have constitutional courts and therefore only some Member States would be able to reject an EU measure based on judgments from the constitutional court. This might create an imbalance between the Member States.

A measure such as the one proposed could in reality create a veto-right, and only for some Member States. This should be taken into consideration even though the idea of promoting general legal principles and human rights is attractive.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 As pointed out, the Danish Supreme Court is worried about the standard of protection of general legal principles such as the rule of law, legal certainty, foreseeability and legal expectations. The Former President of the Danish Supreme Court has stated that this concern is shared by judges in other Member States.[117] Obviously, such a concern within the national courts in the Member States should be taken seriously both at the national level and at the EU level. These principles are also EU principles, and although they might have a slightly different content in EU law, there seems to be no doubt that the principles express legal values that are also shared by the EU legal system.

2.13.2–2.13.4 An extensive overview of all EU measures and the CJEU's interpretation of them would be required to answer this question. The Danish Supreme Court has expressed a growing concern and it is important to note that the Supreme Court only receives cases in which a plaintiff has legal standing in the form of a legal interest in the case. Furthermore, not all cases reach the Supreme Court due to procedural rules or because the cases are not appealed. Thus, the judges only see 'random samples', which might be just the tip of the iceberg. The Danish Supreme Court has heard a number of cases where a national judgment which followed the CJEU's interpretation of an EU measure or an unwritten principle developed by the CJEU would require the Supreme Court to rule *contra legem* as regards national legislation. This would be in contradiction with fundamental legal principles such as the rule of law, legal certainty and legal foreseeability. This obviously shows that the CJEU's dynamic interpretation style in certain cases creates a state of the law which was not foreseeable for the Member States, private parties, national judges, etc. According to EU law, the duty to interpret national legislation in conformity with EU law does not include a duty to interpret *contra legem*. If the CJEU were to uphold this in the mentioned case, C-441/14, referred to the CJEU for a preliminary

[117] See quotation above in Sect. 2.1.3, n. 50.

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ruling from the Danish Supreme Court, one might put forward that the private party in the concrete case would not suffer any loss. However, the practice of the Danish Supreme Court still reveals that the interpretations of the CJEU are not always predictable and that this unpredictability in certain cases can be so extensive that a *contra legem* situation is reached. Case C-441/14[118] relates to the unwritten principle of the prohibition of age discrimination as recognised by the CJEU.

The Danish cases regard the CJEU's interpretations of EU measures which can appear years after the adoption of the measures by the political institutions. Furthermore, the Danish cases regard the CJEU's development of unwritten principles with the same legal status as the EU treaties. Several possible solutions could be mentioned such as a greater awareness within the CJEU of the importance of general legal principles and a strengthened legal value attached to *travaux préparatoires* when interpreting EU measures. Allowing for dissenting opinions would support a nuanced debate within the CJEU and strengthen legal arguments, since it would create more focus on 'differences'. It would also support public debate. A strengthened dialogue between the CJEU and the national courts and a more proactive role by the courts would seem to advance a solution, since this would highlight problems. However, solutions might also be sought by the political institutions. The EU legislator can seek to be clearer when formulating new EU measures. The EU's political institutions could engage in a debate following concrete CJEU judgments which give EU measures an interpretation far from that which was originally intended. National governments and parliaments can be better in expressing concern as regards legal principles and human rights in the legislative process. Creating a new independent judicial body which could *ex ante* or *ex post* review new EU measures in relation to constitutional principles and rights could be an effective solution. Importantly, if all Member States were represented in a judicial body, a good balance between constitutional traditions would be reached. The only concern is that such a judicial body might perhaps become a 'political' player with the power to 'veto' EU measures.

As regards the CJEU's responsiveness to national concerns, it will be very interesting to see how the CJEU responses to the Danish preliminary ruling request noted above, which refers to a number of general legal principles.

As regards the Danish context, it seems that the fact that important legal principles are not directly emphasised in the text of the Constitution and that the human rights catalogue is rather old might be a problem in relation to a strengthened focus on the constitutional identity, principles and rights of the Member States. This is to some extent strengthened by the fact that Denmark does not have a constitutional court. Furthermore, the national courts' tendency to apply general principles without referring directly to them or indicating whether they are at constitutional level deserves mention. One might state that if Denmark wants to be heard at the EU level as regards our constitutional values, principles and rights, we need to be clearer on what they are and we need to communicate them in a clearer way to the

[118] Case C-441/14 *DI* [2016] ECLI:EU:C:2016:278.

EU. The Supreme Court has just done so in its preliminary ruling request, which is a good starting point. Other Member States are much better at formulating and communicating their constitutional values and identity to the EU and the other Member States. If Denmark wants to be part of a constitutional dialogue with the CJEU, the other EU institutions and the other Member States, we need to focus much more on our own constitutional values and identity. Whether this is sufficiently possible within the context of the present Constitution from 1953 is questionable. A public and political debate focusing on constitutional principles, values, etc., and a new Constitution based on such debate and expressing the Danish constitutional identity in a clearer way would probably strengthen the Danish 'voice' in the multi-level debate, as would the establishment of a Danish Constitutional Court.

3 Constitutional Issue in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 As mentioned in Sect. 1.3, Arts. 19 and 20 of the Danish Constitution regulate the transfer of powers to international organisations and the ratification of treaties. Articles 20 and 19, subsection 1 are quoted in Sect. 1.3.1. Article 19, subsections 2 and 3 read as follows:[119]

> **Art. 19**
>
> Subsection 2: Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall forthwith be submitted to the Folketing. If the Folketing is not in session it shall be convened immediately.
>
> Subsection 3: The Folketing shall appoint from among its members a Foreign Affairs Committee, which the government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by statute.

Article 20 on transfer of sovereignty refers to the following very broad objective sought by an international organisation: 'international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation'.

No specific international organisations are mentioned in the Constitution.

3.1.2–3.1.4 The Constitution has not been amended since 1953. Article 19 was introduced already in the first Constitution of 1849 although with a slightly different

[119] Only the first subsection of Art. 19 is quoted in Sect. 1.3.1.

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content (then Art. 23). It was amended in 1866, 1915 and 1953. Parliamentary involvement was strengthened between 1849 and 1953. As mentioned in Part 1 of this report, Art. 20 was introduced in 1953.

In a Ph.D. thesis from 2003 it is shown how the Foreign Affairs Committee has tried to copy the procedures of the European Policy Committee including the mandate procedure.[120] This has been done through reports (like the European Policy Committee) and at the meetings by counting whether a majority is against the Government's position on certain foreign policy issues. The Committee has tried to force the Government to make it clear when the Government (1) informs the committee and (2) when it seeks its advice.[121]

In legal commentary the traditional standpoint has been that Parliament cannot legally bind the Government by legislation and/or parliamentary decisions in the field of foreign affairs because of the foreign affairs prerogative. However, the late Professor of Constitutional Law at the University of Copenhagen, Henrik Zahle, disagreed. According to him this is possible.[122]

3.2 The Position of International Law in National Law

3.2.1–3.2.2 Article 19, quoted above, regulates the application of treaties and their position in domestic law. Denmark has a dualistic legal system. As mentioned, this can be interpreted on the basis of Art. 19 and case law.[123] Considerable debate took place 15–20 years ago in the legal literature on whether Denmark had moved from dualism to so-called 'practical monism'. However, recent case law from the Supreme Court confirms that Denmark has a dualistic system.[124] Even though recent case law has established that non-incorporated treaties are not directly applicable within the domestic legal order, these treaties still constitute valuable sources for interpretation, which should be in accordance with the relevant ratified treaties.[125]

Three important rules modify the dualistic approach to national law and international, ratified treaties: (1) Danish legal norms should be interpreted in accordance with international obligations if possible; (2) when applying national legal norms, they should be applied with the assumption that the legislator has not intended to breach international treaty obligations and (3) administrative authorities

[120] See Krunke 2003. See also Krunke 2007, pp. 335–348.

[121] See Report from the Foreign Policy Committee, 13 March 2000.

[122] See Zahle 2006, pp. 388–391. See also Krunke 2003.

[123] See for instance Rytter 2010, p. 189, and U 2006.700H, U 2010.1035 and U 2010.1547H.

[124] See U 2006.700H, U 2010.1035 and U 2010.1547H.

[125] See Zahle 2007, pp. 362–364. Zahle further states that if an international treaty is in direct conflict with a national legal norm and the conflict cannot be solved by applying the above mentioned rules and the legislator intended the breach with an international obligation, then the national norm must be respected by the national authorities. See ibid., p. 374.

shall conduct their cases in a manner such that the breach of international treaty obligations is avoided. While Danish courts will go far to try to interpret Danish law in coherence with international obligations, there are limits to this and, as mentioned, the Danish courts have in recent years made it clear that the Danish legal system is dualistic. If international obligations are in clear conflict with Danish legislation or the Constitution (and this was not intended by the legislator), national law will be given precedence.

In an interesting case, U 2013.3328H, a person complained about the treatment by the authorities of his citizenship application. In Denmark citizenship is accorded by a bill adopted by the legislator listing the names of the persons concerned. The Supreme Court stated that it could not review whether the plaintiff should have been included in the bill on citizenship or whether he should have been granted Danish citizenship. This is due to the prerogative of the Government to propose bills under Art. 21, and the competence of Members of Parliament to propose bills. However, the Supreme Court could review whether Denmark had violated an international obligation in this field and whether the plaintiff was entitled to compensation on this basis.

3.3 Democratic Control

3.3.1–3.3.2 Democratic control over foreign policy is discussed in Sects. 3.1.2–3.1.4.

It follows from Art. 19 that Parliament must consent to international obligations which increase or reduce Danish territory, the fulfilment of which requires the concurrence of Parliament or which are otherwise of major importance. Consent must also be given if the Government wants to denounce any international treaty entered into with the consent of the *Folketing*, the Danish Parliament. The Foreign Affairs Committee must be consulted before making any decision of major importance for foreign policy. Since the debates in this committee are normally confidential, the committee is a good forum for the involvement of Parliament in foreign affairs. Parliament also has normal standing committees on Foreign Policy and Defence Policy. As regards the EU Common Foreign and Security Policy, both the Foreign Affairs Committee and the European Policy Committee are involved. The above-mentioned committees also follow international cooperation after ratification.

Because of the changed landscape with more globalisation and international cooperation, power has been transferred from the legislator to the Government. Areas which were formerly entirely regulated by national legislation are now debated in international fora by representatives from the national governments. In this light it seems necessary to rethink the foreign affairs prerogative and to compensate the national parliaments for lost competence in the national constitutions.

According to Art. 42, part 6, bills introduced for the purpose of discharging existing treaty obligations cannot be decided by a referendum. If a majority of

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Parliament so decides, an Act passed under Art. 19 can be submitted to a referendum. However, Parliament must first pass an Act to the effect that the resolution must be submitted to a referendum.

3.4 Judicial Review

3.4.1 No further points have arisen.

3.5 The Social Welfare Dimension of the Constitution

Not relevant.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

No further points have arisen.

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The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power

Joakim Nergelius

Abstract The Swedish Constitution is composed of four constitutional acts, some of which date back more than two hundred years. The central document is the Instrument of Government of 1974. The report observes that the fundamental rights chapter had rarely been applied by the Swedish courts until recent years. Traditionally, the national protection of basic rights is described as weak, as there is neither a constitutional court nor a strong tradition of judicial review by the ordinary courts. Judicial restraint is deemed necessary so as not to undermine the Swedish popular democracy. Thus, in general, EU and international law have enhanced rights protection and judicial review. Areas where constitutional concerns have arisen include the following: (a) freedom of speech enjoys a strong protection in the Constitution and this prompted delays regarding the implementation of the Data Retention Directive, which led to a consequent EU fine; (2) the ECJ ruling in *Laval* clashed with the right for trade unions to initiate collective action; (3) concerns have been expressed by civil society about limitation of the widespread access to documents where their secrecy may be requested by an international organisation. The European Arrest Warrant has not raised rights concerns in Sweden, although the report finds the ECJ's approach in *Melloni* to be misguided. The Constitution contains extensive amendments regarding EU and international co-operation, including a fundamental rights based limitation clause that had its origin in the German Constitutional Court's *Solange* decisions.

Keywords The Constitution of Sweden/Instrument of Government
Amendment of the Constitution in relation to EU and international co-operation
Solange clause · The Swedish Supreme Court · Strengthening of judicial review

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through EU and ECHR law · Deference of courts · *Laval* and impact on collective action, posted workers and freedom of expression · European Arrest Warrant and extraditions · Data Retention Directive, freedom of expression, public protests and EU fine for delay in implementation · Fundamental rights · *Melloni*, Article 53 EU Charter and the question of a higher standard of protection · Referendums on EU accession and adoption of the euro

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 Without any doubt whatsoever, Sweden falls into the second category of constitutions noted in the Questionnaire. If we take Joseph Raz's distinction between 'thick' and 'thin' constitutions, where the latter are 'simply the law that establishes and regulates the main organs of government, their constitution and powers', while the former have to meet a number of requirements, such as long duration, 'canonical formulation' and entrenchment as a point of departure,[1] few countries fit better into the 'thick' category than Sweden, with its long, peaceful tradition. Similarly, Besselink makes a distinction between historical and revolutionary constitutions, where the former, like in the UK, Netherlands or Sweden, have developed gradually over a long period, which tends to make them less binding or normative and just as political as legal in their nature. As for the latter, they have been enacted radically, under more dramatic circumstances, in a way that has been formative for the state in question.[2] It is thus also true that Sweden's constitutional culture has never been influenced to a notable extent by any constitutional traditions in other countries or regions. In fact, the visible change in the attitude of the highest Swedish courts in relation to judicial review during the last few years, under the influence of EU law as will be explained below, is probably the clearest example of this kind of 'constitutional influence'.

1.1.2 The Swedish Constitution is composed of four constitutional acts: the Instrument of Government (*Regeringsformen*) of 1974; the Freedom of the Press Act (*Tryckfrihetsförordningen*) of 1949 (but with a history dating back to 1766); the Freedom of Speech Act (*Ytttrandefrihetsgrundlagen*) of 1991, regulating media other than the printed media; and the Act of Succession of 1809, regulating the right to the throne. On 1 January 2011, the main Swedish constitutional act, the Instrument of Government (IG), was subject to some important changes. This was not its first main reform; for example when Sweden joined the European Union on 1 January 1995, some important changes were made, notably in the field of human rights protection. From a structural point of view, however, this new reform of 2011

[1] See Raz 1998, pp. 152–193.

[2] See Besselink 2007 and Nergelius 2009, p. 34.

is probably more interesting, since it mixed the traditional popular sovereignty upon which the Constitution is based with some new elements of judicial review and increased the separation of powers, both in a horizontal and vertical manner.

Since 1974, there has been a chapter on fundamental rights (Chap. 2 IG) in the Swedish Constitution. It is quite similar to the European Convention on Human Rights (ECHR) and must as such be described as extensive; however, until very recent years, it has very rarely been applied by Swedish courts. Thus, the centre of gravity is now gradually moving from a total focus on popular sovereignty to a combination of the traditional ideal pertaining to fundamental rights protection as well as the separation of powers.[3]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The constitutional regulation covering EU membership as well as other kinds of international agreements is found in Chap. 10, Art. 6 of the Instrument of Government, the main constitutional act. A few words could be said about the historical background for this regulation, which today reads as follows:

> Within the framework of European Union cooperation, the Riksdag [Parliament] may transfer decision-making authority which does not affect the basic principles by which Sweden is governed. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms.
>
> The Riksdag may approve a transfer of authority, provided that at least three fourths of those voting and more than half the members of the Riksdag vote in favour of the decision. The Riksdag's decision may also be taken in accordance with the procedure prescribed for the enactment of fundamental law. Such a transfer cannot be decided until the Riksdag has approved the agreement under Article 3.[4]

Roughly speaking, this Article was introduced when Sweden joined the European Union in 1995, while some other important articles in Chap. 10 that are dealt with below date back to the enactment of the new Constitution in 1974 or even earlier.[5] Already in 1964, the possibility to transfer decision-making powers to an international organisation aimed at peaceful co-operation was established, although this could only take place to a limited extent. Although these old provisions could of course not be used to facilitate EU membership, this constitutional reform was

[3] See Nergelius 2014, where this recent change is the point of departure.

[4] Quoted from the official publication 'The Constitution of Sweden – The Fundamental Law and the *Riksdag* Act, *Sveriges Riksdag* – The Swedish Parliament', Stockholm 2012.

[5] A useful comment on the historical background of this Article, and its history before 1995, is provided by Algotsson 2000, p. 273. See also Holmberg and Stjernquist 2003, pp. 198 et seq. and Bernitz 2002b, p. 28.

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thus actually enacted as early as fifty years ago, with the future relation to the European Community in mind (given that Sweden had applied for association with the Community already in 1961). These rules were then transferred to the new Constitution in 1974, with the additional provision that competences could also be transferred to an international court.[6]

However, it may be said that Chap. 10, Arts. 7–10 permit transfers of legislative powers, budgetary powers including the use of the assets of the state and treaty-making power, all to a limited extent, to international organisations *other* than the EU, while the possibility to transfer rights of decision-making to the EU itself is, and has been ever since 1995, much wider and more general. From a material point of view, such a transfer is thus limited only by the standard of the protection of human rights within the EU.

From what has been said above, it follows that when Sweden was going to join the EU, the question was whether the three formerly last sections of Chap. 10, Art. 5 (now Arts. 7–10) would be sufficient or not. In other words, was a constitutional reform required in order to enable Sweden to join the European Union?

The first committee that attempted to deal with this question, the so-called Constitutional committee for joining the (then) EC,[7] answered in the affirmative but proposed a new rule in Chap. 1, Art. 10, according to which the supremacy of any kind of EU law in relation to any Swedish law, including the Constitution, should be clearly stated or declared. However, criticism of this proposal was very heavy in the spring of 1993, mainly due to political reasons. It was seen as a sign of Swedish resign or capitulation before Europe and was identified with an unlimited handing over of power to Brussels.[8] Consequently, the Government quickly proposed three other alternatives, one of which was similar to the one finally chosen.[9] It should be noted that the solution chosen was very much influenced by certain jurisprudence of the German Constitutional Court, the *Bundesverfassungsgericht*.

The background to this is that according to Chap. 8, Art. 14 IG, constitutional amendments must be presented in Parliament nine months before a general election and then approved, by a simple majority of the members of Parliament, in two subsequent and identical decisions before and after the election. This rule applies to all four Swedish constitutional acts, i.e. not only to the Instrument of Government but also the Freedom of the Press Act, the Freedom of Speech Act and the Act of Succession noted in Sect. 1.1.2. Such an election was going to take place in September 1994 and thus, in February 1994, it was also decided that a referendum on EU membership should be held in November of that same year. Consequently, the proposal for constitutional reform had to be presented to the Parliament in December

[6] Some minor changes were also introduced in 1976 and 1985. See Algotsson 2000, p. 274.

[7] *Grundlagsutredningen inför EG* SOU (*Statens offentliga utredningar*, Official Bills and Proposals) 1993:14.

[8] For a further analysis of this debate, see Algotsson 2000, p. 273. See also Bernitz 2002b, pp. 109 et seq., and Melin and Schäder 1999, pp. 168 et seq.

[9] These were all presented in the report Ds 1993:36, *Våra grundlagar och EG – förslag till alternativ* (Our constitutions and the EC – different options).

1993 at the latest, in order to facilitate EU membership, given that the content of the then Sects. 2–4 of IG 10:5[10] was not sufficient for this. Furthermore, from the point of view of the Government, this proposal had to have a different content or at least a different form than the first, unpopular proposal, which had been seen as a kind of gift to the already very strong 'No' side in the forthcoming referendum.

Compared with the earlier text, the main changes in the new proposal were that the former requirement that transfer of competences could only occur to a limited extent was abolished and, most importantly, that the previous mention of transfers, in general, to an 'international organisation for peaceful cooperation', was replaced by a specific mention of transfer of decision-making powers to the three European Communities (which in 2002 became the EU). However, this transfer could only take place under the condition (or, as it read, 'as long as', '*så länge*' (cf. *Solange*)) that the protection of fundamental rights within the EU was as far-reaching as that envisaged by Chap. 2 IG (dealing with basic human rights) *and* the ECHR.[11]

Here, the influence of the case law of the German Constitutional Court seems clear. It seems evident that the Governmental committee analysing the constitutional conditions for future EU membership, faced with severe time pressures since it was necessary, due to Swedish constitutional requirements, to present a proposal for constitutional amendment no later than in the middle of December 1993, suddenly stumbled upon the *Maastricht* judgment of the German Constitutional Court delivered on 12 October 1993,[12] which somehow seemed to indicate a solution to the Swedish dilemma, since it provided conditions for further transfer of decision-making powers and for future development *within* the EU. Subsequently, the committee also discovered the two *Solange* judgments from 1974 and 1986, the language of which thus found its way into the Swedish Constitution.[13] In other words, the position of the German Constitutional Court was suddenly also the position chosen by the Swedish constitutional legislator.

The formulation based on the *Solange* doctrine ('*så länge*', 'as long as') was subsequently changed in 2002, giving way, as seen below in Sect. 1.3.3, to the rather vague notion 'the principles of the form of government'.[14] Nevertheless, the basic content of this former first section of IG 10:5, now Chap. 10, Art. 6, remains the same. So what does this Article mean in reality?

First and foremost, Chap. 10, Art. 6 IG is a rule to be used when new treaties are agreed. It has been used in relation to the ratification of the treaties of Amsterdam, Nice and Lisbon. Thus, it made it possible for Sweden to join the EU once the

[10] I.e. the former Sects. 1–3.

[11] This then means that these two catalogues of basic human rights should be read together, in order to analyse whether the protection within EU law corresponds to their added value of protection of basic human rights. However, the two catalogues are mutually overlapping, albeit with some differences. In reality, if the question were ever to become a real problem, the assessment of the applicable human rights standard could turn out to be quite tricky.

[12] *Brunner*, BVerfGE 89, 155.

[13] BVerfGE 37, 271 (Solange I) and 73, 339 (Solange II), respectively.

[14] A proposal based on governmental bill SOU 2001:19.

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referendum in November 1994 had resulted in a positive 'Yes' vote, but it also made it possible for Sweden to ratify new treaty changes, in a rather uncomplicated manner, since the only material requirement for this was that the protection of basic human rights within the EU continue to be reasonably high (which, as we know, has not been a problem thus far).[15]

The reasons for choosing this particular solution given in the bill introducing this reform were that it would mean that in the future, Sweden would not be bound to accept the legal situation that would exist at the time of joining the EU *and* that otherwise, the legal acts of the Union could not be questioned in Swedish domestic law by using national rules on the protection of basic rights. According to this line of reasoning, which bears clear traces of arguments used not only by the German Constitutional Court in its *Maastricht* judgment of 1993 but also by the Danish Supreme Court in a similar judgment in 1998,[16] legal acts from the EU that fall outside the area where a transfer of sovereignty has taken place (i.e. outside the areas where the Union is competent to act, cf. Arts. 2–4 TFEU) are *ultra vires* and thus not applicable within the domestic legal system or by the national courts, who may simply set them aside. This may, in fact, be too simplified in reality; the main problem with this line of reasoning is, of course, that according to the settled jurisprudence of the European Court of Justice (CJEU), only the CJEU has the competence to decide whether a particular EU act is in fact invalid (because it is *ultra vires* or due to other reasons).[17] Here, national courts and authorities in quite a few Member States seem quite simply not to agree with the CJEU. However, should such a situation occur before a Swedish court, where the court might actually be uncertain as to the validity of an EU rule, it would quite simply have to ask for a preliminary ruling from the CJEU according to Art. 267 TFEU.[18]

A few words should also be said about the formal requirements for a transfer of decision-making powers to the EU. Such a transfer by a single decision of the *Riksdag* requires a majority of 75% *of the voting* members; the alternative is that transfer takes place in the same way as an amendment of the Constitution, i.e. through two identical decisions, one before and one after a general election (cf. Chap. 8, Arts. 14–15).[19] It may be noted that while Swedish public opinion was for a long time regrettably hostile towards EU membership (as shown most clearly in the controversial referendum on the euro in September 2003), parties that are in favour of membership have had a solid majority within the Parliament, having held

[15] Instead, a number of new rules on fundamental rights have been included in the Treaty on European Union, starting with the Treaty of Amsterdam in 1999. Furthermore, the Charter of Fundamental rights was drafted in 2000 and is now becoming more important in the jurisprudence of the CJEU.

[16] U 1998.800 H.

[17] See for example the well-known Case C-314/85 *Foto-Frost* [1987] ECR 04199. Cf. on the position of Swedish courts Nergelius 1998a, pp. 156 et seq. and 170.

[18] Cf. Bernitz 2002b, p. 116.

[19] As follows from Sects. 3–4 of this Art., this could actually also lead to a referendum on the issue, should one-third of the Members of Parliament so wish. So far, however, this possibility to hold a referendum on a constitutional amendment has never been used.

more than 80% of its 349 seats at all times between 1994 and 2018 (and even before). This also means that the transfers of decision-making powers that have been made so far, in 1994, 1998 (Amsterdam) and 2001 (Nice), have all been taken through one single decision, with the necessary majority.[20]

From a theoretical point of view, this type of regulation makes it possible for Sweden to adhere to new treaties or approve treaty changes without a referendum and without having to change the Constitution, which is a practical advantage. Also, the process for ratification as such is uncomplicated, not least compared with the requirements in many other Member States.

The reference to the level of protection of basic rights within EU law is interesting, since this is something which has never before been so clearly identified as an important aspect of the Swedish Constitution. Traditionally, the national protection of basic rights is also rather weak in Sweden, where there is no constitutional court and not even a strong tradition of judicial review by the ordinary courts, as discussed below. Once again, the influence of the German constitutional jurisprudence, 'discovered' by the constitutional legislators at a particular, crucial moment in 1993 may be stressed. Furthermore, since the protection of basic rights within the EU has grown ever stronger since 1994, as mentioned above, it seems clear that Sweden may continue to transfer decision-making powers to the EU.

The new declaratory rule in Chap. 1, Art. 10, which was enacted in 2010, states that Sweden is a member of the European Union and also that Sweden participates within the UN, the Council of Europe and other forms of international co-operation (for the full text see Sect. 3.1.1).

Some further EU provisions on the participation of the Parliament and on the elections of the European Parliament will be addressed in Sect. 1.4.

1.2.2 An important fact to be observed is the relative ease with which the Swedish Constitution(s) may be changed. According to Chap. 8, Art. 14, the constitutional acts or fundamental laws are enacted, changed or amended by means of two parliamentary decisions of identical wording (see also Art. 17). The second decision, however, may not be taken until the elections for the *Riksdag* have been held and the newly-elected Parliament has been convened. At least nine months shall elapse between the time when the matter is first submitted to the Chamber of the *Riksdag* and the date of the election, unless the Parliamentary Committee on the Constitution (*Konstitutionsutskottet*) grants an exception from this provision by means of a decision supported by five-sixths of its members.[21] It must be noted, however, that

[20] A question to be asked in this respect is whether there may be any material differences between what may be transferred to the EU using one or the other of the two procedures. Personally, I believe that neither the wording of Chap. 10, Art. 6 IG nor the practical experience during twenty years of membership points towards any such difference, but the issue has been raised in the doctrine (e.g. by Holmberg and Stjernquist 2003, pp. 199 et seq.).

[21] In Sect. 2 of the same Article it is also stated that the *Riksdag* may not adopt a proposal for a constitutional amendment which conflicts with another amendment proposal which has already been adopted earlier, unless it rejects the proposal which it first adopted together with the vote on the new proposal.

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a qualified majority of the 349 Members of Parliament (MP) is not required on either of these occasions; instead, a majority of the MPs present and voting is sufficient on each occasion, which is surprising from a comparative perspective. Nevertheless, constitutional amendments are normally made in accordance between all main political parties.

A certain degree of protection for parliamentary minorities is provided by Chap. 8, Art. 16, which stipulates that a referendum shall be held on a proposal concerning a constitutional amendment which has been voted by the *Riksdag* for the first time, on a motion to this effect by at least one-tenth of the MPs, provided that at least one-third of the MPs concur in approving the motion.[22] The referendum will then be held simultaneously with the election of the new Parliament. The proposal is deemed to have failed if it is rejected by more than half of all votes validly cast. If it is successful, it proceeds to the *Riksdag* for final consideration.

Still, from an international perspective it seems clear that the Swedish constitutional acts are unusually easy to change or amend, in particular if one takes into account the highly technical nature of the Freedom of the Press Act and Freedom of Speech Act, which both contain extensive sections of criminal, procedural and civil law. This fact has favoured frequent and regular constitutional amendments (in total more than 200) since 1974. In fact, the parliamentary election of September 2006 was the first since 1974 in which no constitutional amendment was proposed. It should also be noted that the possibility to request a referendum on a proposed constitutional amendment, the result of which would be legally binding on Parliament, has so far never been used.

These rules are best understood if one bears in mind their political purpose, which is to facilitate consensus on constitutional changes among the main political parties, notably the Social Democrats and the right-wing parties. In fact, politically disputed or contested constitutional amendments have so far been extremely unusual, which has somewhat mitigated the practical impact of the generous rules on the adoption of constitutional amendments.

1.2.3 In order to explain the reasons why Sweden joined the European Union in 1995, some historical background is necessary. The effects of the economic crisis in the early 1990s were important. Suddenly, Sweden was no longer a model for the rest of the world, but rather a symbol of a societal model that no longer worked and was in need of profound change. The initial response to the crisis by the Swedish population, in the aftermath of the events of 1989, was to be strongly in favour of joining the European Union. At that point, membership of the EU was perceived as a first necessary step towards renewed economic prosperity. Gradually, however, from 1992 until early 1994, this opinion changed and instead the Union came to be seen as a threat to the Swedish welfare state.

[22] Such a motion must be put forward within fifteen days from the date on which the *Riksdag* first adopts the amendment proposal.

Finally, however, Sweden voted in favour of joining the EU in November 1994 (by 52.3%), after Austria and Finland had both voted in favour.[23] Economic arguments affected the outcome significantly, but if one compares the Swedish EU debate with, for instance, the situation in Denmark, it may be noted that the idea of the EU as a political instrument was not at all neglected or rejected in Sweden. On the contrary, in 1994 the EU was described by the Social Democrat Government that had just returned to power as a political means to balance the power of global capitalism.

1.2.4 The new Chap. 1, Art. 10 which states that Sweden is now a member of the EU, may be worth noting here once more.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 As follows from Chap. 10, Art. 6 and Chap. 8, Arts. 14–15, the transfer of powers to the EU is quite clearly regulated by the Constitution, while the supremacy and direct effect of EU law that follows from EU membership is not as such regulated or even mentioned in the Constitution (or in any other law for that matter). Instead, this has been left to the courts to regulate and here it is clear that both of these two crucial concepts have now really been acknowledged by the Swedish courts, and thus in Swedish law, as explained below.

1.3.2 It is absolutely clear that the Swedish Constitution is currently going through a transitional phase, moving away from a traditional, total focus on popular sovereignty to a situation characterised by a separation or division of powers between many different actors (or by 'constitutional pluralism').

Swedish courts have acknowledged the supremacy of EU law in some important cases. However, since legal support for the supremacy principle cannot be found in Chap. 10, Art. 6 of the national Constitution, it must instead be derived from the general principles of EU law, which is also what the Supreme Administrative Court did in the important landmark case *Lassagård* in 1997.[24]

The *Lassagård* case is of fundamental importance as to the extension of the scope of judicial review in Sweden and its interaction with EU law. It clearly shows that EU law prevails over domestic law. Secondly, it shows that EU law has developed the scope of judicial review in Sweden. Application of the general principle of effective legal protection by the Supreme Administrative Court has led

[23] For a comparison with these two countries, and their respective reasons for joining the EU, see Nergelius 2002.

[24] The so-called *Lassagård* case, Regeringsrättens årsbok (RÅ) 1997 ref. 65. This case is commented in detail by Nergelius 1998b. See also Andersson 1996. The reinforcement of the tendency towards stronger judicial review from the (supreme) courts was recently illustrated in case NJA (*Nytt Juridiskt Arkiv* – the Supreme Court's publication of decisions) 2015 p. 298.

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to the invalidation of the national regulation limiting such review, and to the adoption of a new provision ensuring the general competence of the administrative courts to review administrative decisions.

Going further, it must be remarked that within Swedish law, EU law offers better protection for basic human rights than the ECHR. This conclusion is based on the fact that Swedish rules were set aside in the *Lassagård* case because they were contrary to Arts. 6 and 13 ECHR as part of EU law, as well as to the general principles of EU law, not because of the application of the ECHR itself or 'in its own right'.[25]

In this regard, it is also interesting to note that the Supreme Administrative Court in *Lassagård* did not refer to the special rule on judicial review in IG Chap. 11, Art. 14. This constitutional provision reflects the traditional Swedish stance on limited judicial review (in 1997 more so than today, as explained below). Thus, the *Lassagård* case also confirmed that any limitations regarding the power of the court to set aside legislation as unconstitutional do not apply with regard to EU law.

1.3.3 As stated above, the level of protection of human rights within EU law sets the limit here, but since the protection of basic rights within the EU has grown stronger since 1994, as mentioned above, it seems clear that Sweden may continue to transfer decision-making powers to the EU. Another possible limit consists of the rather vague notion of the so-called 'principles of the form of government'. This vague expression was introduced into the constitutional text, Chap. 10, Art. 6, in 2002 and must be understood as referring to the important principles for the Swedish Constitution mentioned in Chap. 1 IG (such as monarchy, local and municipal autonomy and impartiality within the public administration), perhaps in combination with the uniquely Swedish tradition concerning access to documents and protection for 'whistle-blowers' and other media sources, as follows from the two constitutional acts, the Freedom of the Press Act and the Freedom of Speech Act that were noted in Sect. 1.1. Proposals for a referendum on the decisions to transfer sovereignty and decision-making powers to the EU were tabled in relation to the ratification of the EU Constitution in 2005 and the Lisbon Treaty in 2009, but only from the left-wing parties which did not have the number of votes necessary to make this happen.

1.3.4 When Sweden was in the process of joining the EU, the main legal question was whether the former Chap. 10, Art. 5 (now Art. 6) would be sufficient to enable membership. In other words, was a constitutional reform required in order to enable Sweden to join the European Union?

In 1993 the first committee that attempted to deal with this question, the so-called Constitutional committee for joining the EC, answered in the affirmative and proposed adding a new rule to Chap. 1, Art. 10, according to which the supremacy of any kind of EC law in relation to any Swedish law, including the Constitution, should be

[25] See Nergelius 1998b.

clearly stated or declared.[26] However, criticism against this proposal was very heavy in the spring of 1993, mainly due to political reasons; it was seen as a sign of Swedish capitulation before Europe and an unlimited handing over of power to Brussels.[27] Consequently, the Government quickly proposed three other alternatives, one of which was similar to the one finally chosen (the current Chap. 10, Art. 6).[28]

1.4 Democratic Control

1.4.1 The European Parliament is not mentioned in the Swedish Constitution (except in IG, Chap. 8, Art. 2 Sect. 1 p. 6, which makes a short reference to the organisation of elections to the European Parliament). However, a by-law regulation of the Swedish Parliament concerning its functions in respect of European affairs can be found in Chapters 7, 9 and 10 of the *Riksdag* Act (*Riksdagsordningen*). In fact, it has been changed recently, as will be explained below.

Furthermore, according to Chap. 10, Art. 10 IG the Government shall keep the Parliament continuously informed and confer with bodies appointed by the *Riksdag* with regard to developments within the framework of EU co-operation.[29] In practice, this consultation and information is done through regular information provided by ministers to a specific parliamentary committee, the so-called *EU-nämnden*. More detailed regulations on how this information shall take place are found in Chap. 10 of the *Riksdag* Act.

The parliamentary EU Committee is not a regular committee like the other parliamentary committees, which are regulated in Chap. 7 of the *Riksdag* Act. Still, it is mentioned in Chap. 7, Art. 14 of the *Riksdag* Act, which, according to the rules on amendment of that Act in Chap. 8, Art. 16 IG, means that it cannot be abolished by a simple legislative majority. The Committee's composition reflects and is based on the outcome of the general elections.

Some important changes in the *Riksdag* Act entered into force on 1 December 2009 (i.e. on the same day as the Lisbon Treaty) concerning specific procedures related to supervision of the principles of subsidiarity and proportionality. Based on a report from the Constitutional Committee,[30] a document-based or sector-specific model of scrutiny of the principle of subsidiarity, according to which the nature of the matter that will be reviewed determines which of the parliamentary committees

[26] *Grundlagsutredningen inför EG*, supra n. 7.

[27] For a further analysis of this debate, see Algotsson 2000, p. 273 et seq. as well as Bernitz 2002b, p. 109 et seq. and Melin and Schäder 1999, pp. 168 et seq. (who were both members of this legislative committee).

[28] These three were all presented in the report Ds 1993:36, supra n. 9.

[29] More detailed rules concerning the obligation to inform and consult are laid down in the *Riksdag* Act.

[30] KU (*Konstitutionsutskottet* – the Constitutional Committee) 2009/10:2.

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(of the total of twenty) will be responsible for exercising the new test introduced by the Lisbon Treaty, was introduced. The parliamentary committee may, within two weeks, ask the Government to give its opinion on whether the legislative proposal in question violates the principle of subsidiarity. If the majority of the committee should then find that the principle of subsidiarity has been violated, this will also probably become the official Swedish position. The committee will make a statement or report to the Swedish Parliament, suggesting that it declare the position of the committee to be the official position of the Parliament, and that the Parliament should subsequently send this reasoned and justified position to the presidents of the European Commission, Council and European Parliament. Furthermore, should the contested act nevertheless enter into force, the Parliament may, in line with the Protocol on the application of the principles of subsidiarity and proportionality, urge the Government to initiate proceedings before the Court of Justice.[31]

Nevertheless, the various committees dealing with other political issues are far more established and have greater decision-making power, notably in legislative and budgetary issues, while the EU committee has until now been seen only as a forum for discussion and information.

Normally, formal hearings of the ministers take place before the meetings of the Council of Ministers, according to the rules in Chapters 9 and 10 of the *Riksdag* Act. The requirement is that at least five members of the EU Committee must request a hearing. Although this is relatively informal and unregulated, the ministers are supposed to represent an official, Swedish line that enjoys the support of a significant majority of the MPs.

Concerning the new rules on amendment of the Treaties (Arts. 48–49 TEU), the Parliament shall, according to a new rule in Chap. 9, Art. 20 of the *Riksdag* Act, approve or reject any such new initiative, having first heard the responsible committee on its views.

It may be noted that the obligation for the Government to inform the Parliament has expanded and includes all documents originating from the EU (*Riksdag* Act Chap. 9, Art. 22).

In this respect, it may also be worthy of mention that issues related to TTIP, the Transatlantic Trade and Investment Partnership, not least concerning future parliamentary supervision in external trade matters, were greatly discussed in the campaign for the elections to the EU Parliament in May 2014.[32]

1.4.2 Only two referendums have been held in Sweden. The first was held in November 1994, in which 52.3% voted for membership and 46.7% were against. The second was the legally extremely doubtful referendum on European Monetary Union (EMU) membership in September 2003, in which 56.7% voted against. While the first referendum was held for an obvious reason, the background of the second referendum might perhaps warrant further explanation.

[31] See KU 2009/10:2 p. 8.

[32] See e.g. a survey of all the party leaders in the daily *Svenska Dagbladet*, 19 May 2014.

The reason for this peculiar Swedish deviation from its obligations as an EU member simply has to do with domestic politics. After the referendum on EU membership in 1994, only two official No-side parties, the Environmentalists and (former) Communists, together with the small Farmers Party, which had been in favour of EU membership as such but were opposed to the idea of a common currency, demanded a referendum on this matter. Thus, a huge parliamentary majority was against holding a referendum. However, upon returning to Swedish domestic politics in the fall of 1997 and after having acted as a UN peace broker in Bosnia for two years, the right-wing opposition leader and former Prime Minister (at the time of writing Foreign Minister) Carl Bildt, in a surprising move during a parliamentary debate in the build-up to the 1998 parliamentary election, called for a referendum to be held on this special topic. Since he had at that time already consulted the Liberals and the Christian Democrats, only the governing Social Democrats (who held 45% of the seats in Parliament) at that time did not formally support the idea of a referendum, which meant that this idea suddenly became a political reality or even necessity. It may also be added that the Social Democrats never formally opposed the idea, which was logical given the internal division within the party over this issue. Thus, no political party or force, including the media, ever really opposed the idea of organising a referendum on EMU, at least not on legal grounds. The very simple legal fact that EU membership and the result of the referendum in 1994 did not formally or legally allow for this second referendum was never really invoked in the Swedish debate, which is quite surprising.[33]

From a legal point of view, it is clear that Sweden has already since 1997, when the original decision was made not to participate in the third step of EMU, violated its obligations as an EU member. Sweden thus became the first country to meet the so-called convergence criteria but not to participate in the EMU, without any legally binding exception that enables it to remain outside (unlike in the case of Denmark and the UK). However, the introduction of Art. 139 TFEU, with the enactment of the Lisbon Treaty, has probably made Sweden's situation easier from a strictly legal point of view, since Sweden may now be treated as a Member State 'with an exception', like Denmark or the UK – even though no such exception has ever really existed.

As it turned out, 57% of the voters voted against the euro on 14 September 2003, only three days after the assassination of Foreign Minister Anna Lindh towards the end of the campaign. It may be asked if the result might have been different, had the Government spent more time and energy arguing in favour of the common EU currency already in 1999 or 2000.

The legally rather unclear situation to which the referendum led is all the more regrettable since all the other constitutional preparations for full membership in the EMU were conducted or implemented already in 1998–1999, in accordance with

[33] For the only real exception from this, see Bernitz 2002a, Chap. 3 and Bernitz 2002b, Chap. 9 (which were written and published before the EMU referendum). See also Nergelius 2008.

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the provisions of IG Chap. 8, Arts. 14–15.[34] Generally, these consisted of amendments to Chap. 9 Arts. 12 and 13, regulating the financial power of the Realm. According to these rules, the *Riksbank* (central bank of the Realm), which works under the *Riksdag* and is formally independent from the Government, is responsible for monetary policy. No public authority may determine how the *Riksbank* decides in matters of monetary policy. The eleven members of the governing council of the *Riksbank* are all appointed by the *Riksdag*, which also considers whether the members of the Governing Council or the Executive Board of the Bank shall be granted discharge of responsibility. A member of the Executive Board may be removed from office only if he no longer fulfils the requirements laid down for performing his duties or if he has been found guilty of gross negligence. All of these rules, aimed at ensuring the independence of the *Riksbank*, meet the criteria laid down in the TFEU for enabling Member States to join the EMU.

Thus in fact, all possible practical measures in Swedish public life during the last twenty years, be they economic, legal or constitutional, have been directed towards facilitating full Swedish membership in the EMU and adopting the euro as the national currency. The only thing that has been lacking is a clear will on the part of the main political parties.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Since the Swedish Constitution has never been amended to a considerable extent in relation to the EU, the question on the reason for amendments is difficult to answer. As mentioned above, however, the influence of the German Constitutional Court is clearly visible. Apart from this, domestic Swedish political considerations have had much to do with subsequent developments, both in the elaboration of Chap. 10, Art. 6 IG and in the events leading to the euro referendum.

1.5.2 For the factors that influenced the EU amendments, refer to Sects. 1.2.1–1.2.2. On the question of whether the Constitution may become obsolete in this respect, this is not the case in Sweden, since the constitutional solution chosen is very flexible, as described above, and will allow for the further transfer of sovereignty and decision-making power to the EU for a long time yet, when the EU treaties are changed further.

1.5.3 In my assessment, it is hard to give a general answer to the question on the role of national constitutions in the context of transnational governance, since conditions undoubtedly differ between different countries. Generally speaking, my view is that governments and politicians throughout the world ought to devote more

[34] It may also be noted, in this respect, that Sweden actually conducted a severe economic policy, characterised by austerity, in 1994–1996, in order to meet the convergence criteria necessary for EMU membership, which makes the subsequent development even less logical and harder to understand.

time and energy to defending and explaining the need for globalisation and the need for the institutional reforms that it may cause, instead of defending old-fashioned national sovereignty or simply acting as if this were still the basic condition for political action. Yet to transform this general view into specific constitutional recommendations is difficult. Nevertheless, specific shortcomings in individual countries may of course be identified.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Chapter 2 of the Instrument of Government is rather long (25 Arts.) and contains provisions on most of the human rights enumerated in various catalogues of this kind, e.g. the well-known conventions of the United Nations and the Council of Europe. What is striking, however, is the emphasis put on the techniques and possibilities for limiting the scope of the rights by ordinary legislation.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has in fact been a part of Swedish law since 1 January 1995. No law or other provision contrary to Sweden's obligations under the Convention may be promulgated (IG Chap. 2, Art. 19). The exact meaning of this is, however, unclear, as opinions differ as to what the status of such a law should be, if it were promulgated nevertheless. Even the preparatory documents are silent on this issue. Given the sceptical attitude of most of the political parties in Sweden towards judicial review, it was impossible to write into the Constitution that the ECHR would prevail over a conflicting Swedish law, since this would have enabled Swedish courts to set aside Swedish laws in a potentially high number of cases. Still, it seems to be difficult to avoid the conclusion that Swedish courts indeed would have to do precisely that when serious conflicts between the two legal systems arise.

The applicable and binding rules on human rights in Sweden are to be found in Chap. 2 IG, in the Freedom of the Press Act of 1949 and the Freedom of Speech Act from 1991, as far as freedom of speech in books and the media is concerned and finally, since 1995, in the ECHR. Chapter 2 IG guarantees the freedom of expression, freedom of information, freedom of assembly and manifestation, freedom of association and freedom of worship to all citizens. As far as the freedom of expression is concerned, reference is made to the Freedom of the Press Act and the Freedom of Expression Act, which regulate freedom of expression in the media. Some forms of free speech, such as art exhibitions and theatre performances, are exclusively protected by Chap. 2 IG. The same applies to political meetings, subject to the condition that they are not broadcast; in the latter case, the Freedom of Expression Act is applicable.

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Chapter 2 protects the 'negative' dimension of the above-mentioned freedoms. All citizens are thus protected against coercion by the public authorities to disseminate or not to disseminate their political, religious or cultural views, to participate in or abstain from a meeting or manifestation or to join or quit a political, religious or cultural association.

As concerns procedural rights, it has to be noted that retroactive legislation is prohibited both in penal and tax law (IG 2:10), and that courts may not be established for specific cases. More complicated is the provision that every citizen shall be entitled to a hearing before a court if he is deprived of his liberty after having committed a crime or because he is suspected of such an act (or for other reasons). Here, the definition of deprivation of liberty has caused some difficulties in relation to administrative sanctions like the obligation imposed on foreigners to reside in and not leave certain municipalities (which, however, have now been abolished).

Some further rights are protected by the constitutional text but in weaker terms, such as the right to exercise a trade and to practice a profession or the rights of the Sami population. This is also true for the protection of property, which was reinforced in 1995 but is still rather easy to restrict (although compensation must always be promptly paid).

We may also note the weak or unclear legal position that the ECHR has in Swedish law, where, according to IG Chap. 2, Art. 19, no act of law or other provision may be adopted which contravenes Sweden's obligations under the Convention. The ECHR as such was incorporated through an ordinary law (1994:1219). Still, this does not say anything about what would actually happen should a Swedish law nevertheless be contrary to this provision (an issue that is not dealt with in a satisfactory way by the *travaux préparatoires* either).[35] In other words, the supremacy of the ECHR in relation to Swedish national law is nowhere expressly recognised.

2.1.2 Chapter 2, Arts. 12–13 as well as Arts. 20–24 IG are in one way or another concerned with limitations of the rights guaranteed in Chap. 2. Articles 20–24, which will be focused on here in greater detail, are somewhat complex. The relation between these articles is that Art. 20 mentions articles that may be limited by law, while Arts. 21–22 lay down general conditions for restrictions of the rights that may in fact be restricted. Articles 23–24 then regulate more closely the conditions for the restriction of the different forms of free speech and freedom of information, assembly and manifestation as well as of association referred to in Art. 1.

Article 20 begins by mentioning that these rights, together with those guaranteed in Arts. 6 and 8 as well as the right of public attendance at a court trial, may in fact be restricted by an Act of Parliament. Such restrictions may, however, be imposed only to achieve purposes that are acceptable in a democratic society, and must never be disproportionate with regard to such purposes. Furthermore, they may not be extended so far as to constitute a threat to the free formation of opinion, and must never be imposed solely on the grounds of political, religious, cultural or other

[35] For criticism against this fact, see Bernitz 2002a.

opinions. A parliamentary minority which comprises at least one-sixth of the MPs voting on the issue has the right to postpone the final adoption of a law restricting the exercise of basic rights (Art. 22). Whether a bill is in fact of this restrictive kind will be decided by the Constitutional Committee *(Konstitutionsutskottet).* As for the other freedoms guaranteed in Chap. 2 (Arts. 14–18), they may be restricted by law in accordance with the conditions in the provision defining the right. The constitutionality of such legislation, e.g. in relation to property, may of course be reviewed by the courts.

The rights related to free speech may be restricted for the purposes defined in Arts. 23 and 24, e.g. public safety, the integrity of the individual and national security. Some of these purposes, such as national supply of vital goods and services, may seem a bit odd as a justification for the restriction of freedom of speech, as may the circulation of traffic as a justification for restricting freedom of assembly. It may also be observed that the freedom of expression may always be restricted 'where particularly important grounds so warrant', a limitation formulated in very broad terms.

Generally speaking, the scope of the individual rights guaranteed in Chap. 2 IG is quite comprehensive, but the emphasis on the conditions and the forms in which they may be restricted reflects the general tendency towards parliamentary rule discussed above. Apart from the five-sixths majority required for the rejection of a request for the postponement of the adoption of a law restricting certain basic rights (in particular rights related to freedom of speech and personal liberty), qualified majorities are not needed in order to restrict or limit a fundamental right.

2.1.3 Judicial review The Swedish legal system is based, like most other legal systems in the world, on the idea of a hierarchy of norms. However, in the Swedish Constitution, this may only indirectly be deduced from the provision on judicial review in Chap. 11, Art. 14 IG, according to which courts or other public bodies may set aside provisions that are in conflict with rules of fundamental law 'or other superior statutes'.

This provision would be meaningless without an existing hierarchy of norms. Nevertheless, the concept has in fact never been developed in greater detail in Swedish constitutional law; it may even be said that the concept of the Constitution as *higher law* or *lex superior* was not clearly understood when the Instrument of Government was adopted in 1974. At that time, a perspective highly influenced by the principle of popular sovereignty prevailed, according to which the Constitution is above all *descriptive*, containing the procedures which have to be followed in the exercise of governmental powers, e.g. in the enactment of laws or the appointment of the Prime Minister. The opposite and internationally widely accepted view of modern constitutionalism, according to which the Constitution is the *higher law* against which all other laws have to be measured, has received greater attention only quite recently, in the last ten years.

Once again, the main trait or characteristic feature of the Swedish Constitution, identified here as IG, is its emphasis on popular sovereignty. According to the very first sentence in Chap. 1, Art. 1 IG, '[a]ll public power in Sweden proceeds from the

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people'. This is a declaratory statement directed against the concept of separation of powers, since courts are never elected by the people, but also a general attitude that has also influenced other parts of the Swedish constitutional system for a long time.

Historically speaking, it may be noted that judicial review of legislation did not become a part of the constitutional text until 1979, when Chap. 11, Art. 14 IG was enacted. The existence of judicial review as such has, however, been discussed in the legal doctrine at least since the 1880s. It was generally acknowledged by the doctrine in the 1930s and finally accepted as fact by the Supreme Court in a case in 1964.[36]

It was not, however, until 1979, in the second reform wave of the new Constitution of 1974, that judicial review was finally written into the new constitutional text. This was, however, limited by the reservations that followed from the requirement of manifest error, and also by some influential political statements in some of the *travaux préparatoires*, notably from the Constitutional Committee, on the restraint on the part of the courts that was necessary so that this new possibility for the courts would not gradually undermine the Swedish popular democracy.[37]

In the text, that was not changed between 1979 and 2010, Chap. 11, Art. 14 stated that if a court or other public body found that a provision conflicted with a rule of fundamental law or other superior statute, or that a procedure laid down in law had been disregarded in any important respect when the provision was made, the provision could not be applied. However, if it had been approved by the Parliament or the Government, it should be waived only if the error was manifest (the so-called *uppenbarhetskrav)*. Thus, judicial review pertained both to the courts and other public authorities, a fact that has in reality probably diminished the importance of judicial review.

Since 1 January, 2011, Chap. 11, Art. 14 has the following wording:

> If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made.
>
> In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law.[38]

The second section of this Article in particular may be subject to analysis. It may of course be seen as an attempt to reconcile the old popular sovereignty with the somewhat new elements of separation of powers and judicial authority. However, it

[36] NJA 1964, p. 471, concerning opening hours in shops (although that law was actually considered to be constitutional). For a thorough historical account, see Nergelius 2010, pp. 198 et seq.

[37] See in particular KU 1978/79:39, p. 13.

[38] An identical rule on judicial review of the public authorities now exists in Chap. 12, Art. 10 IG.

has also been suggested that it above all underlines the supremacy of the Constitution, since it is the Parliament that enacts or changes the Constitution (see Chap. 8, Arts. 14–17).[39]

One thing that is clear from the wording of Chap. 11, Art. 14, however, is that the review exercised may be either formal or material in nature. What is not quite clear from the Article is whether the courts have an *obligation* to exercise judicial review whenever they find such a situation in a case before them or whether they may do so only when the argument is being raised by the parties in a case.[40] Surprisingly enough, this issue has still not been resolved.

What is clear, however, is that there seems to exist no autonomous right to an *abstract* judicial review, independent of a specific case or dispute. This was established already in a case in 1987,[41] and the European Court of Justice in the so-called *Unibet* case recently confirmed that EU law does not impose any specific conditions on the Member States in terms of allowing specific forms of judicial review, as long as effective remedies do indeed exist before independent courts of law.[42]

From jurisprudence, although not from the text itself, it also becomes clear, logically enough, that judicial review is not of a law or some other rule in itself, but rather of the practical use or application of the rule by a public authority in a specific case.[43]

Access to justice The rights pertaining to access to justice are found in Chap. 2: Art. 9 guarantees the right to have any deprivation of liberty on account of (suspicions of) a criminal act or for other reasons examined before a court of law without undue delay, and Art. 11 prohibits the establishment of courts for specific cases and guarantees public proceedings within a reasonable time. Additionally, Chap. 11, Art. 5 IG provides that legal disputes between individuals may never be settled by authorities other than courts of law, except in accordance with the law (such as arbitration bodies).

The rule of law On the specific points raised in the Questionnaire in point 2.1.3, the rules in Sweden are as follows:

- The rule that only published laws can be valid is self-evident and has never been questioned or even discussed.
- Legal certainty and non-retroactivity: as mentioned above, these follow partly from Chap. 2, Art. 11. The principles of *nulla crimen sine lege* or *nulla poena*

[39] See Karlson 2009, pp. 269–274.

[40] See Nergelius 2010, p. 210 for further discussion.

[41] NJA 1987, p. 198.

[42] Case C-432/05 *Unibet* [2007] ECR I-02271.

[43] For some very clear examples of this, see the two so-called Kurd cases, NJA 1989, p. 131 and 1990, p. 636. Also NJA 1986, p. 489 may be observed here.

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sine lege are guaranteed in penal law in Chap. 2, Art. 10 Sect. 1 and in tax law (with many exceptions), in Sect. 2 of that same Article.[44]

- The rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute, and that sanctions cannot be applied retroactively and cannot be inferred from objectives by virtue of teleological reasoning or by analogy: in addition to Chap. 2, Art. 10 IG, this also follows from Chap. 8, Art. 2 Sect. 1 p. 2, as well as Chap. 8, Art. 3, Sect. 1 p. 1 *e contrario*. Both of these rules stipulate that a law is necessary to regulate these matters.[45]

The rule of law as such is mentioned in one single Article in the Swedish Constitution, namely in Chap. 8, Art. 22 concerning the important Law Council, which will be subsequently explained in more detail. In order to understand the historically rather limited impact of judicial review in Swedish law, it is not enough to be aware of the heavy emphasis on popular sovereignty in Swedish political and constitutional thinking. The important work of the Law Council,[46] which since 1909 has exercised a form of judicial preview of law proposals, must also be taken into account in this respect.[47] According to Chap. 8, Art. 20 IG, the Law Council, which consists of justices or former justices of the two supreme courts, shall pronounce opinions on draft legislation. The opinion of the Council is obtained by the Government or sometimes by a committee of the *Riksdag*. In order to better understand how the Council works, Art. 21 shall be quoted *in extenso,* in its official version from 2010:

> An opinion of the Council is obtained by the Government or, in accordance with what is stated in the Riksdag Act, by a Parliamentary Committee.
>
> Such an opinion shall be obtained before the Parliament enacts
> A fundamental law relating to the freedom of the press or the corresponding freedom of expression on sound radio, television and certain like transmissions and certain like transmissions and technical recordings;
> an act of law restricting the right of access to official documents;
> an act of law under Chapter 2, Art. 14–16, Art. 20 or Art. 25;
> an act of law concerning automatised treatment of personally identified or classified information;
> an act of law relating to local taxation or a law which otherwise imposes duties on the municipalities;
> an act of law under Art. 2 Section 1 p. 1 or 2[48] or an act of law under Chapter 11 or 12, or an act of law amending or abrogating any law under points 1–6 above.

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[44] Although this right is thus very limited, the Supreme Court nevertheless upheld it and set aside a contradictory law in the case NJA 2000, p. 132.

[45] See here also the case NJA 2005, p. 33, which illustrates this.

[46] In the official English translation this is called the Council on Legislation.

[47] Thus, the creation of the Law Council stands in a close relation to the simultaneous establishment of the Supreme Administrative Court, with both reforms aimed at distributing the many tasks that the Supreme Court had under the old Constitution of 1809 to new bodies.

[48] I.e. of Chap. 8.

> The foregoing does however not apply, if obtaining the opinion of the Council on Legislation would delay the handling of legislation in such a way that serious detriment would result. If the Government submits a proposal to the Riksdag for the making of an act of law in any matter referred to in sentence one, and there has been no prior consultation of the Council on Legislation, the Government shall at the same time inform the Riksdag of the reason for the omission. Failure to obtain the opinion of the Council on Legislation on a draft law never constitutes an obstacle to the application of the law.

Chapter 8 Art. 22 further provides as follows:

> The Council's scrutiny shall relate to:
>
> 1. the manner in which the draft law relates to the fundamental laws and the legal system in general;
> 2. the manner in which the different provisions of the draft law relate to one another;
> 3. the manner in which the draft law relates to the requirements of the rule of law.[49]

Whilst there is some uncertainty about the exact scope of this scrutiny, it is important to note two main limitations to the power of the Council. The first is that failure to obtain an opinion from the Law Council will never constitute an obstacle to the application of the law. This fact could lead to the conclusion that the Council lacks importance, but that is hardly correct. In Swedish doctrine, the meaning of the criteria established in Sect. 3 of the provision has been vividly discussed.[50] In short, there seems to be a general agreement that not only the text of a draft law but also its *travaux préparatoires* must be taken into account. Since 1995, the assessment by the Law Council must also include an analysis on the compatibility of the draft law with EU law and the ECHR.

The Law Council today feels more free to criticise proposals also from the point of view of the rule of law (*rättssäkerhet*), which may have something to do with, generally speaking, a lower quality of legislation today compared to 20 years ago, when the pressure to produce laws quickly was much less severe.

The second limitation is that the Government and the Parliament are free to ignore the warnings of the Law Council. This is formally possible, since the opinions of the Law Council are never formally binding. The issue of what constitutional status may be given or attributed to the opinions of the Council is still somewhat unclear. They are of course much more important than ordinary comments on legislation from NGOs or public authorities, since the Council is a body of legal expertise, which represents no party interests and comments on draft laws, i.e. finished legislative products which the Government intends to submit to the Parliament, and not merely on the work of a legislative committee or some similar group.

[49] This is the only Article of the Constitution that mentions the rule of law. Sections 4–5 are omitted.

[50] See Nergelius 2010, p. 185 et seq. with further references.

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In general, the Law Council does definitely not lack influence or the ability to affect the final versions of the laws adopted by the Parliament.[51] Still, given the clear statements and formulations in Chap. 8, Art. 21 IG, it would be impossible to claim that the opinion of the Law Council should have a higher status than a contradictory opinion of the Parliament, which enacts a law despite the Council's objections. But in such a case, which is far from unusual, the fact that the opinions of the Law Council have not been observed by the legislator may be one reason why it might be easier for a court to set aside a law in a subsequent case of judicial review.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 The balancing of fundamental rights with economic free movements rights has not given rise to any major problems. The most contested case so far has been the *Laval* case, which was referred to the CJEU from the Swedish labour court (*Arbetsdomstolen*), which in a subsequent ruling found that the Builders Trade Union had to pay Laval compensation of circa 55,000 EUR.[52] Both this judgment and the ruling of the CJEU in late 2007[53] were very unpopular with the strong Swedish trade unions. However, one constitutional issue which in my view has been neglected in the discussion of this case is that the conflict was not between free movement and the crucial freedom of association as such, but 'only' between free movement and the right for trade unions to initiate collective action, including, in this case, blockades. In the Swedish Constitution, the freedom of association enjoys very strong protection and is difficult to limit or encroach upon (IG Chap. 2, Art. 1 Sect. 1 p. 5 and Art. 20, Sect. 1 p. 2), while the right to initiate collective action is merely mentioned in the Constitution and applies only to the extent that this follows from law or a collective agreement (Chap. 2, Art. 14). This matter is not discussed in the judgment of the CJEU and may have been of no practical importance in this case, but illustrates that this is not a likely area for conflicts between EU law and the Swedish Constitution.

There have been other areas where free movement rules have conflicted with social values rather than constitutional rules, such as the *Franzén* case.[54]

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[51] Cf. Nergelius 2010, pp. 194 et seq. for a recent analysis.

[52] AD 2009:89.

[53] Case C-341/05 *Laval* [2007] ECR I-11767.

[54] Case C-189/95 *Franzén* [1997] ECR I-05909. Case C-405/98 *Gourmet* [2001] ECR I-01795 may also be mentioned, in which a periodical called Gourmet which specialised in food and wine had published some outspoken commercial advertising for wines, which the Consumers Ombudsman wanted to put an end to (by invoking not least FPA Chap. 1, Art. 9 p. 1). The Stockholm City Court asked for a preliminary ruling from the CJEU, which found the Swedish prohibition against this kind of advertisement far-reaching and problematic. Both the City Court

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

On the relevant constitutional provisions regarding *nulla poena*, non-retroactivity and access to courts, see Sect. 2.1. However, the European Arrest Warrant (EAW) has not raised constitutional issues in Sweden.

2.3.1 The Presumption of Innocence

2.3.1.1 The courts try to assert the criteria for extraditions according to the Arrest Warrant and the Swedish law (2003:1156) that implemented the EAW into Swedish law. So far, however, the question of presumption of innocence has not given rise to any debate in relation to these matters.

2.3.1.2 The point of departure is that Swedish courts will grant extradition requests, provided that there is no reason to doubt the quality or impartiality of the legal system in the requesting Member State. The main criteria for these decisions were laid down by the Supreme Court in 2007, in a case in which it was established that an international convention (the UN Convention on the Rights of the Child) could not be invoked in order to prevent an extradition.[55]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principles of *nullum crimen* and *nulla poena sine lege* are very clearly protected in Chap. 2, Art. 10 IG.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 In absentia judgments (*tredskodomar*) are allowed in Swedish law, but only in the case of petty crimes. Given the standard in Swedish law, the judgment in *Melloni*[56] was very surprising, since it is indicative of a very poor and simply unacceptable human rights standard.[57] This is quite easily understood when looking at the case.

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and the special Market Court (*Marknadsdomstolen*) then found it impossible to maintain the prohibition (MDA 2003:5).

[55] NJA 2007, p. 168. This case is commented upon critically by Herlin-Karnell 2007.

[56] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[57] See Nergelius 2013b, p. 815 et seq.

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Compared to the *Åkerberg Fransson* case[58] decided on the same day, the judgment in *Melloni* raises some fundamental issues that are likely to cause more confusion in the field of EU constitutional law, for many reasons and perhaps for a long time, not least concerning fundamental rights. One of the reasons for the somewhat – in my view – odd outcome of the case and one of the main difficulties for the CJEU seems to have been the interpretation of the EAW Framework Decision,[59] which in its original 2002 version prescribed that all Member States were to execute extraditions from other Member States according to the principle of mutual recognition. At the same time, however, Art. 5 of the text contained certain guarantees, with the clarification that if someone is requested for extradition where the person has been sentenced in his absence, there should be a possibility to have the sentence and judgment reviewed. Yet in the new Framework Decision of 2009,[60] it is stated that these guarantees do not apply if the person requested for extradition has been represented by a lawyer and if he knew about the procedure against him and the fact that he might be sentenced in his absence.

Despite the fact that there may be reasons for these harsh rules – such as interest in making the Arrest Warrant work smoothly and, in Italy, the combatting of organised crime – the situation here was complicated, even more so since the CJEU actually neglected to inform the readers of its judgment on the knowledge of such facts that Mr. Melloni might have had during the lengthy procedures.

Unfortunately, the judgment as such is quite short. The CJEU referred to the principle of mutual recognition and stated that extradition must take place in a case such as this, at least if the convicted person was aware of the trial against him and had had the possibility to be represented by a lawyer (or was aware of the fact that a judgment against him might be given in his absence). The CJEU further claimed that the right to be present at a trial may be limited, thus arriving, in a not very convincing or persuasive line of reasoning, at the conclusion that the Framework Decision (in particular Art. 4a(1)) does not violate Arts. 47–48 of the EU Charter of Fundamental Rights. While this argumentation is not convincing and may definitely be criticised, another aspect of the case, in my view, is more worrying.

As is well known, Art. 53 of the Charter states that none of its rules may limit or infringe upon the fundamental rights that are acknowledged by EU law, international law, international conventions to which the Member States are parties or the constitutions of the Member States. The possibility for national courts to maintain a higher standard for individuals in this respect than provided by the EAW (as interpreted by the CJEU) was, however, simply dismissed by the CJEU, since this

[58] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

[59] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[60] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

would 'undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply the legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that state's constitution'. But is that not exactly what national courts ought to do, if they take Art. 53 of the Charter seriously?

This particular line of reasoning of the CJEU is well-known from cases such as *Costa v. Enel*[61] and *Simmenthal*[62]. It basically means that any kind of EU law, primary as well as secondary, is superior to any kind of national law of the Member States, including the national constitution. The latter part of this constitutional jurisprudence is not accepted by very many Member States or their highest courts.

However, in this case the CJEU first, before upholding its jurisprudence on this last point, managed to find that the secondary EU law in question (EAW) was compatible with the applicable primary EU law – the Charter, which itself states that it is inferior in relation to any farther-reaching protection of human rights that may be found in a national constitution. Thus, the CJEU has managed a double operation, both steps of which are most doubtful, in order to 'save the life' of the EAW, which has obviously been seen as very crucial. But while saving this patient, has not the 'life' or at least the legal status of the arguably considerably more important Charter been sacrificed instead, given that its Art. 53 has so evidently been applied and interpreted *e contrario,* in reality losing its significance? At least that is what follows from a close reading of the judgment.

Concerning the general implications for human rights within EU law, the CJEU stated that the possibility for a national court to refuse extradition is a case such as this would spread doubt on 'the uniformity of the standard of protection of fundamental rights as defined in that framework decision', which would, consequently, undermine the principle of mutual recognition and ultimately the confidence between the legal systems of the Member States. But if this line of reasoning is to be followed, prison sentences for as long as ten years rendered in the absence of the accused are generally to be accepted in the EU of today, which is highly surprising. This, or anything similar, would never be accepted or possible in Swedish law.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Travel expenses are normally not needed, since they fall on the requesting state. For translation costs and legal aid the answer is also no, but here the result may depend on the circumstances of the specific case. According to the EAW and other conventions, the defendant has the right to have all documents in the case translated into his or her language. If Sweden were to hand over e.g. a Polish citizen to Poland, translation would not be a problem for obvious reasons, but in other

[61] Case C-6/64 *Costa v. E.N.E.L.* [1964] ECR 01141.

[62] Case C-106/77 *Simmenthal* [1978] ECR 00629.

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cases, translation is the responsibility of the requesting state. Basically, this is also the case for legal aid, where various conventions guarantee legal representation in the requesting state. The Swedish law on legal aid (2000:562) may be applied in certain situations where no other possibilities or means for such aid exist.

There is no need for a special body to assist extradited persons. As far as I can see and according to the spokesperson of the Swedish Prosecutors International Chamber, this is not urgently needed.

2.3.4.2 According to the spokesperson of the Swedish Prosecutors International Chamber, there are no statistics available with regard to subsequent acquittals and, what is more important, based on the routines that are being followed, it would not be possible to obtain any. When an extradition occurs, the Swedish prosecutor's office sends copies of the decision to the colleagues in the requesting state, but there is no corresponding obligation for that bureau to report back on the result – and thus this simply does not happen. Generally speaking, more documents are handed over – in both directions – in cases concerning extradition for someone who is to stand trial in the requesting state than for someone who is being extradited in order to serve a sentence that has already been decided.

On examples of individual cases, see below under Sect. 2.3.5.4.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 No, no such conclusion with regard to effective judicial protection may be made. Generally speaking, this has not been a big problem in Sweden. The courts have applied the rules loyally, which has not caused much discussion.

2.3.5.2 No debate has taken place on the suitability of transposing mutual recognition to criminal law. My own view is that there might perhaps be a future need for such debate, should the position of the CJEU in *Melloni* prevail. The discussion is interesting, but maybe slightly premature.

2.3.5.3 There has been a certain amount of debate, ever since the late 1990s, on this alleged new role for the courts[63] as bodies facilitating European legal and judicial cooperation. It is a matter that is often debated e.g. in annual meetings between the Ministry of Justice and academics.[64] However, issues such as the increased power of courts and the 'judicialisation of politics' have led to much more discussion, both in the legal doctrine and the public debate.

2.3.5.4 There have been no calls for a specific procedure of judicial review. However, it may be noted that as a result of the probably best known case,

[63] See e.g. Lindblom 1997, p. 316 et seq.

[64] See e.g. Svensk Juristtidning 2004, p. 205 et seq.

concerning a young man Calle Jonsson, there was a public outburst when he was extradited to Greece in late 2004. He was accused of stabbing a Greek person with a knife at a bar in Rhodos in 2001 and then arrested in Greece from August 2001 to February 2002. Having returned to Sweden, he did not wish to go back to Greece for the trial but was forced to do so after a lengthy procedure, during which public opinion and the media were clearly on his side, thus displaying a clear lack of faith in the impartiality and competence of the Greek authorities. He was acquitted in the trial in April 2005, but the Supreme Court of Greece decided thereafter in November 2006 that the trial had been invalid due to procedural irregularities and should be restarted. So far, however, this has not happened and Mr. Jonsson does not seem to be obliged to return to Greece.

I would probably not support the reinstatement of some form of judicial review, since the need for this does not seem to be urgent. However, this assumption is based on the fact that there is a mutual trust between the courts and legal authorities of all of the EU Member States.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

A few examples may be given, of which the matters related to the *Åkerberg Fransson* case are the most important. The Supreme Court in two rulings in June and July 2013, on the grounds of the *ne bis in idem* principle, made a U-turn as regards the approach to imposing a tax surcharge on a person and prosecuting the same person for a tax offence in different legal proceedings. In the first ruling, a unanimous plenary ruling in June 2013,[65] the Supreme Court found that the long-established Swedish double sanction system (tax surcharge and criminal sentence), in which two different legal procedures were applied where a person had provided false information in a tax return, was not compatible with the *ne bis in idem* principle. It is clear that this important change in the Swedish legal position was brought about by the decision of the Court of Justice in the *Åkerberg Fransson* case in 2013.[66] Later, in a follow-up ruling in July 2013,[67] the Supreme Court established that as a consequence of the change in the law, a person has the right to a new trial if the person has paid a tax surcharge and has in addition been sentenced in a criminal proceeding for a tax offence. The Supreme Court set the cut-off point for the right to use this extraordinary legal remedy at 10 February 2009, when the European Court of Human Rights (ECtHR) issued its seminal judgment in the *Zolotukhin* case.[68] *Zolotukhin* clarified that the *ne bis in idem* principle in the ECHR

[65] NJA 2013, p. 502.

[66] Case C-617/10 *Åkerberg Fransson*, supra n. 58.

[67] NJA 2013, p. 746.

[68] *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009.

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prohibits a new prosecution or trial for an offence when it arises from identical or substantially the same facts as the first offence already prosecuted or tried.

In the months following these two rulings, a substantial number of persons were released from prison sentences for tax offences, and many ongoing tax offence prosecutions were terminated.

The issue of whether it is legally possible under the ECHR to apply separate legal proceedings for tax surcharges and tax offences based on the same information in a tax return had been debated in Sweden for a long time. In 2002, the ECtHR found that the Swedish system of tax surcharges was criminal in nature.[69] However, these decisions did not make the legislator change the Swedish legislation, and neither did the courts change their practice. Obviously, the legislator wanted the taxation system to be enforced by sharp sanctions, as Sweden is a country with high taxes.

However, the sharpened definition of what constitutes *ne bis in idem* in the *Zolotukhin* judgment in 2009 made the problem urgent. The Supreme Court ruled on the matter in two new decisions in 2010–2011. In the 2010 decision, which focused on the ECHR law, the majority of the justices took the view the *Zolotukhin* judgment did not give 'clear support' to the need to change Swedish practice.[70] This might be seen as an attempt to prevent an expansion of judicial review of legislation by Swedish courts, given that the previous requirement for 'manifest error' in IG Chap. 11, Art. 14 was going to be abolished on 1 January 2011.

In the 2011 case,[71] the defendant invoked the *ne bis in idem* principle in Art. 50 of the Charter of Fundamental Rights. The case partly concerned tax surcharges for undeclared VAT. A Supreme Court majority, three Supreme Court justices, concluded that the Swedish legal provisions on tax offences and tax surcharges lay outside the scope of the Charter, and that no preliminary ruling was thus required. Two dissenting justices took a different view and concluded that the legal position was not clear regarding the possible applicability of the Charter, and that a preliminary ruling should thus be requested. The Supreme Court therefore voted on whether a preliminary ruling should be requested from the CJEU. As is well known, according to Art. 267 TFEU, the highest instance is obliged to request a preliminary ruling if a case pertains to EU law, unless the legal position is clear (*acte clair*). Obviously, the Supreme Court did not observe this obligation. In its *Åkerberg Fransson* judgment the CJEU reminded the Supreme Court of the duty to observe Art. 267 TFEU as interpreted in the *CILFIT* case.[72]

In Sweden, decisions from the Supreme Court are not formally binding on lower courts. Still, they are almost always followed. However, in this case, some judges in

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[69] *Janosevic v. Sweden*, no. 34619/97, ECHR 2002-VII and *Vaštberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002.

[70] NJA 2010, p. 168.

[71] NJA 2011, p. 444.

[72] Case 283/81 *Cilfit and Others* [1982] ECR 03415, para. 47 in the *Åkerberg Fransson* judgment, n. 58.

lower courts found the position taken by the Supreme Court clearly wrong and refused to follow it. This much-observed 'revolt' among Swedish judges forms an important part of the background to the *Åkerberg Fransson* case, in which a district court judge in a small town, Haparanda, in the very north of the country, decided to question the established Swedish system by asking the Court of Justice for a preliminary ruling.[73]

Another example that led to considerable discussion concerned EU Directive 2012/363 on the protection of the financial interests of the European Union.[74] The Parliament decided on 17 October 2012, in line with the Committee, to issue a motivated opinion to the EU, stating that Directive 2012/363 violates the principle of subsidiarity.[75]

2.4 The EU Data Retention Directive

2.4.1 The EU Directive (2006/24)[76] on electronic data retention has been controversial in Swedish law for a long time. Sweden did not implement it in due time (i.e. by 15 September 2007), which led to infringement proceedings against Sweden before the CJEU, which found in 2010 that Sweden had violated EU law.[77] Finally, the Directive was implemented through a law adopted by the Parliament in March 2012, but before that, the opposition parties had used a rule in the IG (Chap. 2, Art. 22) according to which laws that limit fundamental rights may be postponed one year, as explained above. Since Advocate General Cruz Villalon delivered a critical opinion on the Directive in December 2013, a renewed debate on the Directive and its effects on personal integrity emerged. The judgment in these two cases delivered on 8 April 2014 was thus eagerly awaited, and the fact that the CJEU declared the directive incompatible with the fundamental rights that form a part of EU law means that the legal status of the Directive and the implementing law within Swedish law is today uncertain. The Minister of Justice has stated that the law remains in force, while the surveillance authority, *Post-och telestyrelsen* (PTS), has made comments pointing in the other direction. A subsequent legal survey has concluded that the Swedish law foresaw the new judgment and is thus applicable. However, the judgment in December 2016 in *Tele 2* counters this.[78]

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[73] See in particular Zetterquist 2012, p. 353 et seq.

[74] See JuU 2012/13:8. (*Justitieutskottet* – the Committee of Justice).

[75] Rskr 2012/13:8.

[76] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[77] Case C-185/09 *Commission v. Sweden* [2010] ECR I-00014.

[78] See respectively, Ds 2014:23, *Datalagring, EU-rätten och svensk rätt* (EU Law and Swedish Law) and Case C-2013/15 *Tele* 2 [2016] ECLI:EU:C:2016:970.

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2.5 Unpublished or Secret Legislation

2.5.1 No issues regarding unpublished legislation have arisen. Here I would go as far as to say that the whole concept of secret legislation, of any kind whatsoever, is totally unknown in Sweden, the 'promised land' of transparency, and would certainly never be accepted here.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 In Sweden, EU law has primarily enhanced the protection of general principles. There are some well-known cases, notably from the late 1990s, when the Supreme Administrative Court very soon after EU accession acknowledged principles such as proportionality and legitimate expectations. Another very important case dealt with by the Supreme Administrative Court in 1999 concerned the closure of a privately owned nuclear reactor, Barsebäck 1.[79] Here, criticism was raised against the court for deciding such a crucial and complicated issue, which involved many aspects of both EU law and national constitutional law, without asking for a preliminary ruling from the CJEU. The main tendency is however clear, namely that Swedish courts have now definitely accepted the supremacy of EU law in relation to national law.[80]

An important illustration is the so-called *Klippan* case of the Supreme Administrative Court.[81] The case concerned an undertaking (Klippan) that produced paper in 1965–1975 at a lake in the south of Sweden. In 1975, the property was transferred to another company (Modo AB). In 1989, environmental legislation was modified, permitting the authorities to hold an undertaking liable to pay damages even after the transfer of a property. The environmental protection agency wanted Klippan to pay a sum of approximately six million SEK to clean the water of the polluted lake. Although the 1989 legislation entered into force after the transfer of the property from Klippan to Modo, the government considered that Klippan was liable under the 1989 legislation to pay for the environmental sanitation work. Finally, the governmental decision was quashed by the Supreme Administrative Court, which emphasised that there are only limited possibilities to modify or revoke an administrative decision creating rights due to the entry into force of new legislation. It remarked that in certain circumstances the retroactive application of legislation is constitutionally prohibited (IG 2:10). Moreover, it

[79] *Regeringsrättens Årsbok* (RÅ) 1999, ref. 76.

[80] Cfr. Bernitz 2002b, p. 127 in fine print.

[81] RÅ 1996 ref. 57.

referred to EU law and its general principles that generally do not take into consideration situations preceding the entry into force of the legislation, invoking the proportionality principle and the principle of legal certainty (or security) and the protection of legitimate expectations. This EU exception contrasts with previous national jurisprudence (RÅ 1988 ref 132) that, arguably, allowed free-floating exceptions.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 General legal aspects of the Treaty Establishing the European Stability Mechanism (ESM Treaty) have been discussed, but not in relation to the rather technical aspects mentioned in Sects. (a)–(c) of the question.[82] This may be explained by the fact that Sweden is not an EMU member and is not bound by the ESM Treaty.

Various aspects of the Fiscal Compact have been discussed. Concerning the Fiscal Compact, the general assumption is that the changes in the budgetary process and in Chap. 9 IG made in the late 1990s in order to battle the financial crisis and prepare Sweden for EMU membership as described above, are sufficient to meet the demands set out in the Compact.

2.7.2 Once again, the issue has been discussed from some legal points of view but not from this perspective as such, which may have to do with the fact that Sweden has not intended to join the Banking Union from the start.

2.7.3 Sweden has not been subject to a bailout or austerity programme.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Here I must make a disclaimer, since the Swedish Court Administration (*Domstolsverket*) could not provide me with exact data on judicial review, as they no longer provide this type of service, which has caused practical problems in terms of obtaining precise figures. Additionally, the CJEU (where I have been in touch with the Registry (*Greffe*), information and research and documentation offices) has been unwilling to hand out any other material than what can be found in the Court's

[82] See among other material the governmental bill for the fiscal pact Ds 2012:30 *Fördraget om stabilitet, samordning och styrning inom ekonomiska och monetära unionen* (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) and Nergelius 2013a, pp. 61–83.

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Annual Reports. However, since 1995, Swedish courts have asked for preliminary rulings in some 120 cases, of which 76 were submitted between 1995–2008, and the remaining 31 since 1 January 2009. At the end of 2004, when Sweden had been a member for 10 years, the total number was 50 cases. In other words, the frequency is increasing, which may be the result of criticism from the EU Commission to the Swedish government in 2004.[83] Unfortunately, at the time of writing, I can thus not answer questions (b) and (c).

2.8.2 Until 2013, the standard of review was not perceived as a problem from a Swedish point of view. On the contrary, the standard and intensity of the review exercised by the CJEU must be seen as having positive consequences, given the traditional judicial self-restraint of the Swedish courts. A concrete example of how the CJEU has inspired a bolder attitude among Swedish judges is a case from 2013, when the *Åkerberg Fransson* judgment was followed by a plenary judgment of the Supreme Court upholding the *ne bis in idem* principle and setting the Swedish law on tax surcharges aside.[84]

[83] The criticism that may then be raised against Swedish courts in this respect has a lot to do with the way in which they have used the instrument of preliminary ruling, in accordance with Art. 267 TFEU. The above-mentioned *Barsebäck* case is one of the best known cases where criticism has been expressed towards a Swedish court for excessive restraint from this point of view. With this debate in mind, it was interesting to note that the EU Commission, in an opinion in 2004, addressed some critical questions to the Swedish Government concerning the attitude of Swedish courts towards their obligations under Art. 267 and concerning the Swedish legislation on this point (2003/2161, C (2004) 3899). The background to the reaction is somewhat peculiar. In Case C-99/00 *Lyckeskog* [2002] ECR I-04839, the Court of Appeal in Gothenburg, in a minor criminal case, posed the question of whether it could be considered as a court of last instance in the meaning of former Art. 234 (now 267) Sect. 3 (which means that it would in that case be under an obligation to refer any question concerning the interpretation of EU law to the CJEU). Secondly, should that have been held to be the case, the Swedish court wanted to know whether it would have been able to ignore some of the very strict criteria (the so-called *acte clair* doctrine) of the *CILFIT* case. The CJEU answered the first procedural question in the negative and then did not bother to answer the second one. However, when posing the questions to the CJEU, the Swedish court adequately described the Swedish procedural system and pointed to the fact that the Supreme Court and the Supreme Administrative Court only review cases from the respective Appellate Courts under a system of admissibility (*prövningstillstånd*), based on the possibility of a given case to be a future precedent. Furthermore, when deciding not to grant admissibility, the two highest courts were not under any obligation to justify or motivate (or argue in favour of) such decisions. The European Commission, which had intervened in the *Lyckeskog* case, reacted against these requirements and declared that the Swedish procedural rules, in particular the possibility for the two highest courts to dismiss an appeal for admissibility in cases which may contain complicated EC law matters without having to justify their decisions, made it impossible for the European Commission to fulfil its task as the guardian and 'watchdog' of the Treaties and EC law in general. It thus required the Swedish government to change the legislation in this field. This was also done through the law (2006:502) with certain rules on preliminary rulings from the CJEU, which states that the two supreme courts may never refuse admissibility when a preliminary ruling has been requested by the applicant without a justified statement and reasons.

[84] NJA 2013, pp. 502 and 746.

However, the surprising outcome of the *Melloni* case and the poor human rights standard that it reveals – that may even undermine the Charter of Fundamental Rights – may lead to another conclusion for the future, and the future jurisprudence of the CJEU in human rights matters needs to be closely followed and analysed. Cases such as *Kadi II*[85] and the Data Retention Directive judgment[86] indicate that the CJEU maintains a sharp awareness of human rights matters and that *Melloni* was perhaps (hopefully) just an unfortunate deviation.[87]

2.8.3 On the domestic approach to judicial review, the situation has changed in recent years, but in quite another way. Generally speaking, Swedish courts are by tradition very cautious, as described above, but recent constitutional changes and developments in European law, by the European courts, have brought about some profound and important changes in the last few years. The cases on *ne bis in idem* have been mentioned above, as has the important work of the Law Council. A statistical analysis of the case law of Swedish courts in the years 2000–2010 made by Karin Åhman reveals that cases relating to the ECHR were most frequent within the case law of the administrative courts of appeal and the general courts of appeal. In 19 of 47 cases the Supreme Court applied the ECHR in such a way that it had a concrete impact on the interpretation of Swedish law. In some cases, however, the ECHR was directly applicable; this was especially the case regarding Art. 13 of the ECHR. The majority of the cases, however, concerned criminal and procedural issues. The Supreme Administrative Court dealt with the ECHR in 25 of 153 cases. In only in 8 of these 25 cases did the Supreme Administrative Court recognise the ECHR in such a way that it came to influence the interpretation of Swedish law. Most frequent was the application of Art. 6 ECHR.[88] The study also revealed an increased willingness among the courts to apply European law, including European case law, more directly.

Generally speaking, the courts seem more loyal towards the case law of the CJEU than of the ECtHR. However, this loyalty towards the CJEU has not always brought the courts to actually set aside Swedish law by referring to such case law. It should be noted that regarding Arts. 6 and 13 of the ECHR, the courts have tended to increase their adherence to the case law of the ECtHR.

Concerning the Swedish Constitution, Swedish courts have set national laws aside for being unconstitutional three or four times since 1996 (depending on what is counted as setting a law aside or giving it a new interpretation, an issue that will not be dealt with here).[89] A very important case concerning the IG was decided by

[85] *Kadi II,* Joined cases C-584/10 P, 593/10 P and 595/10 P *Commission and Others v. Kadi* [2013] ECLI:EU:C:2013:518.

[86] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[87] See also Case C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317.

[88] See Åhman 2011.

[89] One such case is the so-called *Manga* case of 2012 (NJA 2012 p. 400), which concerned possession of some 40 Japanese art drawings of naked, prepubescent youngsters. In this case, the

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the Supreme Court in April 2014,[90] when a person who had been wrongly deprived of his Swedish citizenship was awarded compensation in the amount of 100,000 SEK due to the fact that the tax authority had violated Chap. 2, Art. 7 IG. Similar cases concerning violations of the ECHR have been heard since 2005,[91] but these have generally been seen as recognition of the legal importance of Chap. 2 IG.

2.8.4 Regarding the review of measures implementing EU law, the jurisprudence is perhaps not entirely consistent or coherent. Normally, Swedish courts apply EU law loyally, including implemented directives, without advanced or sophisticated lines of reasoning concerning compatibility with the ECHR or the Swedish Constitution, but there are a few exceptions from the Supreme Courts. One such example is NJA 2001 (p. 409), concerning Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[92] (transposed into Swedish law by the so-called *Personuppgiftslagen, PuL*, 1998:204). In this case, the Supreme Court clearly favoured and gave priority to the Freedom of the Press Act in a situation of conflict (referring also to Arts. 8 and 10 ECHR).

2.8.5 In the doctrine, some proposals have been made – not least in relation to treaty changes – to introduce a stricter review of the constitutionality of EU legislation, in line with that exercised by the German Constitutional Court.[93] However, this debate has not been very vivid or influential. My own personal view is that there may be a need for such stricter review in some situations and that the Law Council may have a role to play, using its powers under Chap. 8, Arts. 20–22 IG (see above Sect. 2.1.3).

2.8.6 Equal treatment of those falling within the scope of EU and national law was one of the key aspects of the *Lassagård* case of 1997 (RÅ 1997 ref. 65), mentioned above in Sect. 1.3.2. In that case the plaintiff applied to a regional administrative authority (*Länsstyrelsen*) for an agricultural subsidy in May 1995. The *Lassagård* case is of fundamental importance as to the extension of the scope of judicial review

owner was a professional translator who also worked with cartoons, but since 1998, any possession of such material has been illegal and the FPA does not apply in relation to such material (Chap. 1, Art. 10). Nevertheless, the Supreme Court used the rules on freedom of speech and freedom of information in the IG, including the rules determining when these freedoms may be limited (Chap. 2 Arts. 21 and 23) to decide that his possession of the material was justified, while stressing the difference between drawn art of this kind, depicting kids that are not recognisable and – with one exception – not even realistically portrayed and, on the other hand, photos or paintings based on living models. While the owner was sentenced to a fine by two lower courts, he was acquitted in the end by the Supreme Court.

[90] T 5516-12, Judgment 23 April 2014.

[91] Starting with NJA 2005, p. 462. See also NJA 2012, p. 211 (I-II).

[92] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

[93] See e.g. Bergström 2008.

in Sweden and its interaction with EU law. First, it follows clearly from the case that EU law prevails over domestic law. Secondly, it shows that EU law has extended the scope of judicial review in the Swedish legal order. The application of the general principle of effective protection by the Supreme Administrative Court resulted in the invalidation of the national regulation that limited review and the incorporation of a new provision ensuring the general competence of the administrative courts to review administrative decisions.

The importance of the case is shown not least when recalling that in a similar case, *Stallknecht*, which concerned the situation before 1995, both the Supreme Court and the Supreme Administrative Court refused to review an administrative decision against which no appeal existed (although the claim for economic compensation in question was in fact more justified than in *Lassagård*).[94]

2.9 Other Constitutional Rights and Principles

2.9.1 The implementation of EU law that affects individual rights by governmental regulations is not as such an issue in Sweden. However, the prohibition to introduce indictable offences by a governmental instrument also applies, as follows from Chap. 8, Art. 2, Sect. 1, p. 2 and Art. 3 Sect. 2. This is also illustrated by the 2005 Supreme Court case mentioned above in Sect. 2.1.3 under 'the rule of law'.[95]

2.10 Common Constitutional Traditions

2.10.1 Generally speaking, it is difficult to elevate important constitutional traditions from one Member State by giving them the status of 'common constitutional traditions'. However, there is at least one example where the CJEU has allowed a national constitutional tradition to prevail over the free movement of services, namely the *Omega Spielhallen* case, where a local German prohibition against so-called laserdomes was upheld, since they were seen as violating human dignity.[96]

In Sweden, the content of common constitutional traditions has mainly been discussed in relation to specific Swedish rules on access to documents, transparency and protection of whistle-blowers, freedoms that are wider pursuant to the Freedom of the Press Act than under EU law. The issue of the relationship between these

[94] See NJA 1994, p. 657 and RÅ 1995, ref. 58, respectively.

[95] Case NJA 2005, p. 33; see the text accompanying supra n. 45.

[96] Case C-36/02 *Omega* [2004] ECR I-09609.

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Swedish constitutional freedoms and EU law is still unresolved.[97] Subsequent developments within EU law, such as the stricter rules on access to documents and open administration[98] and, not least, the recognition of the constitutional identity of the Member States now mentioned, since 2009, in Art. 4(2) TEU, may have reduced these tensions slightly. However, to show the underlying difficulties, in 2012, the Constitutional Committee of the Parliament, while exercising its so-called review of subsidiarity in accordance with Art. 69 TFEU, protested against the use of a regulation as the legal act for the introduction of new rules on the use of personal data, since the use of a directive for these same rules would have given the Member States greater legal space for action, including a necessary consideration of the national legal context.[99] It may also be mentioned that in November 2013, the Swedish Parliament did, controversially and at least officially, without a specific request from the EU, approve new limitations of the general and widespread access to documents whenever their secrecy may be due to international co-operation or requested by an international organisation (including the EU).[100] Many journalists and press organisations have reacted critically against these changes.

2.10.2 There is definitely a greater need to highlight national constitutional case law in preliminary references. One example of a Swedish case where this would definitely have been most useful is the *Laval* case mentioned above.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As mentioned above, the *Melloni* case may simply be described as wrong in this respect, at least from the Swedish point of view, since it meant that the Spanish Constitutional Court was not allowed to invoke the Spanish Constitution (Art. 24) although it contained a higher level of human rights protection than guaranteed by the Charter of Fundamental Rights. This is contrary to the very wording of Art. 53 of the Charter and thus not acceptable. This issue has so far not been discussed much in Sweden.[101] As noted above, we may hope that the CJEU will not maintain this low human rights standard, thus infringing human rights guaranteed in national constitutions. However, should this be the case, a very lively discussion is likely to start throughout Europe.

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[97] See e.g. KU 1993/94:21, in particular p. 25 et seq., as well as Prop (Government Bill) 1993/94:114.

[98] See Art. 41 of the EU Charter of Fundamental Rights.

[99] See KU 2011/12:25.

[100] See KU 2013/14:6, *Sekretess i det internationella samarbetet* (Privacy in international cooperation), as well as rskr 2013/14:59, leading to the law 2013:972 containing amendments to the Secrecy Law.

[101] See Nergelius 2013b.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 A certain amount of debate on the EAW Framework Decision took place in Parliament in 2003, and it may in particular be noted that the then Prime Minister, Fredrik Reinfeldt, who was then an MP and Chairman of the Law Committee of the Parliament, led the opposition in an attempt to stop or at least stall the Swedish implementation of the EAW.[102] Resistance to the Data Retention Directive was even stronger, as described above in Sect. 2.4.

2.12.2 There may indeed be a need for more 'space', so to speak, for the Member States on these issues. At the same time, at the rather late implementation stage, Member States are expected to act loyally (cf. Art. 4(3) TEU), rather than to bring up issues of constitutionality or similar questions. The Swedish resistance against or reluctance towards the Data Retention Directive is thus a clear exception from what might be expected, and such behaviour must be reserved for situations where real human rights violations or otherwise unconstitutional legal acts are adopted by the EU.

2.12.3 The recommendation to suspend the application of an EU measure if important constitutional issues have been identified by a number of courts is an interesting idea and, if it could be enacted during the next treaty revision – whenever that happens – it might actually be a useful tool for dealing with these kinds of situations in the future.

The defence of unconstitutionality in infringement proceedings merits support, not least because it may make the CJEU reconsider, in future cases, its rigid view on the relationship between EU law and national constitutions, as shown most recently in *Melloni*.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 As noted above, with the exception of the *Melloni* judgment, the answer is no (i.e. there has been no general fall of standards).

2.13.2 Having answered no to the first question, I would only stress the risk of future different standards in the jurisprudences of the CJEU and the ECtHR. So far, the CJEU has applied the ECHR loyally, with a view to the interpretations of the ECtHR. However, the same rights in the Charter will never be applied by the ECtHR, which means that the CJEU might develop its own jurisprudence, setting its own standards, for some rights that are protected also in the ECHR. In the future,

[102] See JuU 2003/04:8.

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this could be a real problem. It is difficult to say whether the accession of the EU to the ECHR will prevent this (potential) problem.

2.13.3 With regard to the quotes in the Questionnaire, I think that the criticism towards the cryptic style of many judgments of the CJEU is highly justified. This concerns both the formalistic language and French-inspired style of writing as well as the lack of dissenting opinions. Generally speaking, judgments from the US Supreme Court, the House of Lords, the *Bundesverfassungsgericht* or even the ECtHR are simply much more interesting to read.

There are no clear examples of constitutional questions from Swedish courts to the CJEU, although issues related to access to documents, commercial advertising, the position of courts when asking for preliminary rulings related to the *CILFIT* criteria or the absence of abstract judicial review may be said to have constitutional implications. In all of these cases,[103] the response from the CJEU has been adequate from the Swedish point of view. The judgment in the *Lyckeskog* case may be criticised for not being very informative concerning the scope of the *CILFIT* criteria, but that was remedied a year later by *Köbler*.[104]

Future 'actions' on the part of the CJEU which merit support include a stricter standard of judicial review of EU measures and allowing dissenting opinions; I support these two suggestions whole-heartedly. If it would be realistic to display the arguments in a case on the website, this sounds like a good idea, but some problems related to the integrity of CJEU procedure are foreseeable.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Regarding specific international organisations, as mentioned in Sect. 1.2.1, since 2010, Chap. 1, Art. 10 IG mentions that Sweden participates in various forms of international cooperation, within the UN and the Council of Europe as well as 'in other contexts'. The Article provides as follows: 'Sweden is a member of the European Union. Sweden also participates in international cooperation within the framework of the United Nations and the Council of Europe, and in other contexts.'

The answer to the question on transfer of powers is more complicated. Here it may be said that Chap. 10, Art. 7 permits transfers of legislative powers, budgetary powers including the use of the assets of the state and treaty-making power, all to a

[103] See Case C-101/01 *Lindquist* [2003] ECR I-12971; Case C-405/98 *Gourmet* [2001] ECR I-01795; Case C-99/00 *Lyckeskog* [2002] ECR I-04839 and Case C-432/05 *Unibet* [2007] ECR I-02271.

[104] Case C-224/01 *Köbler* [2003] ECR I-10239.

limited extent, to international organisations *other* than the EU. The Article has the following wording:

> Decision-making authority which is directly based on the present Instrument of Government and which relates to the laying down of provisions, the use of assets of the State, tasks connected with judicial or administrative functions, or the conclusion or denunciation of an international agreement or obligation may, in cases other than those under Art. 6, be transferred, to a limited extent, to an international organisation for peaceful cooperation of which Sweden is a member, or is about to become a member, or to an international court of law.
>
> Decision-making authority relating to matters concerning the enactment, amendment or abrogation of fundamental law, the Riksdag Act or a law on elections for the Riksdag, or relating to the restriction of any of the rights and freedoms referred to in Chapter 2 may not be transferred under paragraph one.
>
> A Riksdag decision in the matter of such transfer is taken in accordance with the procedure laid down in Art. 6, paragraph two.

Of importance here is also Chap. 10, Art. 8:

> Any judicial or administrative function not directly based on this Instrument of Government may be transferred, in cases other than those under Article 6, to another state, international organisation, or foreign or international institution or community by means of a decision of the Riksdag. The Riksdag may authorise the Government or other public authority in law to approve such transfer of functions in particular cases.
>
> Where the function concerned involves the exercise of public authority, the Riksdag's decision in the matter of such transfer or authorisation is taken in accordance with the procedure laid down in Article 6, paragraph two.

Furthermore, Chap. 10, Art. 9 states that

> If it has been laid down in law that an international agreement shall have validity as Swedish law, the Riksdag may prescribe, by means of a decision taken in accordance with the procedure laid down in paragraph two, that also any future amendment of the agreement binding upon the Realm shall apply within the Realm. Such a decision shall relate only to a future amendment of limited extent.

Thus, the rules for concluding various types of treaties and agreements are now reasonably clear and updated.

3.1.2 Generally speaking, Chap. 10, Art. 6 was introduced when Sweden joined the European Union in 1995, while the other three articles mentioned date back to the enactment of the new Constitution in 1974 or even earlier.[105] Already in 1964, the possibility to transfer decision-making powers to an international organisation aimed at peaceful co-operation was established, although this could only take place to a limited extent. Although these old provisions could not be used in order to facilitate EU membership, this constitutional reform was actually enacted as early as fifty years ago, with the future relation to the EC in mind (Sweden had applied

[105] A useful comment on the historical background of these articles and their history 'before 1995' was made by Algotsson 2000, p. 273 et seq.

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for association with the EC already in 1961). These rules were then transferred to the new Constitution in 1974, with the only addition that transfer of competences could also take place to an international court.[106]

3.1.3 The only case of importance in this regard is a judgment from 1996 concerning the current IG Chap. 10, Art. 8. It concerned the transfer of certain administrative functions on the border between Sweden and Finland to Finnish authorities and a transnational body, which had not been decided in a formally correct manner.[107] A somewhat ironic twist in the case was that on 23 April 2014, some fishermen in the very north of Sweden were awarded financial compensation, after lengthy proceedings, since their right to property according to Chap. 2, Art. 15 IG had been violated by these errors.[108]

3.2 The Position of International Law in National Law

3.2.1 Treaties entered into by Sweden do not form part of the Swedish Constitution and are in fact not even part of Swedish law at all until they have been incorporated or transposed into Swedish national law. In other words, Sweden traditionally adheres to a dualistic view on the relationship between national and international law.

This may be illustrated by the fate of the ECHR. Sweden ratified the ECHR already in 1951 (although the jurisdiction of ECtHR was not acknowledged until 1966), but it was not incorporated into Swedish national law until 1995, when Sweden joined the EU. Thus, for forty-five years, the ECHR was not a part of Swedish law and, strictly speaking, could not be invoked in proceedings before Swedish courts. Still, it was used by the Supreme Courts as a means of interpretation, in particular in the late 1980s and early 1990s, when Sweden had been condemned by the ECtHR for violations in a number of cases (mainly concerning Art. 6). Thus, the ECHR was important in Swedish law before being incorporated, but this is a clear exception.

3.2.2 As mentioned above, Sweden together with the other Nordic countries still has a dualistic view on the relationship between national and international law. This is not likely to change as such, although this may of course be regarded as regrettable in today's globalised world.

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[106] Some minor changes were also introduced in 1976 and 1985; see Algotsson 2000, p. 274.

[107] NJA 1996, p. 370.

[108] NJA 2014, p. 332.

3.3 Democratic Control

3.3.1 Agreements with other states or multilateral international agreements are concluded by the Government, as mentioned above. This is logical given that the Government 'governs the Realm' according to Chap. 1, Art. 6 IG. Concerning parliamentary involvement, which has increased in recent years, see above Sect. 3.1.1.

Chapter 10, Art. 3, according to which, since 2003, the Government may not conclude any binding international agreement without the approval of Parliament, if the agreement presupposes the amendment or abrogation of an act of law or the enactment of a new act of law, or if it otherwise concerns a matter which is for the *Riksdag* to determine, was enacted after the approval of the Nice Treaty. It also applies to new EU treaties. Thus, new EU treaties must, according to IG Chap. 10 Art. 3 Sect. 2, and Chap. 10, Art. 6, be approved twice: first, the Parliament must approve the agreement as such, with a three-fourths majority or by two decisions with an election in the interim, and then a new, separate decision must be made, with the same formal requirements, concerning the transfer of power to the EU that the new or amended treaty will entail.

As stated above, the future TTIP agreement has recently been much discussed from this point of view.

3.3.2 Except for the EMU referendum in 2003, there have been no referendums in Sweden on treaties.

3.4 Judicial Review

3.4.1 This is basically an issue that concerns the ECHR, since other international conventions are very rarely (if ever) applied, given the dualist tradition. Further, as seen above, Swedish courts tend to use the ECHR ever more frequently, a development of which I personally approve.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 Concerns about the impact of globalisation on the social state is much less the case than foreign observers of Sweden in general expect. Concerning social rights as such, mentioned in Chap. 1, Art. 2, public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person. In Sect. 2 of the same Art., the Constitution commits the public authorities to the realisation of social, economic and cultural rights, as well as environmental and other rights, although these rights are in fact not legally protected as such by the Constitution or by the Swedish legal order, which may be slightly surprising for

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foreign scholars and commentators. Instead, Chap. 1, Art. 2 IG is a simple statement on the aims and purposes of governmental activities and public institutions in general, including the duty of public authorities to combat discrimination.[109]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

The most controversial rendition case concerned two Egyptians residing in Sweden, who were abducted to Egypt from a Swedish airport in December 2001. The operation was carried out by CIA agents who were assisted by Swedish police. The fact that the Swedish Government was aware of the action led to a rather big scandal when it was revealed two years later. The Government then chose to claim that the late Foreign Minister, Anna Lindh, had been responsible, but this has never really been proved or clarified.

Concerning inclusion in terrorist blacklists and the freezing of bank accounts, the case *Al-Barakaat*, which until late 2008 was closely connected with the *Kadi* case, is definitely important.

The *Kadi and Al-Barakaat* judgment of the CJEU from 2008 is well known. It may be noted that Al-Barakaat, an organisation helping Somali refugees in Sweden that had some economic ties with an alleged terrorist-linked bank in Somalia, preferred not to bring the case to a Swedish court to ask for a preliminary ruling from the CJEU, which may have been a procedural mistake since it slowed the proceedings.

In this case, the CJEU set aside the judgments of the EU General Court and found that the fundamental rights of the applicants – their right to be heard and to a legal remedy as well as the right to property – had been violated.[110] A subsequent judgment from the CJEU in 2013 confirmed the ruling.[111] This high standard of human rights protection must be welcomed, as opposed to the alarmingly low standard in the *Melloni* judgment of the same year, as discussed above.

Al-Barakaat, who enjoyed the informal support of the Swedish government during the proceedings, was finally removed from the UN sanctions list in autumn 2008.

[109] In the literature on social rights, see Lind 2009.

[110] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-06351.

[111] *Kadi II,* supra n. 85.

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Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism

Tuomas Ojanen and Janne Salminen

Abstract The Constitution Act of 1919 was replaced in 2000 by a new Constitution, which was amended in 2012. While the institution of exceptive enactments, which enables the adoption of laws that are in conflict with the Constitution, had earlier assumed a key role in constitutional adjustment for EU integration, the 2012 amendments expressed a constitutional commitment to EU membership and provided for the transfer of powers to the EU. As a result, exceptive enactments are no longer needed for such transfer. Instead of a constitutional court, a key role in constitutional review is played by the Constitutional Law Committee of Parliament through *ex ante* review of legislative proposals or other matters pending before Parliament, including proposals for EU legislation, for their compatibility with the Constitution and Finland's international human rights obligations. From the late 1980s onwards, the constitutional tendency has increasingly been towards rights-based judicial review. Aside from the ECHR and other human rights treaties, EU membership has greatly contributed to both judicial empowerment and enhanced rights protection. Areas where EU law has presented constitutional challenges include: (a) the European Arrest Warrant, with regard to which Finland introduced constitutional and legislative safeguards for the sake of fundamental rights; (b) the *Laval* and *Viking Line* stream of case law; and (c) concerns around preserving 'the quality of law' when implementing EU law. In result of the *ex ante* constitutional review of the draft ESM Treaty, a change in the

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draft treaty stemming from constitutional concerns about increased financial liabilities without parliamentary control was proposed and achieved.

Keywords The Constitution of Finland of 2000 · The 2012 amendment of the Constitution in relation to EU and international co-operation · *Ex ante* constitutional review by the Constitutional Committee of Parliament · Fundamental rights and the rule of law · Rise of rights-based judicial review · Constitutional and legislative safeguards with regard to the European Arrest Warrant and extraditions Data Retention Directive · *Laval*, *Viking Line*, posted workers and collective action Quality of law · Parliamentary reservation of law when implementing EU and international measures · ESM Treaty and maximum financial liabilities Article 53 EU Charter and the question of a higher standard of protection

1 Constitutional Amendments Regarding EU Membership

1.1 Introduction: Some Characteristics of the Finnish Constitutional System and Culture

1.1.1–1.1.2 The Constitution, as a legal and political instrument, has traditionally been highly esteemed in Finland. The origins of great respect for constitutional enactments can be traced as far back as the legal-positivist resistance by the Finnish legal and political elite to the campaigns of 'Russification' between 1899 and 1905. Over a century, from 1809 to 1917, Finland was an autonomous Grand Duchy within the Russian Empire and thus had its own legal system, including constitutional enactments inherited from the era of Swedish rule (before 1809). During the years of 'Russification', however, Finns fought against arbitrary Russian interferences in Finland's domestic legal and political affairs by advancing a constitutional challenge, essentially founded on a simple, yet firm claim that all authorities, including those of the Russian Empire, had to strictly observe Finland's constitutional enactments and Finnish law in general in the exercise of their powers. As this constitutional challenge also proved very successful, a strong tradition of legalism, including respect for the rule of law, began to characterise Finnish constitutionalism from those years onwards.[1]

The current Constitution of Finland (Act No. 731/1999)[2] entered into force on 1 March 2000, and replaced the earlier Constitution Act of 1919 and three other

[1] See in more detail Ojanen 2007, pp. 146–148. See about the Finnish understanding of the Constitution and the legacy of autonomy under the Russian Empire, also Mutanen 2015, pp. 272–276 with references.

[2] All translations are from the unofficial translation of the Constitution of Finland, including amendments up to 1112/2011, in English available at: https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf.

enactments enjoying constitutional status.[3] The Constitution of Finland is a modern and unified constitutional document with a concise and uniform style. Aside from including some new elements and codifying certain practices and doctrines, the Constitution of Finland incorporates a number of principles, structures and solutions that were already established in earlier constitutional documents. As with earlier constitutional enactments, the Constitution can be understood as enjoying strong legitimacy across the whole sweep of the Finnish political system and society, as Parliament adopted the Constitution almost unanimously, with a final vote of 175 for and only 2 against.

For the practical and theoretical purposes of this paper, the following two peculiarities of the Finnish constitutional system are particularly worthy of elaboration. The first constitutional idiosyncrasy is the structural framework of the Finnish model of constitutional review. It still primarily assumes the nature of (abstract) *ex ante review by the Constitutional Law Committee of Parliament* of legislative proposals and other matters brought for its consideration for their relation to the Constitution and international human rights treaties.[4,5] By contrast, Finland has always lacked a distinct constitutional court. Moreover, there was a rigid prohibition of judicial review of Acts of Parliament for their compatibility with the Constitution until the entry into force of the current Constitution of Finland in 2000. Although Sect. 106[6] of the Constitution now empowers courts to give primacy to the Constitution if the application of an Act of Parliament would be in 'manifest conflict' with the Constitution, Sect. 106 amounts to a form of *weak judicial review* that combines the abstract *ex ante* constitutional review of legislation by the Constitutional Law Committee of Parliament with the concrete *ex post* judicial review by the courts. In this model, the *ex ante* constitutional review by the Constitutional Law Committee is still supposed to remain the primary form of review, whereas judicial review under Sect. 106 is designed to plug loopholes left in the abstract *ex ante* review of the constitutionality of government bills, inasmuch as unforeseen constitutional problems might arise in applying the law by the courts in particular cases.

The main difference in comparison with constitutional courts is, of course, that in the Finnish model the power of review is held by a primarily political organ

[3] Accordingly, there were four constitutional enactments enjoying constitutional status: the Constitution Act of Finland, the Parliament Act and two Acts on ministerial liability. All Acts were passed during the first years of independence (the Acts of 94/1919; 7/1928; 274/1922; and 273/1922).

[4] Section 74 of the Constitution, entitled 'Supervision of constitutionality', provides as follows: 'The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.'

[5] For the Finnish system of constitutional review, see Lavapuro et al. 2011, pp. 505–531.

[6] Section 106 of the 2000 Constitution, entitled 'The Primacy of the Constitution', provides as follows: 'If in a matter being tried by a court, the application of an Act of Parliament would be in manifest conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.' For the background of Sect. 106, see Ojanen 2009a.

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composed of Members of Parliament and acting as an integral part in the political process of legislative action. A cautionary note for those readers who believe that the political organisation of constitutional review automatically results in a non-legalistic and morally deep deliberation of rights issues. Despite its political organisation, the practice of the Finnish Constitutional Law Committee is characterised by formalistic argumentation and a search for interpretations that can be directly linked to the text of the Constitution or its preparatory works as well as to its own precedents. Moreover, before issuing its Opinions or Reports, the Committee regularly hears experts in constitutional law, notably university professors, whose opinions have significant impact on the Committee's interpretive framework. While not formally legally binding, the statements by the Committee on the harmony or discrepancy of a bill with the Constitution are generally treated as authoritative. It is quite usual for the Committee to find a bill to be unconstitutional in one or more respects and, accordingly, require amendments to be made to the bill during its parliamentary consideration.

Given that the Constitutional Law Committee of Parliament assumes a role similar to the usual role of a constitutional court in centralised forms of constitutional review, the practice of the Committee will be of great significance for the purposes of this report.

The second traditional distinction, even quirk, of the Finnish constitutional system is the *institution of exceptive enactments*.[7] The origins of this institution can be traced as far back as the era of the Grand Duchy of Finland in the Russian Empire between 1809 and 1917. In essence, this institution makes it possible to adopt laws that in substance conflict with the Constitution without amending the text thereof, subject to the proviso, however, that such exceptive enactments be approved in accordance with the procedure for constitutional enactments. Traditionally, constitutional lawyers speak about making a 'hole' in the Constitution by an exceptive enactment and filling it with the relevant norms of the exceptive enactment.

While the importance of the institution of exceptive enactments has gradually decreased since the late 1980s and the Constitution of Finland now also imposes limits to derogations from the Constitution by means of exceptive enactments, the institution of exceptive enactments has assumed a significant role in the context of EU membership, as will be discussed in more detail below in Sect. 1.2.1.

The third most significant characteristic of the contemporary constitutional system, including constitutional culture, relates to the domestic system of the protection of fundamental and human rights. Up until the late 1980s, fundamental and human rights, as well as their judicial safeguards, assumed a marginal role on the Finnish scene of constitutionalism. As the Finnish Constitution subscribed to the French Revolutionary conception of the law as a supreme expression of the

[7] A brief historical review of this institution in English is provided in Scheinin 2002, pp. 55 and 56.

people's will as well as to ideas about democracy as majority rule,[8] the outcome was a rigid prohibition of judicial review and a marginal role for individual rights, although the Finnish Constitution has included a distinct catalogue of constitutional rights ever since the entry into force of the Constitution Act of 1919.

Since the late 1980s, however, tendencies of Europeanisation, rights-based judicial review and the rise of international organisations and global institutions with their regulatory networks have entailed that fundamental rights and human rights treaties binding on Finland have started to play a greater role in the courts and the Finnish scene of constitutionalism in general.[9] In particular, Finland's accession to the European Convention on Human Rights (ECHR) in 1989 and the incorporation of its provisions into the domestic legal order in 1990 represents one of the most important turns in Finnish constitutional history.[10] Human rights treaties binding on Finland, with the ECHR at their apex, provided the main inspiration and stimulus for a comprehensive reform of the domestic system for the protection of constitutional rights, which entered into force on 1 August 1995. As a result of the reform, the current fundamental rights catalogue in the 1999 Constitution of Finland (Chap. 2 of the Constitution) is very comprehensive, setting out a range of economic, social, cultural and 'third-generation' rights alongside more traditional civil and political rights.[11] Moreover, these transformations of the Finnish constitutional system and culture regarding fundamental and human rights have been accompanied by a tendency towards stronger judicial safeguards for rights protection, although the growing role of the judiciary also owes to such tendencies of modern law as an overflow of legislation and open-ended framework legislation that pass important decision-making power to the level of concrete cases. In addition, EU membership has greatly contributed to a shift of competence to the judiciary.

1.2 The Amendment of the Constitution of Finland in Relation to the European Union

1.2.1 European Union related amendments On the threshold of EU membership, the Constitution assumed a very minimalist approach to integration and internationalisation in general. The Constitution was very introverted and domestic-oriented.[12] The Constitution lacked a constitutional provision permitting limitations of sovereignty or the transfer of powers to international organisations, not to speak of the EU in particular.

[8] See Nergelius 2006.

[9] Lavapuro et al. 2011.

[10] See also Viljanen 1996.

[11] See also Salminen 2014, pp. 41–63, and Ojanen 2013, pp. 93–113.

[12] Ojanen 2013, p. 110.

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Due to the availability of the institution of exceptive enactments, no amendment of the Constitution was found necessary to enable Finland to join the EU despite the fact that the Accession Treaty was deemed to be in conflict with the Constitution, with the major reason simply being the incompatibility of the Accession Treaty with the sovereignty of Finland.[13] Accordingly, the Treaty of Accession was incorporated into Finnish law through an exceptive enactment (Act No. 1540 of 1994), approved by a two-thirds majority in Parliament.

However, some changes in the Constitution Act of 1919 were found necessary; the relevant amendments concerned the domestic distribution of powers between the Government and the President, and the role of Parliament in EU affairs.[14] The accession of Finland to the European Economic Area (EEA) in 1994 and to the EU in 1995 had already increased pressure to reconsider the domestic distribution of powers between Parliament, the Government and the President. Although the powers of the President had already been reduced in domestic affairs, the President still enjoyed strong powers in the sphere of foreign affairs in the early 1990s. Thus, one of the most important issues to be decided in Finland prior to embarking on the process of European integration was whether European affairs – first EEA affairs and later EU affairs – should be considered as domestic or foreign policy matters. In the latter case, they would have fallen within the competence of the President by virtue of Sect. 33 of the Constitution Act of 1919, with the outcome that the constitutional pendulum would have lurched back again towards a strong presidency, thereby watering down constitutional amendments since the early 1980s that nudged the Finnish constitutional system towards parliamentarism. In particular, this outcome would have meant a severe blow to the participation of Parliament in EU affairs.

However, the competences were arranged according to the same ratio used in domestic legislative affairs, instead of the typical competence arrangements for foreign policy. Accordingly, the Constitution was amended so that the main responsibility for the national preparation of EEA affairs and later EU affairs was given to the Government, whose members are individually and collectively accountable to Parliament. This was important because the line of development had since the mid-1980s begun to move towards parliamentarism from the previous strong powers of the President, and EU membership and these arrangements gave support to this tendency. EU membership resulted in a horizontal relocation of authority between Parliament, the Government and the President, and contributed to an enhancement of the parliamentary features of the Finnish constitutional-political system. In addition, specific constitutional provisions were enacted for the purpose of ensuring the participation of Parliament in considering EU affairs, which would,

[13] See Opinion 14/1994 of the Constitutional Law Committee of Parliament.

[14] See also Ojanen 2004, pp. 536–538 and 551–554. See generally Salminen 2015, discussing the changes as transformations of the integration norms of the Finnish Constitution. See also Mutanen 2015, discussing the changes in the concept of sovereignty in Finland from a comparative perspective. Mutanen 2015 provides a detailed account of the amendment process, drafting history and relevant literature in English.

according to the Constitution, *otherwise fall* within the competence of Parliament. In the same wave, Parliament was also given strong rights for receiving information in EU affairs.[15]

In the Finnish context the experiences of this system – the allocation of powers and the strong participation and information rights of Parliament – were considered to be so valuable that the same provisions were adopted in the Constitution of 2000.

> Section 96
>
> The Parliament considers those proposals for acts, agreements and other measures which are to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament.
>
> The Government shall, for the determination of the position of the Parliament, communicate a proposal referred to in paragraph (1) to the Parliament by a communication of the Government, without delay, after receiving notice of the proposal. The proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee. However, the Foreign Affairs Committee considers a proposal pertaining to foreign and security policy. Where necessary, the Grand Committee or the Foreign Affairs Committee may issue to the Government a statement on the proposal. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made by the Parliament.
>
> The Government shall provide the appropriate Committees with information on the consideration of the matter in the European Union. The Grand Committee or the Foreign Affairs Committee shall also be informed of the position of the Government on the matter.
>
> Section 97
>
> The Foreign Affairs Committee of the Parliament shall receive from the Government, upon request and when otherwise necessary, reports of matters pertaining to foreign and security policy. Correspondingly, the Grand Committee of the Parliament shall receive reports on the preparation of other matters in the European Union. The Speaker's Council may decide on a report being taken up for debate in plenary session, during which, however, no decision is made by the Parliament.
>
> The Prime Minister shall provide the Parliament or a Committee with information on matters to be dealt with in a European Council beforehand and without delay after a meeting of the Council. The same applies when amendments are being prepared to the treaties establishing the European Union.
>
> The appropriate Committee of the Parliament may issue a statement to the Government on the basis of the reports or information referred to above.

Powers are distributed between the Government and the President such that Government clearly has the general competence for EU affairs. According to Sect. 93(2)

> [t]he Government is responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures, unless the decision requires the approval of the Parliament. The Parliament participates in the national preparation of decisions to be made in the European Union, as provided in this Constitution.

[15] See also Ojanen 2004, pp. 554–557, and Viljanen 2003.

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Further, the Constitution of Finland of 2000, which of course was enacted when Finland was an EU member and as such was designed to function as a constitution of a Member State,[16] tried to codify the new doctrinal transitions which had occurred in the understanding of Finnish sovereignty by including a so-called internationalisation principle (Sect. 1(3)) according to which

> Finland participates in international co-operation for the protection of peace and human rights and for the development of society.

According to the *travaux préparatoires*, this provision functions to offer a new dimension for the construction of sovereignty so that those international obligations which are deemed to be 'conventional' in modern international co-operation and which only affect sovereignty in a 'minor way' will no longer be deemed to conflict with the sovereignty of Finland. Moreover, the sovereignty doctrine is based on the idea of the specificity of the EU, with greater tolerance of the limitations on sovereignty stemming from EU membership than those derived from other international obligations. In particular, the part of the section referring to the 'development of society' was meant to denote EU membership.

Nevertheless, membership in the EU was not very visible in the Constitution. Yet one can also not claim that membership was not explicitly reflected in the wording of the Constitution because the provisions on division of powers between state organs included sections on the EU. From the very start of Finland's EU membership, there has been debate over the question to what extent, if any, EU membership should be recognised in the text of the Constitution. Even the entry into force of the Constitution of Finland in 2000 failed to answer this question in a satisfactory way, as it did not contain any explicit references to the EU. The most problematic issue was, however, that the Constitution lacked a solid way of transferring the powers of the state. Upon incorporating the Constitutional Treaty and Lisbon Treaty into Finnish law it became obvious that the transfers could no longer be based on exceptive enactments. Moreover, the fact that EU membership was not clearly stated as part of the fundamental organisation of Finland was considered problematic.[17]

Thus, when the Constitution and its functioning were evaluated and amended after having been in force for ten years, these issues were revisited in a new light. After the amendments of 2012, the Constitution now reflects the constitutional orientation towards international cooperation for societal development through the EU and expresses commitment to EU membership. In a way, the infancy of EU membership is now over and the Constitution has grown up to be able to face the EU. This new approach can also be observed in new provisions explicitly providing that a significant transfer of state powers to the EU or an international organisation requires a decision made by at least two-thirds of the votes cast in Parliament. This also means that transfers of 'insignificant' powers can be decided by simple

[16] See Salminen 2014.

[17] Salminen 2010a, pp. 509–527.

majority. Whereas EU membership was brought into force internally by the use of the institution of exceptive enactments allowing for the adoption of legislation conflicting with the Constitution and thus placing membership principally outside the Constitution as a conflicting phenomenon, the current Constitution expresses a constitutional commitment towards the Union and provides a specific provision for the transfer of powers to the Union. Now, only a significant transfer of powers to the EU requires a qualified majority, and the application of the institution of exceptive enactments is no longer needed for such transfer. The domestic debate over the competence of the President to represent Finland in the European Council also needed some clarification. The finishing touch was added after the Lisbon Treaty had already entered into force with a new provision explicitly providing that the Prime Minister represents Finland in the European Council. In addition, an amendment was made in the domestic catalogue of fundamental rights due to EU membership by adding the right to vote in elections to the European Parliament to the participatory rights of the citizen.

After these changes, Sect. 1(3) of the Constitution provides as follows:

> Finland participates in international co-operation for the protection of peace and human rights and for the development of society. *Finland is a Member State of the European Union* (emphasis added, 1112/2011, entry into force 1.3.2012).

Currently, Sect. 94 on the acceptance of international obligations and their denouncement and Sect. 95 on the entry into force of international obligations include the possibility for the transfer of the powers according to the constitutional system and provide a decision making procedure for this purpose:

> Section 94
>
> The acceptance of the Parliament is required for such treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require approval by the Parliament under this Constitution. The acceptance of the Parliament is required also for the denouncement of such obligations.
>
> A decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. However, if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the decision shall be made by at least two thirds of the votes cast. (1112/2011, entry into force 1.3.2012)
>
> An international obligation shall not endanger the democratic foundations of the Constitution.
>
> Section 95
>
> The provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree. (1112/2011, entry into force 1.3.2012)
>
> A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the Parliament shall adopt it, without

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> leaving it in abeyance, by a decision supported by at least two thirds of the votes cast. (1112/2011, entry into force 1.3.2012)
>
> An Act may state that for the bringing into force of an international obligation its entry into force is provided by a Decree. General provisions on the publication of treaties and other international obligations are laid down by an Act.

Reflecting the multilevel setting and the status of the citizens as citizens of the Union as well, Sect. 14(2) on participatory rights now states:

> Every Finnish citizen and every other citizen of the European Union resident in Finland, having attained eighteen years of age, has the right to vote in the European Parliamentary elections, as provided by an Act.

Considering the changes in the Constitution which had resulted from membership in the EU but which did not mention this context in the text, Sect. 9(3) on the freedom of movement was amended in 2007 after it had previously been altered through an exceptive enactment when the European Arrest Warrant was brought into force in Finland (see Sect. 2.3).[18]

Furthermore, EU law also shaped the reform of the domestic system for the protection of fundamental rights in the mid-1990s. At the time, a relatively widespread concern was that EU membership might somehow dilute the domestic standard of rights protection.[19] (See the more detailed discussion in Sect. 2.1.1).

1.2.2 The procedure of constitutional amendment The procedure for constitutional enactments has remained unchanged since the entry into force of the Constitution Act of 1919. Currently, Sect. 73 of the Constitution provides as follows:

> A proposal on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation of the Constitution shall in the second reading be left in abeyance, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. The proposal shall then, once the Committee has issued its report, be adopted without material alterations in one reading in a plenary session by a decision supported by at least two thirds of the votes cast. However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance and it can be adopted by a decision supported by at least two thirds of the votes cast.

Thus, the normal constitutional amendment procedure requires leaving the bill in abeyance after an election. This may only be avoided in a case of urgency and if the decision on urgency is supported by at least five-sixths of the votes cast. In normal cases, which are also most frequent in practice, an amendment can be assessed by the electorate due to its being held in abeyance until after the next elections.

However, in this context one has to consider the most peculiar thing in the Finnish legal system, the institution of exceptive enactments. As explained above,

[18] See discussion in Ojanen 2006, pp. 89–100, and from the point of view of amending the Constitution, Salminen 2010b, pp. 161–177, and Viljanen 2009, pp. 57–88.

[19] See for example discussion in Ojanen 2004, pp. 541–544.

the institution has its roots in the era when Finland was a Grand Duchy in the Russian Empire. While the Finns, in the legal positivist spirit, urged the Russians to abide by Finland's constitutional enactments that originated in the period of Swedish rule, there was an acute need for modern legislation, and the institution of exceptive enactments was invented to circumvent deadlocks in situations where there was no wish to amend the Constitution formally. Basically, an exceptive enactment enables the adoption of legislation that in substance conflicts with the Constitution without amending the text thereof, subject to the proviso that such legislation be approved in accordance with the procedure for constitutional enactments. A 'hole' in the Constitution is made by an exceptive enactment and filled with the relevant norms of the exceptive enactment. In recent decades, the institution of exceptive enactments has often been used for the purpose of bringing international treaties that conflict with the Constitution into force. Exceptive enactments relating to international treaties can also be enacted through a less arduous procedure than other exceptive enactments, as a two-thirds majority of the votes cast in Parliament suffices for bringing into force international obligations that conflict with the Constitution. By contrast, exceptive enactments in purely domestic matters are enacted through a procedure for constitutional enactments that requires that the bill be left in abeyance until after an election, provided that the bill is not declared urgent by a decision made by at least five-sixths of the votes cast. In addition, the bill must be adopted by a decision supported by at least two-thirds of the votes cast (Sect. 73 of the current Constitution).[20]

1.2.3 The background to EU amendments As an example of the exceptive amendments, the 1994 Treaty of Accession of Finland to the EU was deemed to be in conflict with the Constitution, mainly because of incompatibility between Finland's sovereignty and the transfer of powers to the EU. However, instead of amending the Constitution, the Treaty of Accession was incorporated into Finnish law through an exceptive enactment approved by a two-thirds majority in Parliament. The same procedure was applied to incorporate the Treaty of Amsterdam, the Constitutional Treaty and the Lisbon Treaty into Finnish law. As the Nice Treaty was not considered to be in conflict with the Constitution, its incorporation was approved by simple majority.

When the Constitution of 2000 was enacted, there was not enough political will to express EU membership in the text of the Constitution in a clearer manner at that stage. This minimalistic approach was probably also a result of Finland not having been a Member State for a longer period. Additionally, in the context of incorporating the treaties into the Finnish legal system, the institution of exceptive enactments was considered a useful procedure. However, the first steps in the waning of this particular institution were taken already at this stage. Limitations to the usage of exceptive enactments were enacted and developed in legal research in particular.[21] Contrary to the previous situation, in discussions surrounding the recent

[20] See generally Ojanen 2013, pp. 104–106, and Suksi 2011, pp. 101–105.

[21] See especially Viljanen 1999.

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amendment, emphasis was put on the correctness of the Constitution. It was underlined that the Constitution should in principle give a clear and accurate picture of the constitutional reality. If a great amount of public power that is relevant to Finland and in Finland, both with regard to state organs and individuals, is exercised in the context of the EU, this should be reflected in the text of the Constitution as well. There was a need to be more transparent and open on this question. The Constitution might otherwise risk losing its relevance as *lex fundamentalis*.[22]

The reform of 2012 included several EU motivated issues. Most importantly, a new procedure for transfers of power was introduced. This was from the beginning built on the dynamic idea of transferring powers and also explicitly mentioning the EU in this provision, because the majority of transferred powers relate to membership in the Union. As usual in Finland, when amending the Constitution, the changes were explained as being mostly a codification of the state practice and interpretations that already existed. Thus, the amendments were motivated mainly by a desire to make EU membership visible in the text of the Constitution. The idea not the change the fundamentals of the membership was underlined. Nevertheless, the new procedure for the transfer of powers to the EU in principle signified a very important change in the very elementary features of membership.[23] Additionally, the explicit mention of Union membership among the fundamentals of the Finnish Constitution in its first Chapter clearly shows commitment towards Union membership and binds the Finnish Constitution with European integration.

The recent reforms were greatly supported by legal scholars, and the advice of scholars was followed.[24]

1.2.4 Although there are some inconsistencies in the Constitution now that EU affairs have been placed among international affairs in the system of the Constitution, there are currently no calls for amending the Constitution because of any issue relating to membership in the EU.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The new provisions of the Constitution of Finland explicitly provide that a significant transfer of state powers to the EU or an international organisation requires a two-thirds majority of votes cast in Parliament (Sect. 94(2) and Sect. 95 (2)). This also means that transfers of 'insignificant' powers can be decided by simple majority. Whereas Union membership was brought into force internally by the use of the institution of exceptive enactments that allows for the adoption of

[22] See Salminen 2010b, pp. 161–177.

[23] See Salminen 2015.

[24] See for example the articles Salminen 2010a, b and Salminen 2009, pp. 269–283 and compare with the amendments. The result seems to follow the suggested lines of the revision.

legislation that conflicts with the Constitution and thus places membership principally outside the Constitution as a conflicting phenomenon, the current Constitution expresses a constitutional commitment towards the Union and provides a specific provision for the transfer of powers to the Union. Now, the Constitution recognises transfers of powers and, additionally, only a significant transfer of powers to the EU requires a qualified majority; the application of the institution of exceptive enactments is no longer needed for such transfer. As such, the idea of the provision is clearly based on a transfer, not on a limitation of state powers. The amendment shows a dynamic – instead of static – understanding of the integration norm of the Finnish Constitution. In the interpretation of a possible transfer, one has to also take into consideration that Finland is already a member of the EU, which is part of the fundamental organisation of Finland according to the Constitution as well (Sect. 1(3)).[25]

Neither the incorporation Act of the Accession Treaty nor the Constitution contain any provisions on the domestic effects and status of EU law within the Finnish legal system. Nevertheless, the *travaux préparatoires* reflect the idea of their status and effects according to the view of the EU. The standard understanding is that EU law enjoys legal effects and status as prescribed by EU law and interpreted by the Court of Justice of the European Union (CJEU). Nevertheless, this opinion is not straightforward, and opinions vary when it comes to possible collisions in the constitutional sphere.[26] Thus, the issue is much more nuanced. The situation has now also been modified by the recent amendments, and it is evident that they show a clearer constitutional commitment towards EU membership and various obligations stemming from it. In the national implementation of EU legislation, the constitutional requirement that the domestic standard of protection of constitutional and human rights not be compromised has on some occasions limited the implementation of EU law. However, in some cases, the practice has been more adaptive and flexible.[27] It has been noted that the Finnish system, which gives Parliament and its Constitutional Law Committee the opportunity to take part in the preparation of national positions on proposals for EU secondary legislation, allows them to express opinions to guide the Government and avoid possible conflicts prior to the adoption of a final EU legislative act.

1.3.2 For Finland, it is certainly fair to say 'that an older interpretation of absolute sovereignty has been replaced by a modern, revised approach' (cf. the Questionnaire) during EU membership. The concept has gone through a remarkable change. Whereas every international obligation prior to EU membership was considered to be in grave conflict with the Constitution – like EU membership itself as it was considered to affect Finnish sovereignty – today, the understanding of the concept has developed to mean that being a member in this kind of arrangement is a use of sovereignty. Thus, the construction of the constitutional concept of

[25] Salminen 2015.

[26] See discussion in Heinonen 2012.

[27] See especially Ojanen 2009c, pp. 129–174, Ojanen 2003 and Ojanen 2004, p. 542.

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sovereignty is very different, to say the least. The sovereignty of Finland is qualified by the international obligations binding on Finland. Among them, membership in the EU has special status.[28]

1.3.3 With the entry into force of the Constitution of 2000, formulations which had first appeared in legal research and in the practice of the Constitutional Law Committee found their way into the Constitution and its *travaux préparatoires*. In the *travaux,* the EU was accorded special status, which was soon also recognised in the practice of the Constitutional Law Committee, and thus there is far greater tolerance for limitations on sovereignty stemming from membership in the EU than those arising from international obligations. The openness towards the EU has been further modified by the latest amendments of 2012, which clearly underline the commitment towards European integration.[29] There are, however, some counter-tendencies in the constitutional practice. The recent events and legal implications of the crisis of the monetary and economic union have once again raised some concerns about sovereignty. In this context, the Finnish position that unanimous decision-making protects Finnish sovereignty and especially the budgetary powers of Parliament can be understood as a sign that changes in attitudes towards integration are not yet consistent.[30]

Prior to the Constitution of 2000, the constitutional acts did not include any explicit limits to the use of exceptive enactments. The Constitution of 2000 introduced limitations to the use of exceptive enactments and to acceptance of international obligations. According to Sect. 73 of the Constitution, a derogation made by an exceptive enactment to the Constitution has to be limited in nature. Additionally, another possible limitation was introduced, since according to Sect. 94(3), an international obligation shall not endanger the democratic foundations of the Constitution. Both of these requirements were interpreted in the context of the Constitutional Treaty and the Lisbon Treaty.[31] Because of the recent changes, the transfers of powers no longer have the status of exceptive enactments, and the limitations enacted for the use of exceptive enactments are no longer applicable. Nevertheless, the requirement of Sect. 94(3) of the Constitution is still applicable as it concerns international obligations as such. The issue of democratic foundations has not really been developed in the constitutional practice of the Constitutional Law Committee: this is because there have not, obviously, been any situations in which there has been a need for this. However, when the Constitutional Treaty was

[28] For an extensive recent analysis of the change in the concept of sovereignty in Finnish constitutional law and doctrine see Mutanen 2015 who concludes that Finland has moved from a 'sovereignist to a non-sovereignist Constitution' (p. 359); the sovereignty provisions, read together with the amendments, have acquired a new meaning and have led to a more integration-friendly understanding in the Finnish legal discourse. See especially Ojanen 2004 and Salminen 2004.

[29] Salminen 2015.

[30] See discussion in Leino and Salminen 2013.

[31] Opinions 13/2008 (on the Treaty of Lisbon) and 36/2006 (on the Constitutional Treaty) of the Constitutional Law Committee of Parliament (hereinafter Constitutional Law Committee).

incorporated into Finnish Law, this Section was referred to upon consideration of whether the Union, based on the Constitutional Treaty, would endanger the democratic foundations of the Constitution.[32] In so doing, special emphasis was put on the reforms which were put in effect later by the Lisbon Treaty.

No particular field of state powers nor any fields of legislation are excluded from a possible transfer of powers. However, any transfer of powers based on an international obligation shall, according to Sect. 94(3), not endanger the democratic foundations of the Constitution. This could be considered as a limit to or at least as a condition for such a transfer.

1.3.4 The Finnish Supreme Courts – both the Supreme Court and the Supreme Administrative Court – apply EU law, and accept both direct effect and primacy *per se*. However, not many cases have been reported in which the courts have set aside Finnish legislation or a conflict has been identified where EU law was of relevance. In particular, there are no reports concerning cases where EU law has allegedly been in conflict with the very fundamental questions of Finnish fundamental rights. In addition, it seems that the Finnish courts are not very active in making references to the CJEU either. These features might have many explanations. However, the primary explanation is not that there is resistance to EU law as such. There might be a tendency to resolve any possible *prima facie* conflict by interpretation via an EU-friendly interpretation, for which at least the Finnish Constitution now provides many possible legal arguments. The fact that the courts have never made a reference to the CJEU concerning the validity of EU secondary law might, however, be based in the Finnish constitutional culture, for which the possibility to question the validity of a legislative act on the basis of a constitutional argument is a relatively new phenomenon.

Noteworthy in the Finnish context is, of course, that the Constitutional Law Committee has stated that the domestic implementation of directives and other EU instruments cannot weaken the domestic standard of rights protection.[33] Typically, this has not proved to be a problem at all. Since EU measures that regulate the rights and obligations of individuals or are otherwise of a legislative nature within the meaning of the Finnish Constitution must be implemented by Acts of Parliament in accordance with the same procedure as for domestic legislative enactments, the Constitutional Law Committee may also review the constitutionality of domestic implementing enactments of EU measures. The implementation of EU measures should conform to the requirements originating in the domestic system for the protection of constitutional and human rights. This is, of course, a bold statement, and implementation seems to be rather flexible; there are many ways to adapt and conform with the requirements of European law. The obvious tendency seems to be towards a fusion of the various regimes and their requirements. As EU proposals for legislation may be reviewed by the Constitutional Law Committee, potential problems can be addressed before the relevant national legislation is passed.

[32] Opinion 36/2006 (on the Constitutional Treaty) of the Constitutional Law Committee.

[33] E.g. Opinion 25/2001 of the Constitutional Law Committee.

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1.4 Democratic Control

1.4.1 Already for membership in the European Economic Area, the constitutional acts were amended so as to provide for the strong participation and information rights of Parliament.

Regarding the procedural requirements, Sect. 96(2) of the Constitution (for the text of the relevant provisions see Sect. 1.2.1) specifies the ways in which the Government must communicate the proposals for EU acts, agreements and other measures without delay in order to determine Parliament's position. In matters that fall within Parliament's competence, its position in practice equals the Finnish position, even if Parliament usually leaves the details to the Government's discretion and limits itself to steering the main political lines. Union proposals are considered by the Parliament's Grand Committee and usually also in one or more of the sub-committees. The Government is obliged to keep the relevant committees updated with information on the negotiations and to keep the Grand Committee informed of its position. Section 97 includes provisions on Parliament's right to receive information on international affairs. It requires the Government to keep the Grand Committee informed through reports on the preparation of EU matters other than those falling under Sect. 96, either upon request or when otherwise necessary. This concerns, for example, the preliminary stages of a decision making process or matters in which the Council does not formally act. Under Sect. 97(2), the Prime Minister is required to provide information on matters on the European Council agenda, both before and after its meetings, and on envisaged amendments to the Treaties. On the basis of the information provided, the committees, including the Constitutional Law Committee, may issue statements to the Government.

There is a widely shared view that the system functions well. Of further relevance here is that the traditional interpretation of Sects. 96 and 97, which have generally been understood to extend beyond matters that formally belong to Union competence to questions that can be considered 'comparable' to Union matters, both as regards their substance and their effects.[34] The Constitutional Law Committee has interpreted many measures as matters belonging to Sect. 96 or 97, whether formally taken within the Union framework or not. It has thereby allocated the primary competence in these matters to the Government under Sect. 93(2), equally placing it under a strict obligation to report to Parliament on all matters falling under the competence of the latter.

1.4.2 Finnish constitutional history records only two referendums, of which one was held on the very matter of the accession of Finland to the Union.[35] The Finnish Constitution provides for the possibility of a consultative referendum, on which a

[34] Viljanen 2003, and Ojanen 2004.

[35] The other was the advisory referendum organised in the 1930s *post legem* on the Prohibition Act that limited the production, sale and consumption of alcoholic beverages.

decision shall be made by an Act of Parliament. Today there is the additional possibility of a citizens' initiative pursuant to Sect. 56 of the Constitution.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 The recent EU related amendments of the Finnish Constitution were mostly motivated by the desire to improve the openness and transparency of the Constitution. As an argument, the completeness of the Constitution was used in the meaning that the Constitution should give an accurate picture of the constitutionally relevant issues in Finland.[36] When the Constitutional Treaty and Lisbon Treaty were incorporated into Finnish law, the Constitutional Law Committee of Parliament in particular raised this issue. However, amendment was not constitutionally required. The Committee only advised that there would be reason to consider amending the Constitution both regarding the special provision concerning the transfer of powers and regarding the need to expressly mention the EU.[37]

In the preparation of the EU related amendments, the most important rationale was the need to take the Constitution seriously and to reflect the shift of power to the supranational level.[38] It was motivated by the need for transparency and the requirement of the completeness of the Constitution. Many comparisons were made between various solutions within various Member States, but no clear common denominator was found. There was also some discussion in the Finnish legal literature on this issue.[39]

When evaluating the current state of the Finnish Constitution and its EU related amendments adopted during Finland's EU membership, there seems to be good reason to consider that the relationship between the EU and Finland and Finland as an integrated state have matured. EU membership and the further constitutionalisation of the EU have not rendered the national constitution useless. The Finnish discourse has found it important to strike a balance between national constitutional law and European constitutional law. The amendments contribute to this balance. While they interconnect the orders, they also clearly open the orders to mutual influence. Opening and constitutionalising EU membership on the national constitutional level does not weaken the Constitution for Finland. On the contrary, it has opened new perspectives and possibilities for reciprocal stabilisation.

[36] Salminen 2010a, b.

[37] Opinions 13/2008 (on the Treaty of Lisbon) and 36/2006 (on the Constitutional Treaty) of the Constitutional Law Committee.

[38] Thus, the guidelines in Claes 2005 and Albi 2005 were followed, as suggested by Salminen 2010a, b.

[39] See also Mutanen 2015, pp. 310–323.

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2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 A comprehensive reform of the domestic system for the protection of constitutional rights and human rights entered into force on 1 August 1995. International human rights treaties binding on Finland, with the ECHR at their apex, featured as the main source of inspiration and stimulus for this reform. As a result of the reform, the current fundamental rights catalogue in Chap. 2 of the Constitution of Finland is broad and comprehensive. It sets out a range of economic, social and cultural rights, in addition to traditional civil and political rights. Moreover, there are specific provisions on such rights as everyone's responsibility for the environment and environmental rights (Sect. 20), the right to a fair trial before an independent and impartial court or tribunal within a reasonable time (Sect. 21(1)) and on the right to good administration (Sect. 21(2)). As a rule, fundamental rights are granted to *everyone*, with an exception being made only with regard to freedom of movement (Sect. 9) and certain electoral rights (Sect. 14).[40]

The domestic standard of protection of fundamental rights is intended to ascend to a high level. The established constitutional doctrine is that international human rights obligations binding on Finland feature as a minimum standard of protection.[41] However, the *de facto* implementation of this doctrinal premise leaves a lot to be desired in light of critical observations on the situation of human rights in Finland by international treaty bodies. For instance, since the entry into force of the ECHR in 1990, the European Court of Human Rights (ECtHR) has found a violation by Finland in well over 100 judgments.[42]

Just before Finland joined the EU in 1995, there was concern that EU membership might somehow dilute the domestic standard of fundamental rights protection, particularly in the areas of social rights and good administration. In light of this concern, some provisions of the 1995 Constitutional Rights Reform were deliberately designed to feature as 'constitutional self-defence' against such problematic tendencies that might in the long run arise from EU membership. A reference can be made to a provision on the right of access to information (Sect. 12(2)) and a relatively far-reaching clause in Sect. 19 on the right to social security, guaranteeing social rights to everyone. Some social rights, either by means of the relevant

[40] See e.g. Scheinin 1996, pp. 257–280. On economic, social and cultural rights under the Finnish Constitution, see Scheinin 2001. A thorough Finnish Constitutional Rights Commentary is provided by Hallberg et al. 2011.

[41] See the preparatory works of the reform of the domestic system for the protection of constitutional rights, such as Government Bill 309/1993 and Report 25 of 1994 of the Constitutional Law Committee.

[42] The major problem area has related to Art. 6 of the ECHR, but there are relatively many judgments by the ECtHR finding a violation by Finland of Arts. 8 and 10 of the ECHR.

constitutional provision itself, or by means of Acts of Parliament, have also been guaranteed as subjective rights directly enforceable through the courts.[43] Similarly, Sect. 21(2), which guarantees various attributes of the right to good administration, may also be understood as imposing constitutional constraints on the potentially harmful effects of European integration. As will be discussed in more detail below, the domestic standard of protection of constitutional and human rights has occasionally *de facto* compromised the maximal implementation of certain EU legal measures.

While the current catalogue of constitutional rights is comprehensive insofar as the substantive rights provisions are concerned, the Constitution of Finland is largely, if not exclusively, silent on several important doctrines and principles pertaining to the domestic protection of constitutional and human rights. Hence, one must delve into the practice of the leading authority on constitutional interpretation in Finland, the Constitutional Law Committee of Parliament, and the *travaux préparatoires* of the reform of Constitutional Rights Catalogue in order to get a grip on them. For the present purposes, the following doctrines and principles pertaining to constitutional rights are worthy of elaboration:

(i) *Direct applicability and interpretive effect of constitutional rights*. According to the *travaux préparatoires* of the Reform of Constitutional Rights Catalogue, one of the major aims of the reform was to increase the direct application of constitutional rights by domestic courts and authorities. This aim has also materialised in subsequent domestic court practice, in which courts have not only invoked several provisions on civil and political rights but have also treated several dimensions of social rights as 'justiciable'. However, the direct applicability of constitutional rights is watered down by what can be called a minimalist approach to constitutional rights and human rights: Finnish courts far too often tend to be satisfied with the minimum standard of protection under the ECHR, as indicated by the existing case law of the ECtHR. This practice already contradicts such a fundamental principle regarding the relationship between constitutional rights and international human rights as is the premise that domestic courts should provide rights protection beyond the threshold where the ECtHR would find a violation of the ECHR.[44]

Moreover, it is firmly established doctrine that courts and authorities should resort to a 'constitutional rights-oriented' approach to the interpretation of domestic statutes, in order to avoid conflicts between constitutional rights and domestic legislation, as well as to promote the effective observance of these rights. In everyday court practice the interpretive effect of

[43] Finnish courts have treated several dimensions of social rights as 'justiciable'. See e.g. the following judgments of the Supreme Administrative Court: KHO 2000:36, KHO 2001:35 and KHO 2001:50.

[44] For minimalist approaches by Finnish courts and authorities regarding constitutional and human rights, see in detail Lavapuro et al., pp. 523 and 524.

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constitutional rights is clearly the primary method of giving judicial effect to constitutional rights. As it has been impossible to keep the interpretation of constitutional rights provisions intact and untouched by the influence of international human rights norms, the outcome has also been a human rights-oriented approach to the interpretation of Finnish law, including the Constitution.[45]

(ii) *The semi-constitutional status, direct applicability and interpretive effect of international human rights treaties.* The third notable characteristic of the domestic system for the protection of constitutional rights is the convergence of the effects of constitutional rights and international human rights treaties. Aside from providing a major source of inspiration for the concrete formulations of the various material provisions on constitutional rights and the methods of giving legal protection to constitutional rights, human rights treaties binding on Finland assume a *semi-constitutional status* in the Finnish legal order. This feature originates in several constitutional provisions that make explicit reference both to domestic constitutional rights and to international human rights.[46]

However, aside from producing interpretive effect, the predominant method of implementation of human rights treaties, *the method of incorporation through an Act of Parliament*, warrants the direct application of human rights by domestic courts and authorities.[47] As human rights treaties have invariably been incorporated through Acts of Parliament, human rights treaties enjoy firm formal status as Acts of Parliament within the Finnish legal order so that they are in force in Finnish law according to their content in international law, as seen in the light of the case law of their international treaty bodies (and also in in their authentic languages which are decisive in the case of questions of interpretation originating in translation errors or ambiguities).[48]

(iii) *The position of general principles of law in the Constitution.* The Constitution of Finland is largely, if not exclusively, silent on such general

[45] This was established in Opinion 2/1990 of the Constitutional Law Committee. The principle of a human-rights-friendly interpretation was reiterated in the context of the 1995 constitutional rights reform.

[46] See Scheinin 1996, p. 276.

[47] See Scheinin 1996, p. 259. Also the Constitutional Law Committee of Parliament noted in its Opinion 2/1990 that the method of incorporation entails the direct applicability of human rights treaties by domestic courts and authorities.

[48] See e.g. Opinion 2/1990 of the Constitutional Law Committee on the direct applicability of the ECHR due to the method of incorporation. For example, the Supreme Court of Finland has explicitly stated that the ECHR and the ICCPR are 'part of the law of the land' due to the method of incorporation by an Act of Parliament. See e.g. the decision of the Supreme Court, KKO 1993:19.

principles of law as legal certainty and legitimate expectations. However, both international human rights treaties and EU law have promoted a general awareness among the Constitutional Law Committee of Parliament and Finnish courts and authorities of the significance of these principles in the context of cases pertaining to constitutional and human rights and issues of constitutional law in general. Hence, the practice of both the Constitutional Law Committee of Parliament and the domestic courts indicates that the principles of legal certainty and legitimate expectations have a firm place in domestic constitutional reasoning, e.g. in the context of cases pertaining to the right to property (Sect. 15) or to the freedom to engage in commercial activity (Sect. 18).[49]

While the general principles of law are generally recognised at the level of constitutional doctrine, the principle of non-retroactivity features as an exception to the rule, to the extent that Sect. 8 of the Constitution explicitly recognises the prohibition of non-retroactivity in criminal cases (see Sect. 2.3.2).[50] However, the other dimensions of the principle of non-retroactivity have gained a firm foothold in constitutional practice through the Constitutional Law Committee and courts.[51]

2.1.2 The criteria for limiting constitutional rights The Constitution of Finland lacks a provision stipulating the conditions under which restrictions can be imposed on constitutional rights. However, it is firmly established constitutional doctrine that all interferences with constitutional rights must be reviewed by the Constitutional Law Committee of Parliament or the domestic courts in accordance with the following seven distinct, yet interrelated conditions:

(i) Limitations must be provided by an Act of Parliament.
(ii) Legislative provisions on limitations must be sufficiently clear and precise.
(iii) The essence of a constitutional right cannot be subject to limitations.
(iv) Limitations must have a legitimate aim that corresponds to the objectives of general interest or the need to protect the fundamental rights of others.
(v) Limitations must conform to the principle of proportionality, including be necessary for genuinely reaching the legitimate aim.
(vi) Limitations must be in conformity with human rights obligations binding on Finland.

[49] See e.g. Opinions 33/2002, 45/2002, 21/2004, 25/2005, 42/2006 of the Constitutional Law Committee.

[50] Section 8 of the Constitution, entitled 'The principle of legality in criminal cases', provides as follows: 'No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, *which has not been determined punishable by an Act at the time of its commission*. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.' (Emphasis added).

[51] See e.g. Opinions 33/1998, 34/1998, 37/1998, 63/2002 and 42/2006 of the Constitutional Law Committee.

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(vii) There must exist adequate legal safeguards (judicial review, the right to appeal, the right to be heard, etc.) regarding interferences with constitutional rights.[52]

Each condition listed above has an autonomous function to fulfil. As these conditions are *cumulative*, one failure suffices to result in a conclusion that an interference amounts to a violation of the Constitution. Given all these characteristics, the permissible limitations test under the Constitution of Finland is one of those concrete arrangements that generates both substantive and doctrinal coherence between the ECHR and other human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR), as well as the EU Charter of Fundamental Rights. Yet, as international human rights treaties feature as a minimum standard of rights protection, the permissible limitations test under the Constitution of Finland is, at least potentially, more rigorous than e.g. the standard three-partite test under the ECHR. However, it also warrants emphasis that if the Constitutional Law Committee of Parliament is of the view that a legislative proposal pending before Parliament fails under the permissible limitations test, it does not declare the legislative proposal invalid or null and void. Instead, the Committee usually proposes modifications to the bill so as to achieve compliance with constitutional and human rights.

2.1.3 The position of the rule of law Up until the entry into force of the Constitution of Finland on 1 March 2000, the principle of the rule of law remained unmentioned in the text of the Constitution. Nevertheless, some important dimensions of the rule of law, such as access to courts (Sect. 21(1)) and the requirement of limitations on constitutional rights 'being provided by the law' were recognised either within the text of the Constitution or in constitutional doctrine or practice.

Nowadays, however, the Constitution of Finland explicitly recognises the rule of law, as Sect. 2(3) provides as follows:

> The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.

The systematic location of this provision in Chap. 1 of the Constitution, entitled 'Fundamental provisions', also reveals that the rule of law is one of the most fundamental principles of the Constitution, alongside sovereignty, the inviolability of human dignity and the freedom and rights of the individual, justice, democracy, parliamentarism and the separation of powers.

Moreover, such elementary dimensions or attributes of the rule of law as the principle of legality – particularly the requirement that the rights and obligations of individuals be provided by an Act of Parliament – or access to courts are relatively frequently invoked by individuals before domestic courts. Administrative courts in

[52] See Report 25/1994 of the Constitutional Law Committee, pp. 4–5. For a comprehensive examination of the permissible limitations test under the Constitution, see Viljanen 2001.

particular have treated the rule of law as justiciable in reviewing the legality of administrative decisions or other measures; several Opinions of the Constitutional Law Committee of Parliament in the context of *ex ante* review of legislative proposals include explicit references to the rule of law principle.[53]

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 As already noted in Sect. 2.1.1, on the verge of Finnish EU membership in the mid-1990s, there was concern that European integration might dilute the domestic protection of fundamental rights. One of the major reasons for this anxiety was the thinking that such economic market freedoms as the free movement of goods and workers or the freedom of establishment and freedom to provide services in particular constituted the 'core' of the EU legal order, whereas the protection of fundamental rights featured only as a dimension of EU law, with the result that economic freedoms tended to have an edge over fundamental rights in cases involving balancing between economic freedoms and fundamental rights.

While these domestic concerns have not been totally groundless, they have nonetheless proved to be exaggerated. The years of EU membership since 1995 have *not* prompted any widespread or serious concern about the EU excessively prioritising economic liberties over fundamental and human rights. Although the tendency in recent years has been towards the weakening of the welfare state and the lowering of the standard of protection of social rights, it is submitted here that EU law or EU membership in general has *not* been a major impetus for this tendency.

However, some individual judgments by the CJEU in cases such as *Laval* and *Viking*[54] in particular have generated some domestic debate over the appropriate balance between economic freedoms and fundamental rights. However, instead of any straightforward and unanimous view that the balance has tilted too far in the direction of economic freedoms at the expense of fundamental rights, the domestic views regarding these two cases have been relatively polarised, especially among the Finnish economic and political elite. While some have hailed these decisions from a free market perspective, others have criticised them, particularly from a labour law perspective for their interference with the fundamental premises of collective labour law and the industrial relations of states.[55]

In addition, the so-called euro crisis has prompted constitutional concern regarding the effects of the crisis on the appropriate protection of fundamental social rights.[56]

[53] See Opinions 21/2009, 67/2010 and 33/2012 of the Constitutional Law Committee.

[54] Case C-438-/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767.

[55] See e.g. Ojanen 2011, pp. 127–131.

[56] See Tuori and Tuori 2014.

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2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1–2.3.3 The presumption of innocence, *nullum crimen, nulla poena sine lege*, fair trial and *in absentia* judgments

In Finland, the Constitutional Law Committee reviewed *both* the proposal for the Framework Decision on the European Arrest Warrant[57] (EAW)[58] *and* its domestic implementing enactment[59] for compatibility with the Constitution and international human rights obligations binding on Finland. However, the constitutional observations by the Committee revolved around other issues pertaining to the EAW, such as the extradition of Finnish citizens, the rule of double criminality, the extradition of minors, the protection of family life and certain other issues relating to fundamental and human rights. In particular, the extradition of Finnish citizens and the issue of dual criminality warranted constitutional attention by the Committee, simply because Finland at the time in the early 2000s still adhered to the principle of double criminality and the prohibition on extraditing Finnish nationals.[60]

By contrast, the Constitutional Law Committee remained totally silent on the issue of the presumption of innocence within the context of the European Arrest Warrant. Neither have concerns with regard to the presumption of innocence arisen in domestic court proceedings.[61] In fact, any concern over the appropriate observance of the right to a fair trial, including the presumption of innocence, has only been voiced by some individual judicial actors, such as the President of the Supreme Court of Finland, Justice Pauliine Koskelo, in some of her public remarks.

While the abolition of double criminality was one of the issues that warranted the attention of the Constitutional Law Committee of Parliament, it should be emphasised that the Committee eventually did not find this issue to be a reason for constitutional concern. Instead, the Committee took the view that the domestic implementing act for the European Arrest Warrant limited the scope of application of the European Arrest Warrant without verification of the double criminality of the

[57] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[58] Opinion of 42/2001 of the Constitutional Law Committee.

[59] Opinion of 18/2003 of the Constitutional Law Committee.

[60] Up until 1 October 2007, Sect. 9(3) of the Constitution of Finland provided as follows: 'Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will.' However, the Constitutional Law Committee (see Opinion 13/2003) regarded the EAW as prompting the need for a constitutional amendment of this constitutional provision on the extradition of Finnish citizens, so as to comply appropriately with Finland's international obligations and, specifically, obligations under EU law. The amendment entered into force on 1 October 2007 with the result that the extradition of Finnish citizens is no longer absolutely forbidden by the Constitution of Finland.

[61] For constitutional concerns regarding the European Arrest Warrant in Finland, see Ojanen 2009b, pp. 143–156.

acts constituting such offences as could be regarded as sufficiently 'serious crimes'. In addition, the Committee noted that the offences giving rise to surrender without verification of double criminality were also largely, if not exclusively, serious crimes under domestic law. Finally, the Committee emphasised that the domestic implementing act included grounds for mandatory non-execution that appropriately limited the application of the European Arrest Warrant to what was constitutionally acceptable.

In this context, it warrants emphasis that the bill for the domestic implementing Act of the EAW (the Act on Extradition on the Basis of an Offence between Finland and Other Member States of the European Union, Act No 1286 of 2003, the so-called EU Extradition Act) included additional grounds for mandatory non-execution of an EAW on which the European Arrest Warrant Framework Decision is silent. As the Constitutional Law Committee also proposed a number of additional specifications to the domestic implementation act for the EAW in order to ensure the appropriate observance of constitutional and human rights,[62] the outcome was that the maximal implementation of the EAW Framework Decision made way for the active observance of constitutional and human rights in Finland.[63] Furthermore, the Committee of Legal Affairs of Parliament emphasised the need for fundamental and human rights-friendly interpretation and application of the European Arrest Warrant and its domestic implementing act, particularly insofar as such grounds for mandatory refusal under Sect. 5 of the Act on Extradition on the Basis of an Offence between Finland and Other Member States of the European Union (Act No 1286 of 2003) are concerned.[64] In particular, the necessity of rights-friendly application was emphasised in relation to Sect. 5(6) of the domestic implementing act, essentially requiring, inter alia, that extradition be refused if there is cause to assume that the person requested would be subjected to a violation of his or her human rights or constitutionality protected due process, freedom of speech or freedom of association. In this context, the Legal Affairs Committee explicitly emphasised the interconnections between Sect. 5(6), and such constitutional rights as the right to a fair trial under Sect. 21 of the Constitution. By contrast, however, no domestic *constitutional* discussion can be found on the issue of *in absentia* judgments.[65]

Overall, the domestic implementation of the European Arrest Warrant Framework Decision is one of those cases in which Finland has compromised the

[62] See also Opinion 48/2002 of the Constitutional Law Committee.

[63] For the details of the 'Finnish constitutional challenge' in the context of the domestic implementation of the EAW Framework Decision, see Ojanen 2009c.

[64] Report 7/2003 of the Legal Affairs Committee of Parliament.

[65] The rule under Sect. 28 the Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union (Act No. 1286 of 2003) is clearly the presence of the individual at the proceedings, or at least he or she shall be reserved an opportunity to be heard on the contents of the request. However, Sect. 28(3) provides that if the requested person is absent from the consideration of the matter *without a lawful excuse*, the question may be examined and decided despite his or her absence. (Emphasis added).

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most effective domestic implementation of EU legislation for the sake of fundamental and human rights. Although there may thus be tension or even a conflict between the European Arrest Warrant Framework Decision and its domestic implementing act, it deserves notice that Finland was also praised by the UN Human Rights Committee for its practice of trying to appropriately integrate fundamental and human rights into various legislative instruments aimed at countering terrorism in 2004 as follows:

> The Committee is pleased to observe the State party's concern to integrate human rights into action to combat terrorism, in part by maintaining an outright ban on extradition, refoulement or expulsion to a country where the individual concerned might be exposed to the death penalty and violations of articles 6 and 7 of the Covenant. (Concluding observations of the Human Rights Committee: Finland. 02/12/2004).[66]

The application of the European Arrest Warrant has already generated relatively voluminous case law by the domestic courts. Up until now, there has been no evidence of any judicial resistance on the part of domestic courts or authorities to apply and enforce the European Arrest Warrant. The Finnish courts have also embraced the effect of the EAW on the interpretation of Finnish law. Overall, the approach of Finnish judicial authorities to the application of the European Arrest Warrant assumes a pragmatic case-by-case approach. Each case is dealt with individually, without expressing any bold and sweeping judicial observations on the European Arrest Warrant and its relationship with Finnish law, including the domestic system for the protection of fundamental and human rights. One looks in vain for any kind of bold and sweeping observations on the 'constitutional aspects' of the EAW.

Indeed, what is still lacking is a 'hard case' inviting a Finnish court to really ponder the application of the European Arrest Framework Decision and its domestic implementing enactment in light of such constitutional and human rights as the *nulla poena sine lege* rule or fair trial – or the compatibility of the domestic implementing act with the European Arrest Framework Decision for that matter.[67] Given how the need to adequately safeguard these rights shaped and directed the enactment of the domestic implementing legislation for the EAW, and even to the extent that it is justified to speak about 'the Finnish constitutional challenge to the European Arrest Warrant Framework Decision', extremely complicated questions concerning the status and effects of constitutional and human rights in the application of the European Arrest Warrant may sooner or later emerge. This is especially so because the highest constitutional authority of the country, the Constitutional Law Committee of Parliament, has also generally emphasised that

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[66] Concluding observations of the Human Rights Committee: Finland. 02/12/2004. CCPR/CO/ 82/ FIN. (Concluding Observations/Comments), para. 4.

[67] On 25 February 2010, a reference for a preliminary ruling from the Supreme Court of Finland was lodged before the CJEU in Case C-105/10 PPU *Gataev and Gataeva* [2010] ECLI:EU: C:2010:176. The reference included a number of questions directly or indirectly aimed at finding out whether the domestic implementing enactment was in harmony with the Council Framework Decision on the European Arrest Warrant. However, the reference was subsequently withdrawn due to the cancellation of the arrest warrant.

the domestic implementation of EU legislation is not permitted to weaken the domestic standard of protection of constitutional and human rights.[68]

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 In Finland, there has been only little discussion about the practical challenges regarding a trial abroad. However, when reviewing the proposal for the domestic implementing act for the Framework Decision on the European Arrest Warrant, the Legal Affairs Committee of Parliament briefly emphasised the importance of ensuring that in each and every case appropriate legal aid and assistance is provided to the extradited individual. Hence, the Committee emphasised that Finnish authorities should occasionally take advantage of the possibilities under the Legal Aid Act (Act No 257 of 2002) even if the starting point is that the Member State requesting the extradition of the individual is primarily responsible for providing legal aid and assistance.[69]

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.2–2.3.5.4 Beyond what was already noted about the domestic constitutional discussion surrounding the European Arrest Warrant, the principle of mutual recognition has not been a matter of *constitutional* concern in Finland.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

There has been constitutional concern in Finland that the domestic implementation of EU criminal law may erode such fundamental constituents of the principle of legality as those originating in 'the quality of law'. After all, the principle of legality is not just confined to prohibiting the retrospective application of criminal law. In addition, this principle embodies the fundamental principle that an offence must be clearly defined in law. This condition is essentially satisfied where the wording of the relevant provision indicates what acts and omissions will give rise to the individual's criminal liability. However, it warrants emphasis that this constitutional concern over the erosion of the 'quality of law' standard has not related to the domestic implementation of EU criminal law. Instead, there has been a general constitutional concern that the domestic transposition of EU law has diluted the 'quality of law', particularly insofar as the law constitutes an interference with fundamental rights. In such situations, the permissible limitations test under the Finnish constitution requires that legislative provisions on limitations must be sufficiently clear and precise.

Against this background, the Constitutional Law Committee has emphasised that the domestic implementation of EU measures is not permitted to weaken the quality of law standard.[70] In addition, it has on several occasions emphasised the

[68] Opinion 23/2001 of the Constitutional Law Committee.

[69] Report 7/2003 of the Legal Affairs Committee.

[70] See e.g. Opinion 9/2004 of the Constitutional Law Committee.

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importance of taking the quality of law standard into account when implementing EU criminal law at the level of domestic legislation. In particular, the Committee has a very negative attitude to criminalisation '*in blanco*', so that the implementing act only mechanically states that the provisions of the EU measure in question 'are in force' domestically.[71]

From this premise, the Committee has emphasised that the appropriate method of implementing EU criminal law is *transformation*, i.e. enacting domestic criminal law in harmony with the EU measure in question.

By contrast, the Committee has been very critical towards using the method of *incorporation* so that the incorporating act simply states that the provisions of a certain EU measure 'are in force' domestically.[72] Similarly, the Committee has been reserved regarding *reference* as a method of implementing EU criminal law. This method involves clauses in domestic legislation stipulating that a certain EU measure must be taken into account in the application of the domestic legislation in question. It deserves emphasis that these constitutional reservations by the Constitutional Law Committee regarding the use of methods of incorporation and reference also apply regarding the implementation of EU law in general, although they have become emphasised in the context of EU criminal law.

2.4 The EU Data Retention Directive

2.4.1 In Finland, the implementation of the EU Data Retention Directive[73] in 2008 was not seen as posing a major constitutional problem. While the Constitutional Law Committee regarded the domestic implementing enactment as constituting an interference with the right to private life and the protection of personal data under Sect. 10 of the Constitution and, accordingly, considered whether such interference was justified under the permissible limitations test of the Finnish Constitution, the Committee ended up taking the view that the domestic implementing enactment passed the permissible limitations test.[74] Hence, the Committee regarded the Act as being in harmony with the Constitution. The primary reason for this outcome was simply that the directive 'only' regulated the obligations of the service providers to retain such communications data as location data and traffic data. By contrast, the directive did not regulate access to such data by the competent authorities of the

[71] See e.g. Opinions 9/2007, 53/2006, 40/2002, 31/2002, 6/2002, 45/2001 and 5/1998 of the Constitutional Law Committee.

[72] The Committee adopted this view already during the very first years of EU membership. See e.g. Opinion 20/1997 of the Constitutional Law Committee.

[73] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[74] See Opinion 3/2008 of the Constitutional Law Committee.

Member States for law enforcement purposes. Moreover, the Directive explicitly provided that no data revealing the *content* of the communication may be retained. In Finland, these characteristics of the Directive combined to make the outcome that the directive left enough leeway for the domestic legislator to take requirements stemming from constitutional rights and human rights appropriately into account in the implementation of the directive. Put differently, it can be said that Finland took advantage of the margin of discretion left by the directive in a constitutional rights-friendly way, by specifying the conditions for access to data and the length of retention in domestic law much more narrowly than in the directive. Finally, it is to be emphasised that the scope of mandatory data retention was limited only to such data that the providers of publicly available electronic communications services or of public communications networks were nonetheless generating or processing for their own commercial purposes.

Originally, the data retention directive was implemented by means of an amendment (Act No. 343 of 2008) of the Act on the Protection of Privacy in Electronic Communications (Act No. 516/2004) that was intended to ensure confidentiality and protection of privacy in electronic communications. This Act implemented Directive 2002/58/EC of 12 July 2002 of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.[75]

Just recently, Finnish legislation in the area of electronic communications was subject to a very comprehensive reform, as the New Information Society Code (Act No. 917/2014) entered into force on 1 January 2015. This Code compiles all domestic legislative provisions on electronic communications, including the provisions on data retention. The Code also updates domestic legislation in areas such as e-privacy, consumer protection, communications networks and data security, and collects the formerly fragmentary legislative regime under one umbrella.

Originally, the proposal for the Information Code actually included more extensive provisions on mandatory data retention than were previously required by the Act on the Protection of Privacy in Electronic Communications; the new Code would have enabled retention of data collected in the context of browsing websites, for example.

However, when the bill concerning the New Information Society Code was pending before Parliament in spring 2014, the CJEU gave its judgment in the *Digital Rights Ireland* case.[76] The judgment significantly affected the parliamentary deliberations on the bill.

In April 2014, the Constitutional Law Committee of Parliament gave its Opinion on the proposed legislation in light of the Constitution of Finland and the CJEU's

[75] [2002] OJ L 201/37.

[76] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

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ruling.[77] In its Opinion, the Committee[78] discussed the judgment by the CJEU in the *Digital Rights Ireland* case at length when reviewing the Government Bill (No. 221/2013) for the Information Society Code to the extent that the bill included provisions on data retention. Although the Constitutional Law Committee did *not* take the view that the judgment of the CJEU would prevent the adoption of new domestic legislation on mandatory data retention, the Committee nonetheless required some significant specifications to the proposal so as to achieve compliance with the Finnish Constitution and the EU Charter of Fundamental Rights, as seen in the light of the CJEU's judgment. The following points are worthy of elaboration for the present purposes:

1. The Constitutional Law Committee took the view that the EU Charter of Fundamental Rights, as interpreted by the CJEU in *Digital Rights Ireland*, still applies in this area despite the invalidity of the Data Retention Directive. Hence, the Finnish legislator was bound to take the Charter into account alongside the Constitution even though the Data Retention Directive was invalid *ex tunc.* The Committee apparently took the applicability of the Charter for granted since its opinion does not include any specific reasoning as to why the Charter still applies despite the invalidity of the Data Retention Directive *ex tunc*.
2. The Committee required the removal of all explicit references in the proposed legislation to the Data Retention Directive. It also demanded some other modifications to the bill, so as to comply with the requirements stemming from the right to privacy and the protection of personal data under Sect. 10 of the Finnish Constitution and the EU Charter, essentially requiring that data be retained only when strictly necessary for investigation, detection and prosecution in relation to a serious crime.
3. The Committee noted that its own well-established doctrine regarding the constitutional protection of 'metadata' (information about parties and about messages being sent and delivered between them) should be revised. Earlier, the constitutional doctrine had been that the processing of metadata was invariably seen as falling within such 'peripheral areas' of privacy and data protection where relatively wide-ranging limitations were permissible because the legislator was understood to enjoy a wide margin of discretion. Conversely, the intensity of constitutional review by the Committee of legislative provisions involving the processing of metadata had been 'low'. Now, however, the Committee took the view that the distinction between the content of electronic communications and such metadata as location data and traffic data could no longer be treated as a determining factor for the assessment of the level of fundamental rights intrusions. As a combination of various forms of metadata

[77] Opinion 18/2014 of the Constitutional Law Committee.

[78] The Constitutional Law Committee submitted its Opinion to the Transport and Communications Committee of Parliament which also discussed at length the provisions on data retention, including the judgment by the CJEU. Also, the Administration Committee (Opinion of 9/2014) gave its Opinion on the bill, including observations on data retention.

can reveal a lot of confidential and sensitive personal information, constitutional attention should also be given to the assessment of the details of a particular situation, i.e. what types of metadata are at issue and what is their combined effect upon the right to privacy and data protection.

4. The Committee concluded that the proposed legislation did not include the flaws that jointly triggered the invalidity of the Data Retention Directive in the CJEU's judgment.
5. The Information Society Code with its provisions on mandatory data retention entered into force on 1 January 2015. According to the revised Sect. 157 of the Information Society Code, telecommunications companies, which are to be specified by a decision of the Ministry of the Interior (*sisäministeriö*), must retain location and traffic data as follows: (1) 12 months for data from a mobile network-based telephone or SMS-service; (2) 6 months for data from an internet-based telephone service, and (3) 9 months for data from an internet connection service. The retained data may only be used in the investigation and prosecution of the serious crimes stipulated in Chap. 10 Sect. 6(2) of the Coercive Measures Act (*Pakkokeinolaki*, Act No. 806/2011).

Hence, the period of retention is limited to 12 months at the most, and only data necessary for the purpose of preventing or investigating relatively serious crimes can be retained. Finnish law also seeks to make at least some distinctions between the categories of data on the basis of their possible usefulness for the purposes of the prevention, detection or prosecution of serious crimes.

Also, authorisation by a court is invariably necessary for each request for access to retained data, i.e. access is always dependent on a prior review carried out by a court, as required by the CJEU. Furthermore, unlike in the Directive, Finnish law includes relatively strict conditions on access to and exchange of retained data, including by specifying the national authorities that may be granted access to data to be retained. Finally, Finnish law provides for safeguards relating to the security and protection of data retained by private providers of electronic communications.

In conclusion, Finnish law seems to meet at least several of the requirements set out by the CJEU for mandatory data retention quite well although there is certainly room for arguing that the scope of application of retention should still be more limited in order to curtail the legislative framework on mandatory data retention to what is 'strictly necessary' as the CJEU required in its judgment.

Finally, it deserves emphasis that the judgment by the CJEU exemplifies how the case law of the EU Court of Justice can make a *positive* contribution to the evolution of domestic constitutional law in the area of fundamental rights protection. Indeed, the impact of EU membership on the domestic system for the protection of fundamental and human rights has often been positive, rather than harmful, in the context of several constitutional rights in Finland. Examples of the positive effects of EU membership abound, but the most noteworthy are perhaps those positive effects of EU membership that pertain to the constitutional protection of non-discrimination and equality.

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2.5 Unpublished Or Secret Legislation

2.5.1 In Finland, the constitutionality of unpublished or secret measures has not been raised as an issue. However, it may be added that generally the Constitution prohibits the existence of any 'secret' or 'unpublished' legislation. To begin with, Sect. 79 of the Constitution, entitled 'Publication and entry into force of Acts', explicitly requires that the Government shall 'without delay' publish an Act in the Statutes of Finland after signature by the President of the Republic (Sect. 2). Moreover, subsection 4 of the same provision unequivocally requires that all Acts 'are enacted and published in Finnish and Swedish' that enjoy the status of 'national languages of Finland' in accordance with Sect. 17(1), of the Constitution.[79] Hence, it can be said that the validity of the law does not only depend on its publication *per se* but on its enactment and publication in both Finnish and Swedish. Finally, it also follows from the rule of law principle and the permissible limitations test for interferences with constitutional rights that each and every piece of legislation must be accessible and published, especially insofar as that legislation includes provisions on the exercise of public powers or the rights and obligations of individuals or other private parties.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 In Finland, EU law has not directly affected the standard of protection of constitutional rights in the area of property rights. However, it can be noted on a general level that, as with the ECHR, EU law has contributed to a general inclination towards a model of constitutional reasoning in which general principles, inductive reasoning, precedents and case law make up the methods and body of both human rights law and rights constitutionalism. Namely, the traditional Finnish approach was characterised by a very formal, rule-focused reasoning that basically reflected the idea that the legislature has the competence to define the actual content of constitutional rights and that judicial powers must be exercised in this pre-legislated and judicially self-restrained framework. However, both international human rights law and EU law have emerged as one of the major reasons underpinning the transformation in the Finnish constitutional and human rights culture in

[79] Aside from providing explicitly that Finnish and Swedish are the national languages of Finland, Sect. 17(2), guarantees the right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language. Moreover, the public authorities are obliged to provide 'for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis'.

which reasoning based on such principles as legal certainty, non-retroactivity and proportionality have assumed greater significance in constitutional reasoning.[80]

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 The constitutionality of euro crisis measures, among them the Treaty Establishing the European Stability Mechanism (ESM Treaty), has been discussed widely in Finland, both during the negotiation of the various crisis measures – be they international treaties or EU secondary law measures – as well as during the time of approving the measures at national level.[81] Ultimately, Parliament has approved all the new agreements and brought them into force nationally, and has given the Government a mandate to approve the Union measures. The Constitutional Law Committee has taken a rather active role in evaluating these measures.[82]

Already during negotiations, the draft ESM Treaty was addressed by Parliament under Sect. 96 specifically due to its effects on state finances. In the process of approving the Treaty, it was not considered to result in such a transfer of competence that would have to be considered significant (Sects. 94(2) and 95(2), of the Constitution). The Treaty was accepted in Parliament and brought into force nationally in accordance with the ordinary legislative procedure pertaining to an Act of Parliament.

The drafts of the ESM Treaty were scrutinised *ex ante* by Parliament and its Constitutional Law Committee before the treaty was submitted to the Parliament for final approval. The Constitutional Law Committee had established that the treaty impinged upon the legislative and budgetary powers of Parliament and thus approval by the latter was required. In some matters the Committee considered unanimous decision making in the stability mechanisms to be a precondition for compatibility with Finnish sovereignty and the Constitution. In particular, the emergency decision making procedure and the scope of decision making by qualified majority in the ESM Board of Governors provoked constitutionality issues. In the *ex ante* review, it seemed that the financial liabilities of Finland could also be increased by a qualified majority decision of the Board of Governors above the maximum limit defined in the Treaty, even if Finland opposed such a decision. This possibility was considered to affect national sovereignty and the budgetary competence of the Finnish Parliament, and led to demands to specify the agreement in this respect.[83] The Finnish constitutional demands were understood during the

[80] For these effects of European integration on the Finnish legal culture, see e.g. Ojanen 2009a.

[81] See for example Leino and Salminen 2013, and Tuori and Tuori 2014.

[82] See the numerous Opinions of the Committee listed in Leino and Salminen 2013.

[83] Opinions 25/2011, 22/2011, 1/2011 and 13/2012 of the Constitutional Law Committee.

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negotiations on the European level, and the unanimity requirement was introduced into the Treaty.

According to the previously adopted interpretation, when considering the Treaty, the Constitutional Law Committee assessed the amount of Finnish capital investment in the European Stability Mechanism (ESM) and the related risks against the so-called Constitution-based obligations of the state.[84] It required that all the financial liabilities and investments in the various parallel mechanisms be calculated in order to get a clearer picture of the liabilities. In order to establish the applicable procedure for the approval and bringing into force of the Treaty, the Committee considered the total amount of public debt and the risks of the investment. In the ESM, the Finnish part of the paid-in capital (1.4 billion EUR) and on demand callable capital (11 billion EUR) was found to be extensive when compared for example with the annual state budget. The annual state budget is approximately 54 billion EUR (2015). The paid capital is under 1% of the annual GDP, and the maximum is about 5% of the GDP.

Of major importance for the evaluation of the state's current liabilities and whether these might possibly compromise the ability of the state to take responsibility for its constitutional duties was the interpretation that Parliament has the possibility to genuinely control and influence the Finnish member of the ESM Board of Governors, where for example decisions on the capital payments are made unanimously. Through these interpretations of its participation and information rights, Parliament is now involved in the functioning of the mechanisms. Parliament has based the requirement concerning its participation in national decision making on Sects. 96 and 97 of the Constitution. The Finnish Parliament has considered that, for example, decisions relating to the granting of loans are as to their nature and their financial implications considered to be so significant that they require the provision of relevant information by the Government prior to decision making within the ESM in order to safeguard the prerogatives of the Parliament. It has even required that these constitutional requirements for the participation of Parliament through the national representative be reflected in the decision making rules, arrangements and practices within the ESM.[85]

2.7.2 When the elements of the Banking Union were discussed for the first time in the Constitutional Law Committee of Parliament in the *ex ante* review of the proposals, the Committee took a rather dubious, perhaps even a somewhat suspicious position towards the competence of the Union, and some elements in the international treaty (Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund) that were planned in this context were evaluated as to whether they possibly contained constitutionally problematic features.[86] When it then later reviewed the national implementing legislation and the same legislation

[84] See Opinions 13/2012 and concerning the European Financial Security Facility and the Framework Agreement Opinion 5/2011 of the Constitutional Law Committee.

[85] Opinion 13/2012 of the Constitutional Law Committee.

[86] Opinion 28/2013 of the Constitutional Law Committee.

package contained the approval of an international agreement between the Member States and its incorporation into national law, no such problems were raised. While the legislation was carefully evaluated, it was not, however, deemed to cause problems which would have affected the relevant procedure. The international agreement was approved as it was not considered to result in a transfer of competence that would need to be considered significant (Sects. 94(2) and 95(2) of the Constitution), and it was accepted in Parliament and brought into force nationally in accordance with the ordinary legislative procedure pertaining to an Act of Parliament.[87]

2.7.3 Not applicable. Finland has not been subject to a bailout or austerity programme.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Up until now, Finnish courts have yet to request a preliminary ruling by the CJEU on the validity of an EU measure. The peculiarity of the lack of preliminary ruling requests to the CJEU on the validity of EU measures is emphasised by the fact that the number of cases involving the application of constitutional rights and human rights by the courts has proliferated significantly since the mid-1990s. Furthermore, there have been a number of the specific form of constitutional challenge to the implementation of EU legislation at the legislative phase, as was already noted in the context of the domestic implementation of the European Arrest Warrant Framework Decision.

It may be added in this context that the total number of references by Finnish courts for a preliminary ruling to the CJEU has remained low. As of the end of 2014, Finnish courts had made 91 references.[88] Given that Finland joined the EU in 1995, the total number of references is so low that it may evince some sort of judicial 'resistance' to or 'shunning' of EU law by the Finnish courts.[89] However, Finnish courts have embraced such fundamental qualities of EU law as direct effect, indirect effect and primacy well, although the cases in which Finnish courts have given primacy to EU law over conflicting national law have remained relatively few in number. Instead, EU law predominantly enters Finnish courts in the form of questions concerning the effect of EU law on the interpretation of Finnish law (the indirect effect of EU law). This approach appears to be of particular importance in cases involving *prima facie* tension between EU law and national law. In such cases, Finnish courts try to interpret, to the extent possible, national law in harmony

[87] Opinion 25/2014 of the Constitutional Law Committee.

[88] It is also significant to note that the Supreme Administrative Court of Finland alone has made 45 references for a preliminary ruling by the CJEU.

[89] For the application of EU law in Finnish courts, see in more detail Ojanen 2009a, pp. 198–201.

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with EU law so as to avoid any open conflict. The traditional constitutional doctrine emphasising the subordination of the judiciary to the legislature probably explains the judicial predisposition towards indirect effect, as it involves a similar method as that traditionally endorsed by Finnish courts in situations involving the granting of judicial effect to constitutional and human rights.

Finally, it is to be noted that the primary authority of constitutional interpretation and review in Finland – the Constitutional Law Committee of Parliament – is not considered a court or tribunal that is entitled to make a request for a preliminary ruling by the CJEU. This significantly hampers *ex ante* review by the Committee of proposals for EU measures or their domestic implementing enactments for their compatibility with the Constitution and human rights treaties, including the EU Charter of Fundamental Rights, because such a review often requires a sufficient knowledge of the meaning of EU law. The inability of the Committee to make preliminary ruling references also means that the Committee cannot engage in the same kind of constitutional dialogue with the CJEU as the constitutional courts of other Member States of the EU increasingly tend to have.

2.8.2–2.8.4 It is now submitted that the standard of judicial review by the EU courts cannot, at least in general terms, be considered lower than that applied by Finnish courts. Quite the contrary perhaps: it is to be emphasised that the traditional Finnish position towards judicially protected rights was remarkably 'distrustful', and 'reserved' until the late 1980s. Although Finland has had a written constitution with a constitutional rights catalogue since 1919 and its human rights treaty ratification record can be considered excellent, constitutional and human rights and the judiciary have assumed a rather marginal significance on the Finnish scene of constitutionalism. Instead, the country's constitutional system has revolved around such premises as the law as a supreme expression of the people's will, as well as around ideas about democracy as majority rule.[90] The fundamental principle of legislative supremacy was intensified by the statutory legal system, as well as by a positivist conception of law.[91] Finally, there was a rigid doctrine prohibiting judicial review of legislation for its compatibility with the Constitution.[92]

Given these constitutional traditions, there was a lack of any genuine judicial review based on constitutional or human rights in Finland before the 1990s. Instead, the traditional approach was a general inclination towards the idea that the legislature has the competence to define the actual content of rights, and that judicial powers must be exercised in this pre-legislated and judicially self-restrained

[90] See Nergelius 2006.

[91] A difference can be detected between the Nordic countries in that while Scandinavian realism remains the mainstream philosophy in the other Nordic countries, Finland maintains a more traditional Kantian-Kelsenian normativist perspective of legal positivism. As a historical background to this, reference can be made to the successful legal positivist resistance by the Finnish legal and political elite to campaigns of Russification in the late 19th and early 20th century when Finland was still an autonomous Grand-Duchy within the Russian Empire (until 1917). See also Scheinin 2008.

[92] See especially Lavapuro et al. 2011.

framework. Indeed, there was hardly any room in the Finnish traditional thinking for a 'strict' standard of judicial review.

It now goes almost without saying that EU membership, together with international human rights treaties with the ECHR at their apex, have propelled the strong tendency towards rights-based constitutionalism since the late 1980s, with the outcome that the overall constitutional setting today is characterised by the peculiar combination of *ex ante* review by the Constitutional Law Committee of Parliament and a less traditional but now important *ex post* review by the courts.[93] While there may be some differences between the standard of review by the EU courts and domestic constitutional actors at the level of individual cases, it is submitted here that it is simply impossible to maintain that in general the domestic standard is higher than that applied by the EU courts – or *vice versa*.

As noted already above, the judgment of the CJEU in the *Digital Rights Ireland* case warranted the adoption of a new approach by the Constitutional Law Committee of Parliament, as the Committee acknowledged that a rigid distinction between 'content' and 'metadata' (information about the parties and about the messages being sent and delivered between them) can no longer be treated as a decisive and determining factor for the assessment of fundamental rights intrusions due to surveillance (see Sect. 2.4).

2.9 Other Constitutional Rights and Principles

2.9.1 In Finland, the Constitution unequivocally requires that legal provisions on the exercise of public power, as well as on the rights and obligations of individuals or other private parties, must be laid down by an Act of Parliament. This premise is indicated by a number of constitutional provisions, such as Sect. 80 and Sect. 95 of the Constitution.[94] It follows that all directives and other EU measures that regulate the rights or duties of individuals and other private parties or that otherwise are of a 'legislative nature' must be implemented through an Act of Parliament.

Yet tension can be noted as regards the methods of implementation of EU legislation where the method of incorporation through an Act of Parliament *in blanco* has been used, instead of the method of transformation which is clearly the most appropriate for the purpose of taking the requirements stemming from constitutional rights and the Constitution in general into account appropriately, as this method entails enacting domestic legislation in harmony with the EU measure in

[93] Ojanen 2009a.

[94] Section 80(1) provides that '[t]he principles governing the rights and obligations of individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts of Parliament'. Section 95(1), in turn, provides that '[t]he provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act of Parliament.' Several constitutional provisions on constitutional rights also require that more detailed provisions on those rights be laid down by an Act of Parliament.

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question. The method of incorporation on the other hand simply entails a statement in an Act of Parliament that a certain EU measure is in force domestically. Hence, it invites problems insofar as 'the quality of law' is concerned (see also the discussion in Sect. 2.3.6). The same can be said about the third major method of implementation of EU measures – reference, i.e. special clauses in domestic legislative provisions which stipulate that a specified EU measure is to be taken into account in the application of the Act in question. The Constitutional Law Committee of Parliament has on several occasions emphasised that the method of transformation should be preferred in the domestic implementation of EU legislation, especially in cases in which EU legislation affects individual rights or imposes obligations on individuals, or entails interferences with fundamental and human rights.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 While there has been some scholarly discussion about the possible significance of the Finnish constitutional traditions, including constitutional identity, within the European context, this topic has yet to figure at the level of domestic constitutional practice, as neither the Constitutional Law Committee of Parliament nor the Finnish courts have thus far articulated 'Finnish constitutional traditions' in their practice.[95]

However, it should be emphasised that the Constitutional Law Committee of Parliament could very well take advantage of arguments originating in domestic constitutional traditions, including domestic constitutional identity, when expressing its views on the constitutionality of proposals for EU measures under Sect. 96 of the Constitution. Similarly, Finnish courts could refer to the long-standing constitutional traditions or idiosyncratic elements of the 'Finnish constitutional identity' when requesting a preliminary ruling from the CJEU on the interpretation of EU law or the validity of EU legislation. This has simply yet to be done.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As already noted, one of the concerns in Finland on the threshold of Finland's accession to the EU was that EU membership might erode the national standard of protection of fundamental rights. Hence, some solutions of the 1995 Fundamental Rights Reform can be seen as attempts to protect certain constitutional rights against opposite tendencies that EU membership might entail in the long run.[96] In 2001, the Constitutional Law Committee also went so far as to say that the

[95] See Salminen 2014.

[96] See e.g. Ojanen 2007, p. 157.

domestic implementation of EU law was not permitted to weaken the domestic standard of rights protection[97] – a claim with readily obvious potential for conflict with the primacy of EU law over all conflicting domestic law, especially in light of the judgment by the CJEU in the *Melloni* case[98].

To date, the Constitutional Law Committee has already issued a myriad of Opinions on either proposals for EU measures or domestic implementing enactments of regulations, directives and other EU instruments in light of the Constitution and human rights obligations binding on Finland. It is possible to identify the following major trends and patterns in the welter of details in these Opinions.

The first major observation to be made is that despite Finnish fears to the contrary, EU membership has not posed any significant threat to domestic fundamental rights. In a clear majority of situations, it has been possible to implement EU law without having to fall short of the appropriate observance of fundamental and human rights. In other words, the constitutional premise that the implementation of EU measures may not weaken the protection of fundamental rights has so far very seldom resulted in the following optimisation dilemma: an effort by the national legislature or some other state organ to ensure the observance of fundamental rights undermines the effective implementation and enforcement of EU law – or *vice versa*. Indeed, it deserves to be emphasised that EU membership has actually contributed to the protection of fundamental and human rights in Finland in the area of several rights. Perhaps most noteworthy are the positive effects of EU law on the principles of equality and non-discrimination, as well as fundamental environmental rights.

The second major observation is that even if there has occasionally been a *prima facie* tension between domestic fundamental rights and EU law, the practice of the Constitutional Law Committee suggests an attempt to blunt the edge of any open conflict between domestic fundamental rights and EU law in a variety of ways. To start with, the Committee has avoided the reality of any open conflict by interpreting *EU measures* in a manner designed to meet the requirements stemming from domestic fundamental rights.[99] The imprecise and open-ended wording of EU measures has often eased this task. Moreover, the Committee has increasingly taken advantage of the premise that EU law itself generally ensures an effective protection of fundamental rights and, moreover, demands that all areas of the EU legal order must be interpreted in a manner sensitive to EU fundamental rights.[100] Yet another reason for the lack of tension between domestic fundamental rights and EU law has been that the EU measures in question have often assumed the character of minimum standard measures, i.e. they have only established the lowest common denominator in their field of application. Consequently, it has not been contrary to

[97] Opinion 25/2001 of the Constitutional Law Committee.

[98] Case C-399/11 *Melloni* [2013] EU:C:2013:107.

[99] Opinion 5/2001 of the Constitutional Law Committee.

[100] See e.g. Opinion 5/2001 of the Constitutional Law Committee.

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EU law to grant more extensive protection to domestic fundamental rights under national law.[101] Finally, EU acts have most often been directives or framework decisions, which usually allow a broader or stricter margin of discretion for the Member States in their implementation.

Thirdly, it can be noted that there are a few situations involving the implementation of EU law in which the observance of fundamental and human rights has compromised the 'maximal' implementation of EU law. Aside from the implementation of the European Arrest Warrant Framework Decision discussed above, reference can be made to the domestic implementation of the Council Framework Decision of 13 June 2002 on combating terrorism.[102] However, these situations have clearly been very rare exceptions to the rule which is simply that EU membership has not brought about any significant erosion of the domestic protection of fundamental and human rights.

Finally, it should be noted that the whole domestic thinking about 'stricter constitutional standards' has proved to be more self-sufficient and self-satisfied Finnish thinking than something reflecting the reality of Finnish legal practice. In Finland, the meaning of rights and, accordingly, the standard of protection is still very much dependent on majoritarian notions of democracy, formal notions of legal certainly and other similar factors that combine to cause what can be called a 'minimalist approach' to constitutional and human rights. Although the ECHR and other human rights treaties should feature 'only' as a minimum standard of rights protection, both the Constitutional Law Committee and the Finnish courts are far too often satisfied with the standard of protection under the ECHR, as indicated by the existing case law of the ECtHR. Hence, the problem is not only 'a race to the bottom', i.e. to the lowest common denominator of rights protection, but also the disregard of other human rights treaties beyond the ECHR.[103]

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 In principle, the Finnish system of abstract *ex ante* constitutional review by the Constitutional Law Committee of Parliament provides a good framework for democratic – or, perhaps more to the point, parliamentary – debate on constitutional rights and values in the context of European integration. Up until now, however, the most significant democratic debates on constitutional rights and values or fundamental constitutional principles in general have not taken place within the context

[101] See e.g. Opinions 1/2001 and 11/2001 of the Constitutional Law Committee.

[102] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3.

[103] For a minimalist approach to constitutional and human rights, see especially Lavapuro et al. 2011, especially pp. 518–529.

of the implementation of the EAW Framework Decision or the EU Data Retention Directive, although there has been some discussion and debate in Parliament and elsewhere in Finnish civil society on these two topics. Instead, the most noteworthy democratic debates have related to the constitutionality of various measures, programmes and other instruments pertaining to the so-called euro crisis. As was already noted above in Sect. 2.7, Finland and particularly its Constitutional Law Committee were actually the forerunners in calling attention to various constitutional questions pertaining to the ESM Treaty and other instruments, and already at the time when these instruments were still at their draft stages.

2.12.2–2.12.3 The authors of this report are of the view that if a certain EU measure has raised serious constitutional questions in a number of constitutional courts or with similar domestic constitutional actors, this might very well warrant the *interim* suspension of the application of such measure until its validity has been resolved. Similarly, it is at least thinkable that the unconstitutionality of a certain EU measure might feature as a defensive argument in infringement proceedings against a Member State, although the admissibility of this argument would eventually be up to the CJEU to decide in light of the EU legal order as a whole, including the EU Charter of Fundamental Rights.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 The Experts cannot share the concern about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. A reference is made here to what has been observed about the effects of EU membership on the domestic system for the protection of constitutional rights and human rights throughout Part 2 of the report. However, this is not to deny that there have been some situations in which EU law has fallen below the domestic standard of protection. Moreover, the implementation of EU law has sometimes compromised the 'quality of law' which is one important dimension of the rule of law principle and fundamental and human rights protection.

Overall, therefore, the reduction of the domestic standard of rights protection and the rule of law principle by EU membership can be described as 'low' and 'limited'.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The Constitution of Finland does not include any specific rules on international organisations beyond the EU and the general internationalisation clause,

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'Finland participates in international co-operation for the protection of peace and human rights and for the development of society' (Sect. 1(3)), as was already noted in Part 1 of this report.

3.1.2 For the background of the above-mentioned internationalisation clause, see Sects. 1.2.1 and 1.5.3.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 As a matter of domestic constitutional law, the hierarchical status of the domestic incorporating Act of an international treaty determines the form and rank of the treaty provisions in the domestic legal order. As international treaties are brought into force domestically either through an Act of Parliament *in blanco* or through a similar government decree, it follows that the formal status of an international treaty assumes either the hierarchical rank of an Act of Parliament or a government decree. Moreover, the Constitutional Law Committee of Parliament has emphasised that the method of incorporation warrants the direct application of international treaties by the domestic courts and authorities.[104]

Insofar as the issue of ratification and implementation of treaties under international law, including the founding treaties of the EU, are concerned, in the Constitution of Finland, the relationship between Finnish law and international law has traditionally been understood as representing the dualist approach. Therefore, no international treaty can be part of Finnish law solely by virtue of its acceptance by Parliament. A distinct domestic legal enactment is also required for the purpose of making any particular international treaty part of the Finnish legal order. The 'dualist approach' is clearly indicated by Sects. 94 and 95 of the Constitution, which distinguish between 'Acceptance of international obligations and their denouncement' (Sect. 94) and 'Bringing into force of international obligations' (Sect. 95). However, as the predominant method of implementing international treaties in Finland is incorporation either through an Act of Parliament *in blanco* or through a similar government decree, the Finnish constitutional position towards international treaties represents dualism formally, but monism in practice.

It also deserves emphasis that international human rights treaties are a special case among international treaties in the domestic constitutional setting,[105] as they assume what might be called *semi-constitutional status*. This feature is the outcome of the following four factors: (i) several constitutional provisions explicitly refer to both domestic constitutional rights and international human rights; (ii) the method of incorporation warrants their direct applicability by domestic courts and authorities; (iii) courts and authorities are obliged to interpret all domestic law, including

[104] See e.g. Opinion 2/1990 of the Constitutional Law Committee on the direct applicability of the ECHR due to the method of incorporation.

[105] See Scheinin 1996, pp. 259–260.

constitutional provisions on constitutional rights in a 'human rights-oriented' way; and (iv) the status of international human rights treaties as a minimum standard of domestic rights protection.

3.3 Democratic Control

3.3.1 In the Finnish system, Parliament is involved in the negotiation, acceptance and incorporation of treaties according to the same sets of rules as already explained in Part 1. As to the acceptance and incorporation of treaties, Sect. 94 and Sect. 95 of the Constitution apply. Although the Government has a major role in international affairs alongside the President, depending on the content of the treaty, Parliament has competence to accept and incorporate treaties. In the negotiation phase, Sect. 97 is relevant from the point of view of Parliament and democratic control. It should be noted, however, that Sect. 96 provides Parliament better means for controlling the Government's actions. Thus, in many cases it is important to discuss whether the international treaty in question, despite having the form of an international treaty, is *de facto* an EU affair. In practice, the division between Sects. 96 and 97 has become indistinct.

The European Stability Mechanism provides an excellent example of this. This applies to scrutiny beyond its ratification as well. Through the interpretations of participation and information rights, Parliament is involved in the functioning of the mechanism.

3.3.2 Only EU accession has been subject to a referendum. Sometimes, in political discussions, NATO accession is mentioned as one possible case for a referendum. Typically, the legitimacy of this kind of decision is mentioned as the rationale for a referendum. As already mentioned above, the Constitution allows for such referendums, but they are not constitutionally required.

3.4 Judicial Review

3.4.1 See Sects. 2.1 and 2.8.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 The Constitution of Finland includes several rights which are a basis for the social welfare dimension of the Constitution, and international human rights treaties also have a role in this aspect.

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Nevertheless, the privatisation of public services for example has been rather quick and most certainly affects the welfare dimension of the Constitution. Delegation of public powers has occurred at all levels of the administration, especially at the local level. Section 124 of the Constitution of Finland provides the specific constitutional context for the limitations on privatisation. According to Sect. 124,

> [a] public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities.

In Finland, global governance has not been a major or direct cause of the possible weakening of the welfare state or the erosion of the social elements of the society, rather this has been caused by domestic politics which are of course highly dependent on European and international tendencies.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 In Finland, there has been some domestic discussion and debate about the possible negative impact of the investment protection regime under the Transatlantic Trade and Investment Partnership (TTIP), which is currently being negotiated between the European Union and the United States. In essence, the worry has been that the planned investment protection regime could transfer powers from the EU, domestic legislators and other public authorities to an arbitration body with the outcome that this could inhibit Finland from adopting stricter legislative measures in such areas as environmental and consumer protection, social policy and employment. Also, the democratic legitimacy of the planned investment protection regime has come into question.[106]

[106] See also Opinion 1/2014 of the Foreign Affairs Committee and Opinion 1/2014 of the Grand Committee where attention is called to the need to secure that the planned investment protection regime would not prevent Finland from adopting new legislation in the areas of consumer protection, environmental protection and employment. The distinguished Finnish legal scholar Professor Martti Koskenniemi has also cautioned in several interviews and public speeches that the free trade pact could allow companies investing in Finland to launch legal action due to restrictions laid out in Finnish legislation. See e.g. (2013, December 15). Professor: Finland's legislative power may be in jeopardy. Helsinki Times. http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in.

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Part III
The Post-Totalitarian or Post-Authoritarian Constitutions of the 'Old' Member States: An Extensive Bill of Rights, Rule of Law Safeguards and Constitutional Review by a Constitutional Court

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European Constitutionalism and the German Basic Law

Dieter Grimm, Mattias Wendel and Tobias Reinbacher

Abstract The German Basic Law of 1949, intended to be the counter-authoritarian answer to the atrocities committed during the National Socialist regime, enshrines a distinctive and widely followed model of constitutionalism, entrenching institutions and procedures for the protection of fundamental rights. The Constitution begins with provisions on human dignity and inalienable human rights. It determines the unamendable substantive core of the constitutional order. A pre-eminent role is held by the German Federal Constitutional Court (FCC), and its judgments are taken into account early in the process of drafting legislation. The report outlines the extensive amendments that have been made to the Constitution to allow for EU and inter-

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national co-operation. Both the Constitution and the Constitutional Court adhere to a Europe-friendly approach, albeit with limits. The FCC has delivered a considerable number of widely discussed constitutional judgments with regard to a broad range of EU measures, from the early *Solange* cases regarding fundamental rights to the more recent *Data Retention*, *ESM Treaty* and *OMT* cases, which are all summarised in the report. The extensive constitutional debates regarding the European Arrest Warrant system are also outlined. In the FCC case law on the euro crisis, a key theme is that financial liabilities ought to remain calculable, in order to preserve a link between the people and democratic representation through Parliament. More broadly, the report observes the way in which the constitutionalisation through EU Treaties of wide-ranging areas of regulation which are normally not found in constitutions has reduced democracy (the 'over-constitutionalisation' thesis developed by Dieter Grimm); a case is made for a revised approach. Regarding contested aspects of transnational law, there has been a constant concern regarding its effects on the social state.

Keywords The Constitution/Basic Law of Germany · Amendment of the Constitution in relation to EU and international co-operation · Euro-friendly interpretation and constitutional limits · German Federal Constitutional Court Inalienable human rights · Constitutional review statistics · *Solange* Data Retention Directive · European Arrest Warrant, extraditions, *nulla poena sine lege*, Judicial review and *ordre public* · ESM Treaty · *OMT* and calculability of financial liabilities · Democracy and parliamentary control over the budget Human dignity and a change of balancing in *Omega* · Constitutionalisation of EU and international law · Changing language of constitutionalism at the transnational level · Identity review · Unamendable core of the constitutional order

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The **German Basic Law of 1949** (*Grundgesetz*, hereinafter also GG) is a legally fully binding constitutional text at the top of the domestic hierarchy of norms, containing constitutional principles and rules that are generally enforceable in the courts. Its historical conditionality is twofold.[1] First and foremost the Basic

[1] Cf. Dreier 2007, para. 6.

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Law was adopted after the fall of the National Socialist regime. It was intended to be the counter-authoritarian answer to the atrocities committed between 1933 and 1945. Secondly, the Basic Law stands in the tradition of the democratic Weimar Constitution, albeit differing significantly in several aspects in order to avoid the constitutional vulnerability and political instability of the latter. The denomination as 'Basic Law' symbolises the provisional character initially attributed to it, leaving open the possibility of a new constitutional order for an eventually unified Germany. However, in 1990 German reunification was put into effect at constitutional level without the adoption of a new constitution.

Despite its originally provisional character, the Basic Law can be described as one of the most important success stories of German post-war history. Not only has the Basic Law provided a normative framework for the effective protection of individual rights and stable political institutions, but there is also a high degree of identification among the citizens with its basic values, institutions and procedures – a civic approach referred to as 'constitutional patriotism' (*Verfassungspatriotismus*) by Sternberger and Habermas.[2] In contrast to constitutional systems in Europe such as in the UK, the Netherlands and the Nordic countries, the German constitutional system is particularly characterised by the eminent role of the German Federal Constitutional Court (*Bundesverfassungsgericht* hereinafter BVerfG), a powerful, but certainly not unquestioned,[3] institution. The BVerfG is a court designed to adjudicate individual complaints on fundamental rights violations as well as disputes on inter-institutional and competence issues. It decides regularly on key questions of political life and holds a high reputation among the German population. Furthermore, the constitutional culture in Germany is characterised by a strong constitutional scholarship traced back, to this day, to the Weimar Republic.[4]

1.1.2 The **substantial key elements and the rationale of the Basic Law** lie in the protection of fundamental rights as well as the safeguarding of the core principles enshrined in Art. 20 of the Basic Law, namely the principles of democracy, federalism, separation of powers, the social state and the rule of law (*Rechtsstaatsprinzip*). While the latter can linguistically be translated by the term 'the rule of law', it should conceptually not be confounded with 'the rule of law' in the sense of the common law system (for the *Rechtsstaatsprinzip*, see in more detail Sect. 2.1.3). The BVerfG has played a central role in enforcing and spelling out these constitutional principles in legal practice. Regarding the fundamental rights in the Basic Law, the BVerfG does not only construe them in the sense of effective individual rights protecting the individual against public authority, but also interprets them as key principles shaping the legal order of Germany as a whole.

[2] Sternberger 1990, pp. 17–31; Habermas 1992, p. 642 et seq. For an analysis of the concept, see Müller 2010.

[3] See Jestaedt et al. 2011.

[4] For a 'genealogy' and the peculiarities of the German scholarship of constitutional law, see Schultze-Fielitz 2013.

Furthermore, the BVerfG has played a major role as a guardian of the inter-institutional balance of powers and (political) minority rights.

1.2 The EU in German Constitutional Law

1.2.1 Germany is a founding member of the European Communities. Its determination to 'promote world peace as an equal partner in a united Europe' has been highlighted in the preamble of the Basic Law ever since its entry into force in 1949:

> **Preamble** [since 1949][5]
>
> … Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. …

However, Germany's membership in the EU (and the former European Communities) was not specifically addressed in the operative part of the German Basic Law until 1992. In the previous decades Germany's membership in the EU was constitutionally based on Art. 24, a clause authorising the 'transfer of sovereign powers' (*Übertragung von Hoheitsrechten*) to international institutions by means of an ordinary statute of Parliament. Despite referring to international institutions in general, Art. 24 had in fact been drafted in 1948/49 with a view to a (future) process of European cooperation.[6] In a comparative perspective, the clause was even described in 1948 by one of its drafters as a 'very nice answer'[7] to the preamble of the French constitution of 1946 (Fourth Republic), which enabled 'limitations' to national sovereignty in its paragraph 15.[8] Although still in force as such, since 1992, Art. 24 no longer applies to EU affairs. The Article reads as follows:

> **Article 24** [Transfer of sovereign powers to international organisations i.a. – since 1949]
>
> (1) The Federation may by a law transfer sovereign powers to international organisations.
>
> …

Constitutional provisions specifically addressing Germany's membership in the EU (*EU-related constitutional law*)[9] were introduced for the first time in December 1992 with regard to the Treaty of Maastricht. Major subsequent revisions took place in the course of the second reform of Germany's federalist system in 2006 and with

[5] Translation by Tomuschat, Currie and Kommers, available at the Website of the German *Bundestag*, https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.

[6] For the historical development, see Sommermann 2008, para. 5 et seq.

[7] Eberhard 1948, p. 70.

[8] The conception and practical importance of these clauses differ significantly, however.

[9] For the terminology, see Mayer and Wendel 2014, para. 1 et seq.

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regard to the Treaty of Lisbon in 2009. Furthermore, the sovereign debt crisis led to several amendments of the financial provisions in 2009 (see Sect. 1.2.3).

The key provision addressing Germany's membership in the EU today is the so-called *integration clause* (*Integrationsklausel*), laid down in Art. 23 of the German Basic Law. This provision was introduced in December 1992 with regard to the Treaty of Maastricht, was subsequently amended in 2006 with regard to the participation of the federal states (*Länder*) in EU affairs and extended in 2009 with a view to the subsidiarity control by national parliaments. It reads as follows:

> **Article 23** [European Union – introduced in 1992, para. (6) amended in 2006, para. (1a) introduced in 2009]
>
> (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.
>
> (1a) The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions from the first clause of paragraph (2) of Article 42, and the first clause of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.
>
> (2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall keep the Bundestag and the Bundesrat informed, comprehensively and at the earliest possible time.
>
> (3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.
>
> (4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the Länder.
>
> (5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.

(6) When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.

(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the Bundesrat.

Alongside the integration clause and the preamble, there are several stipulations addressing specific issues relating to Germany's membership in the EU. The most important[10] are:

Article 16 [extradition i.a. – para. (2) cl. 2 introduced in 2000]

…

(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

Article 28 [participation of EU citizens in local elections i.a. – para. (1) cl. 3 introduced in 1992]

(1) … In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. …

Article 45 [parliamentary EU-Committee – introduced in 1992, cl. 3 added in 2009]

The Bundestag shall appoint a Committee on the Affairs of the European Union. It may authorise the committee to exercise the rights of the Bundestag under Art. 23 vis-à-vis the Federal Government. It may also empower it to exercise the rights granted to the Bundestag under the contractual foundations of the European Union.

Article 88 [Federal Bank & European Central Bank – cl. 2 introduced in 1992]

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.

Article 109 [golden rule i.a. – introduced/amended in 2009]

…

(2) The Federation and the Länder shall perform jointly the obligations of the Federal Republic of Germany resulting from legal acts of the European Community for the maintenance of budgetary discipline pursuant to Article 104 of the Treaty Establishing the European Community and shall, within this framework, give due regard to the requirements of overall economic equilibrium.

[10] Further references to the EU or the former European Communities can be found in Art. 104a(6), Art. 106(1) No. 7, Art. 108(1), Art. 109(5) (financial and budgetary matters) and Art. 87d(1) (air transport administration).

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(3) The budgets of the Federation and the Länder shall in principle be balanced without revenue from credits. The Federation and Länder may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted. Details for the budget of the Federation shall be governed by Article 115 with the proviso that the first clause shall be deemed to be satisfied if revenue from credits does not exceed 0.35 percent in relation to the nominal gross domestic product. The Länder themselves shall regulate details for the budgets within the framework of their constitutional powers, the proviso being that the first clause shall only be deemed to be satisfied if no revenue from credits is admitted.

…

(5) Sanctions imposed by the European Community on the basis of the provisions of Article 104 of the Treaty Establishing the European Community in the interest of maintaining budgetary discipline, shall be borne by the Federation and the Länder at a ratio of 65 to 35 percent. In solidarity, the Länder as a whole shall bear 35 percent of the charges incumbent on the Länder according to the number of their inhabitants; 65 percent of the charges incumbent on the Länder shall be borne by the Länder according to their degree of causation. Details shall be regulated by a federal law which shall require the consent of the Bundesrat.

Alongside these stipulations expressly referring to EU affairs, several general articles play a key role for the constitutional foundations of Germany's membership in the EU. These provisions address key constitutional principles and have been part of the German Basic Law since 1949:

Article 1 [Human dignity, human rights – since 1949]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

…

Article 20 [Basic constitutional principles – since 1949]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

…

Article 38 [elections, right to vote – since 1949]

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

…

Article 79 [constitutional revision, 'eternity clause' – since 1949]

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. …

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 146 [Duration of the Basic Law – amended in 1990 in the context of Germany's reunification]

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

Beyond the stipulations of positive constitutional law, the EU related jurisprudence of the German BVerfG has played an eminent role for the constitutional foundations of Germany's participation in the ongoing process of European integration, but also for the development of the jurisprudence in other EU Member States. The following figure among the most prominent leading cases: *Solange I* (1974),[11] *Eurocontrol I* (1981),[12] *Solange II* (1986),[13] *Treaty of Maastricht* (1993),[14] *Banana Market* (2000),[15] *European Arrest Warrant I* (2005),[16] *Treaty of Lisbon* (2009),[17] *Honeywell* (2010),[18] *Data Retention* (2010),[19] *Greece and EFSF* (2011),[20] *Investment Allowance Act* (2011),[21] *Five Percent Threshold EU Elections* (2011),[22] *ESM & Fiscal Compact – summary review* (2012),[23] *OMT* (2014)[24] and

[11] BVerfG, case 2 BvL 52/71, *Solange I*, order of 29 May 1974, BVerfGE 37, 271.

[12] BVerfG, case 2 BvR 1107/77 et al., *Eurocontrol I*, order of 23 June 1981, BVerfGE 58, 1.

[13] BVerfG, case 2 BvR 197/83, *Solange II*, order of 22 Oct. 1986, BVerfGE 73, 339.

[14] BVerfG, case 2 BvR 2134, 2159/92, *Treaty of Maastricht*, judgment of 12 Oct. 1993, BVerfGE 89, 155.

[15] BVerfG, case 2 BvL 1/97, *Banana Market*, order of 7 June 2000, BVerfGE 102, 147.

[16] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273.

[17] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267.

[18] BVerfG, case 2 BvR 2661/06, *Honeywell*, order of 6 July 2010, BVerfGE 126, 286.

[19] BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260.

[20] BVerfG, case 2 BvR 987/10 et al., *Greece & EFSF*, judgment of 7 Sept. 2011, BVerfGE 129, 124.

[21] BVerfG, case 1 BvL 3/08, *Investment Allowance Act*, order of 4 Oct. 2011, BVerfGE 129, 186.

[22] BVerfG, case 2 BvC 4/10, *Five Percent Threshold EU Elections*, judgment of 9 Nov. 2011, BVerfGE 129, 300.

[23] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195.

[24] BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366.

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European Arrest Warrant II (2015).[25] While the gist of these decisions will be treated below in the context of the respective questions, one should, as a start, distinguish between two lines of case law.

The first line of jurisprudence relates to the scenario of treaty reform. In this scenario the parliamentary Act approving the ratification of a European reform treaty (e.g. Treaty of Maastricht or Lisbon) or an international treaty substantially supplementing EU law (e.g. the Treaty Establishing the European Stability Mechanism Treaty (ESM Treaty) or the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) has been challenged before the BVerfG before the ratification process has been completed. Unlike constitutions such as the French or the Czech, the German Basic Law does not provide for a specific procedure for preventive treaty review, i.e. a procedure specifically allowing the review of the constitutionality of a draft treaty before its ratification. In contrast, the BVerfG's case law relating to treaty reforms is predominantly[26] based on constitutional complaints lodged by individuals who have claimed that the parliamentary approval of ratification would violate the essential content of their right to vote guaranteed by Art. 38(1) of the Basic Law (for the standard of review see Sect. 1.3.3 in more detail).

The second line of jurisprudence concerns direct or indirect challenges to the primacy of application of EU (secondary) law. In this respect the BVerfG has formulated judicial reservations in the field of fundamental rights review, *ultra vires* review and identity review (see in detail Sect. 1.3.4).

1.2.2 The **constitutional amendment procedure** is enshrined in Art. 79 of the Basic Law. According to Art. 79(1), a constitutional revision requires a law expressly amending or supplementing the text of the Basic Law. Furthermore, under Art. 79(2) any such law necessitates a two-thirds majority of the Members of the *Bundestag* and a two-thirds majority of the votes of the *Bundesrat*, i.e. the representation of the federal states. Finally, Art. 79(3) – the so-called '*eternity clause*' – establishes substantial limits to constitutional amendments by protecting the key principles of the German Basic Law (constitutional identity), such as the principle of democracy, the protection of fundamental rights and the federalist structure of Germany against any constitutional revision (see Sect. 1.3.3). All explicit revisions of the German Basic Law, including those relating to EU affairs and introducing and subsequently amending Art. 23, have been put into effect according to this procedure. However, one of the particular characteristics of Germany's EU-related constitutional law that was introduced in 1992 is that Art. 23 (1) cl. 3 acknowledges that Germany's participation in the EU can have the effect of an *implicit revision* of the Constitution, particularly by means of transfers of sovereign powers to the EU (for more details see Sect. 1.3.1).

[25] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 Dec. 2015.

[26] In some cases accompanied by intra-institutional proceedings.

1.2.3 The **background of and reasons for the (explicit) constitutional revisions relating to the EU** are the following. The most important amendment in the EU context has been the constitutional revision of 1992, which introduced the EU specific integration clause (Art. 23).[27] The reform primarily aimed at capturing the constitutional dimension of the European integration process, which had become apparent with the Treaty of Maastricht. A key goal was to reflect the constitutional impact of Germany's membership in the EU, but also to constitutionally frame its objectives, conditions and limits as well as the participation of the *Bundestag* and the federal states in EU matters. A major change effected by the constitutional reform of 1992 was that henceforth transfers of sovereignty with constitutional relevance required a double two-thirds majority both in the *Bundestag* and the *Bundesrat*. While some aspects, such as the precise conditions under which this requirement of a qualified majority applies, were disputed during the reform process and still are today (for details see Sect. 1.3.1), the constitutional reform as a whole was supported by an overwhelming political majority. Alongside the integration clause, the 1992 revision addresses several specific questions, such as the participation of EU citizens in local elections (Art. 28(1) cl. 3) and the creation of the European Central Bank (Art. 88 cl. 2). Furthermore, the mandatory creation of a parliamentary EU committee was constitutionally entrenched (Art. 45). In a comparative perspective it is interesting to see that there was a major EU-related constitutional reform going on in France at the same time, which introduced Art. 88–1 et seq. of the French Constitution.[28] However, the German integration clause differs in many ways from its French counterpart and was not conceptually influenced by the latter.[29]

The second reform of the German federalist system in 2006 amended Art. 23(6) in order to strengthen the participation of the federal states in EU matters in the fields of their exclusive competencies under German constitutional law.[30]

The constitutional revision of 2009 relating to the Treaty of Lisbon had the goal of implementing the new powers of the national parliaments under the subsidiarity protocol. As in France where a similar reform package was put in place, the German constitutional legislator designed the parliamentary right to introduce an action before the Court of Justice as a parliamentary minority right (Art. 23 (1a)). Furthermore, the *Lisbon* judgment of the BVerfG led to a significant change in the accompanying legislation, particularly the enactment of the so-called 'Responsibility for Integration Act', ensuring the prerogatives of the *Bundestag* (for more details see Sect. 1.4).

Finally, in the course of the financial crisis, several provisions relating to fiscal issues were introduced or amended in 2009. The so-called 'golden rule' in Art.

[27] 38th amendment of 21 Dec. 1992. For more details, see König 2000 and Schmalenbach 1996.

[28] See on that Ziller 2003, pp. 261 et seq.

[29] For more details Mayer 2004, pp. 927 et seq.

[30] For more details Pernice 2007, para. 118a et seq.; Classen 2007, pp. 103 et seq.; Hoffmann 2007, pp. 225 et seq.

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109 was introduced three years ahead of the conclusion of the Fiscal Compact. With regard to the ESM Treaty, the act approving its ratification as well as the accompanying legislation, the so-called ESM Financing Act, were enacted in 2012 and provide for a detailed and differentiated framework regarding prior parliamentary approval.[31]

1.2.4 Currently there are no provisions that would be highlighted as in urgent need of amendment in view of EU membership at the political level. Furthermore there are no precise EU-related reform projects that would be underway or that would have failed, such as, for instance, the reform package presented by the Spanish State Council in 2006. What has been discussed vividly since the BVerfG's *Lisbon* judgment, however, are the circumstances under which a new constitution might be required for future steps of European integration (see in more detail Sect. 1.4.2).

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The integration clause allowing for transfers of sovereign powers laid down in Art. 23 of the Basic Law is the key provision regarding the constitutional foundations of Germany's participation in the EU's multi-level constitutionalism.[32] It can be summarised as follows.[33]

Article 23(1) cl. 1 stipulates a *positive obligation* for Germany's state institutions to 'participate in the development of the European Union' with the constitutional objective of 'establishing a united Europe' (*Staatszielbestimmung*).[34] The clause also aims at ensuring the EU's commitment to certain key principles, namely to 'democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity' and to the protection of fundamental rights at a level 'essentially comparable to that guaranteed by this Basic Law'. Hence, the integration clause goes on the 'offensive' by demanding certain structural principles which the EU should respect (*Struktursicherungsklausel*). However, as part of German constitutional law, the clause does not bind EU institutions, but only addresses German state organs when participating in the creation and development of the EU.

Article 23(1) cl. 2 contains the core of the integration clause, i.e. a constitutional authorisation to transfer sovereign powers, i.e. competencies, to the EU (*Integrationsermächtigung*). Two key functions must be distinguished: First, the clause has a constitutive function, allowing Germany to participate in an EU-wide process of *constituting an autonomous public authority* at the EU level by

[31] See Act on Financial Participation in the European Stability Mechanism, 13 Sept. 2012, Sects. 4–6 and Act on the Treaty Establishing the ESM, 13 Sept. 2012, Art. 2.

[32] Pernice 1999, pp. 706 et seq. and Pernice 2009, p. 349 with further references.

[33] In detail Pernice 2006; Classen 2010; Streinz 2014.

[34] Cf. Sommermann 1997, pp. 381 et seq.

transferring, or better, conferring competencies on the EU (regarding the question as to how to conceptualise the act of 'transferring' sovereign powers see Sect. 1.3.2). Secondly, Art. 23(1) cl. 2 has a self-limiting function ensuring the *permeability* of the German constitutional order, i.e. the capacity to limit its own claim of normative exclusivity in order to enable legal rules or principles which emanate from a formally separated legal order to integrate.[35]

Article 23(1) cls. 2 and 3 provide for a dynamic integration clause,[36] i.e. an integration clause that allows substantial (and implicit) changes of the Basic Law in the course of Germany's participation in the European Union without necessitating a textual amendment. According to Art. 23(1) cl. 3 the domestic approval of changes of the EU's founding treaties and comparable regulations which 'amend or supplement this Basic Law, or make such amendments or supplements possible' requires a qualified majority of two-thirds of the Members of the *Bundestag* and two-thirds of the votes of the *Bundesrat* (Art. 79(2)). Referring to the constitutional revision procedure and demanding an elevated degree of democratic legitimation, Art. 23(1) cl. 3 thus mirrors the constitutional implications that are being attributed to the transfer of sovereign powers from the perspective of German constitutional law. The consequence is that every parliamentary approval of the ratification of a reform treaty conferring new powers on the EU, like the treaties of Maastricht or Lisbon, is treated like a constitutional amendment – however, without the need to amend the text. There is an unresolved dispute between the Federal Government and the federal states as to whether every 'transfer of sovereign powers' in the sense of Art. 23(1) entails an implicit revision of the Constitution and thus requires a qualified majority (position of the federal states) or if the constitutional impact of the reform project has to be assessed on a case-by-case basis (position of the Federal Government).[37] Given that a two-thirds majority has always been attained in practice, there has been, until today, no occasion for the BVerfG to decide on the matter. The same applies to the question whether the domestic approval of the ratification of international treaties supplementing EU law and not conferring competencies on the latter, such as the ESM Treaty or the Fiscal Compact, falls within the scope of application of Art. 23(1) cl. 3 and thus requires a qualified majority.[38]

Furthermore, any domestic statute approving the ratification of a reform instrument implicitly amending the Constitution is subject to the substantial limits established by the eternity clause in Art. 79(3).[39] The reference to the 'eternity clause' in Art. 23(1) cl. 3 thus highlights the *defensive* dimension of the Basic Law against (hypothetical) violations of Germany's constitutional identity by the

[35] For the concept see Wendel 2011a, pp. 5 et seq.

[36] Ibid., pp. 145 et seq. for the different categories.

[37] Ibid., pp. 241 et seq. for more details and references.

[38] See on that Lorz and Sauer 2012, pp. 685 et seq.

[39] These limits were already highlighted before the entry into force of Art. 23 by the BVerfG, case 2 BvL 52/71, *Solange I*, order of 29 May 1974, BVerfGE 37, 271, 279 et seq., paras. 43 et seq.

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European integration process. According to the BVerfG, Germany's participation in the EU ends where the limits established by the eternity clause begin.

1.3.2 The debate on how to construe the transfer of sovereign powers is old. In Germany it dates back to the 1950s when the conceptual implications of Art. 24 were intensively discussed in the context of Germany's rearmament. Today it is widely acknowledged that both Arts. 23 and 24 of the Basic Law are an expression of the principle of open statehood (*offene Staatlichkeit*).[40] There is also a widespread consensus amongst scholars and in the jurisprudence that the act of 'transferring' sovereign powers must not be confounded with cession (*in rem*) – a conception that would end up construing public authority at the EU level as a mosaic of national, cumulatively limited sovereign powers. Already back in its *Solange I* decision the BVerfG stated that the concept of transfer of sovereign powers must not be taken literally, and essentially means an 'opening' of the national legal order.[41]

Regarding the principle of sovereignty, one should note that the term 'sovereignty' is not used in the German Basic Law. With the notable exception of the judgments on the *European Arrest Warrant I* and the *Lisbon Treaty* – the latter highlighting the principle of 'sovereign statehood' (*souveräne Staatlichkeit*) – the concept of sovereignty does not figure in the BVerfG's EU-related case law, including the decisions of recent times. Instead, the constitutional key principle for the BVerfG's case law on treaty change is the principle of democracy, as is also and particularly true for the *Lisbon* judgment (see Sect. 1.3.3).

According to the BVerfG, the Basic Law 'abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as "freedom that is organised by international law and committed to it"'.[42] While almost every scholar in Germany would subscribe to the latter, there is, however, an ongoing and highly intense debate on the concrete legal consequences of Germany's open statehood and the question of how to construe the normative foundation of the applicability of EU law in Germany. This debate was particularly intense on the occasion of the *Lisbon* judgment,[43] but also with regard to the more recent decisions in the context of the financial crisis.[44] The *Lisbon* judgment refined the idea of conceptualising the principle of conferral through the lens of national constitutional law. According to

[40] The term goes back to Vogel 1964, pp. 6 et seq.

[41] BVerfG, case 2 BvL 52/71, *Solange I*, order of 29 May 1974, BVerfGE 37, 271, 279, para. 43, within the boundaries of Germany's constitutional identity.

[42] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 346, para. 223.

[43] For mainly critical assessments of the *Lisbon* judgment, see Schönberger 2009; Halberstam and Möllers 2009; Mayer 2011; Jestaedt 2009; Thym 2009; Tomuschat 2009; Everling 2010; Schwarze 2010. For more affirmative appraisals, cf. Schorkopf 2009; Grimm 2009; Gärditz and Hillgruber 2009.

[44] See the two special issues of GLJ on the ESM & TSCG and on the OMT-reference. For a critical appraisal of the latter, cf. also Wendel 2014, pp. 263 et seq.

the BVerfG, the principle of conferred powers is not only a principle of EU law, but the 'expression of the foundation of Union authority in the constitutional law of the Member States' which remain the 'Masters of the Treaties'.[45] Accordingly, the 'foundation and the limit of the applicability of European Union law in the Federal Republic of Germany is the order to apply the law' (*Rechtsanwendungsbefehl*) contained in the parliamentary statute approving ratification – an order 'which can only be given within the limits of the current constitutional order'.[46] Despite its own claim of constitutional autonomy, EU law is thus reduced to a mere derivative of national sovereign powers, an interpretation running counter to the idea that the 'transfer of powers' is not a *transferre*, but a *conferre* instead.[47] In other words, according to the BVerfG's conception, the parliamentary statutes of approval for the treaties constitute a bridge connecting national law with EU law – a bridge at the end of which stands a guardian: the BVerfG[48] (see further Sect. 1.3.4).

1.3.3 Substantial limits to Germany's participation in the EU follow, according to the BVerfG, from Art. 79(3) which protects the *constitutional identity* of the Basic Law against constitutional revision. While in the context of European integration the term 'national constitutional limits' can simply refer to the requirement to amend the Constitution before ratification (which is the approach of the EU-related jurisprudence of the French *Conseil constitutionnel*), the constitutional limits derived from Art. 79(3) are red lines framing the *inalienable substantive core* of the German constitutional order. This means that within the normative framework of the Basic Law these limits – drafted in order to prevent a backslide into dictatorship – must not be overstepped even by the constitutional legislator. According to the BVerfG, these limits could only be (factually) overcome by superseding the Basic Law, i.e. by establishing a new constitutional order – a highly controversial claim (see Sect. 1.4.2).

Regarding the question of justiciability, the BVerfG declares individual constitutional complaints admissible (but regularly unfounded) if the complainants plausibly demonstrate that by transferring competences or authorising financial commitments, the *Bundestag* would lose its continuous and decisive say in fields which the BVerfG considers to be essential for shaping political development in Germany. This standard of review is intrinsically linked with the very essence of the principle of democracy as protected by the eternity clause. That the Court enables virtually every German citizen who has the right to vote to initiate a *de facto* objective review of constitutionality regarding domestic acts approving the ratification of EU reform measures, has raised numerous and profound critiques ever since this approach was established for the first time in the *Maastricht* judgment.[49]

[45] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 350, paras. 234–235.

[46] Ibid., para. 343.

[47] For this reading, see already Kaufmann 1953.

[48] Kirchhof 1991.

[49] Tomuschat 1993; König 1994, pp. 27 et seq.

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However, the Court explicitly confirmed this path in its *Lisbon* and *Greece and EFSF* judgments, stating that if the *Bundestag* were to give up key elements of political self-determination and thus permanently deprive the citizens of their democratic influence, their claim to democracy would lapse.[50] The Court held that

> [t]he defensive dimension of [the right to vote] therefore takes effect in configurations in which the danger clearly exists that the competences of the present or future Bundestag will be eroded in a manner that legally or de facto makes parliamentary representation of the popular will, directed to the realisation of the political will of the citizens, impossible.[51]

This line of jurisprudence is thus intrinsically linked to protection of the principle of democracy and the assumption that substantive and justiciable limits to European integration can be derived from the eternity clause.

Regarding the substance of the constitutional limits to Germany's participation in the process of European integration, the BVerfG has identified five key areas within which the future conferral of competencies to the EU could bear a high risk of violating the constitutional identity of Germany and the principle of democracy in particular:

> Particularly sensitive for the ability of a constitutional state to democratically shape itself are, since time immemorial [*seit jeher*] decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).[52]

This catalogue was spelt out in more detail in the subsequent paragraphs of the *Lisbon* judgment[53] – an approach vividly criticised in literature[54] and openly opposed by the Czech constitutional court.[55] To the great surprise of many, the BVerfG stated that Germany could not participate in a (so far only hypothetical) European federal state within the framework of the Basic Law, but would have to adopt a new constitution in this case. No other national court in the EU has spelt out an eternity clause in the context of European integration in such a detailed, albeit apodictic manner as the BVerfG has in relation to Art. 79(3).[56] This approach does

[50] BVerfG, case 2 BvR 987/10 et al., *Greece & EFSF*, judgment of 7 Sept. 2011, BVerfGE 129, 124, 169, para. 101.

[51] Ibid., paras. 101–102.

[52] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 359, para. 252.

[53] Ibid., paras. 253–260.

[54] Cf. Schönberger 2009, pp. 1208–1209.

[55] Czech Constitutional Court, case Pl ÚS 29/09 *Treaty of Lisbon II*, judgment of 3 Nov. 2009, para. 137 et seq.

[56] In detail Wendel 2011a, pp. 331 et seq.

not only raise fundamental objections as to its procedural dimension (*de facto actio popularis*), but also – and even more severely – as to its substantial foundation: It relies on an apodictic and theoretically highly questionable claim of necessary state functions, is ultimately bound to the (pre-)existence of statehood, remains widely blind to forms of genuine democratic legitimation in multilevel settings and goes along with an unprecedented deconstruction of the European Parliament.[57]

In its judgment on the bilateral aids for Greece and the EFSF, the BVerfG developed its jurisprudence further in the field of budgetary commitments. It held that the essence of the principle of democracy as part of the constitutional identity would be violated if the *Bundestag* relinquished its 'parliamentary budget responsibility' by giving up the capability to decide on the budget on its own terms.[58] According to the Court,

> [n]o permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate.[59]

The Court also reiterated this approach in its much noted decision of 12 September 2012 by which, on the basis of a summary review, it allowed the ratification of the amendment of Art. 136 TFEU, the ESM Treaty and the Fiscal Compact at a relatively early stage and far ahead of the decision on the principal proceedings.[60] In substantive terms, the decision of 12 September 2012 was characterised in particular by a remarkably strong manifestation of judicial restraint.[61]

1.3.4 Unlike several other constitutions, such as those of Portugal or Croatia, the German Basic Law does not provide a clause that openly addresses the question of the **primacy or direct effect of EU law**. In turn, there is also no stipulation that would expressly postulate the supremacy of the Constitution vis-à-vis EU law.[62] However, there is a rich and widely discussed case law on these matters. In legal and judicial practice the primacy of EU law is, on the one hand, generally accepted as a part of the *acquis* and as a consequence of the Basic Law's 'openness towards European law' (*Europarechtsfreundlichkeit*).[63] On the other hand, the BVerfG has

[57] Halberstam and Möllers 2009, pp. 1249–1250; Schönberger 2009, pp. 1208–1209; Nettesheim 2010, pp. 110 et seq.

[58] BVerfG, case 2 BvR 987/10 et al., *Greece & EFSF*, judgment of 7 Sept. 2011, BVerfGE 129, 124, 177 et seq., para. 120 et seq.

[59] Ibid., para. 128.

[60] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195.

[61] In detail Wendel 2013, pp. 41 et seq.

[62] Article 31 ('Federal law shall take precedence over *Land* law') only addresses the relationship between federal and sub-federal law within Germany.

[63] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 347, 353 et seq. and 401, paras. 225, 240 et seq., and 340. For possible meanings of the concept, see Voßkuhle 2010; Mayer 2010, pp. 256 et seq.

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repeatedly challenged the position of the Court of Justice of the European Union (CJEU) regarding its claim of the unconditional primacy of EU law by formulating judicial reservations for exceptional circumstances in three fields.

The first judicial reservation relates to fundamental rights protection at EU level and has been developed in the so-called *Solange* jurisprudence.[64] According to *Solange II*, the BVerfG 'will no longer exercise its jurisdiction to decide on the applicability of secondary [law] … and it will no longer review [EU law]' by the standard of national fundamental rights *as long as* the EU and the Court of Justice in particular 'generally ensure effective protection of fundamental rights' at a degree 'which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights'.[65] As a consequence, constitutional complaints by individuals and submissions by German ordinary and specialised courts are 'inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice …, has resulted in a decline below the required standard of fundamental rights after the "*Solange II*" decision'.[66] Such actions could only be declared admissible if the complainants or the referring court demonstrated 'in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured' at EU level.[67] However, to the extent that EU law does not strictly determine national law and leaves a margin of discretion to the national legislator or administrative branch, the BVerfG will carry out a fundamental rights review.[68] In this respect the BVerfG places special emphasis on the responsibility of German ordinary and specialised courts, given that it requires them under certain conditions to refer preliminary questions to the CJEU in order to decide whether or not EU law leaves a margin of discretion.[69]

The second judicial reservation relates to the concept of *ultra vires* review, i.e. the exercise of the BVerfG's self-proclaimed right to decide as a court of last instance whether an EU institution has transgressed its competences under the Treaties.[70] This approach is entirely a product of judicial law-making and was foreshadowed in the Court's case law as early as 1971,[71] followed by increasingly

[64] The German word *solange* means 'as long as'.

[65] BVerfG, case 2 BvR 197/83, *Solange II*, order of 22 Oct. 1986, BVerfGE 73, 339, 387, para. 132; BVerfG, case 2 BvL 1/97, *Banana Market*, order of 7 June 2000, BVerfGE 102, 147, 164, para. 62.

[66] BVerfG, case 2 BvL 1/97, *Banana Market*, order of 7 June 2000, BVerfGE 102, 147, 164, para. 62.

[67] Ibid.

[68] See for example BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260, 308, paras. 185–187.

[69] BVerfG, case 1 BvL 3/08, *Investment Allowance Act*, order of 4 Oct. 2011, BVerfGE 129, 186.

[70] For an in-depth analysis, see Mayer 2000, pp. 87 et seq.

[71] BVerfG, case 2 BvR 255/69, *Lütticke*, order of 9 June 1971, BVerfGE 31, 145, 174, para. 97 et seq.

articulate indications in 1981[72] and 1987[73]. The first open claim of jurisdiction to review whether acts of EU law exceed the competencies attributed to the EU was made in the *Maastricht* judgment (1993).[74] The practical modalities as well as the conceptual foundation of this judicial reservation were further substantiated in the *Lisbon* judgment (2009),[75] the *Honeywell* decision (2010)[76] and the *OMT* reference (2014)[77]. *Ultra vires* review essentially aims to ensure that the exercise of public authority at EU level does not exceed the so-called integration programme which has been consented to, in Germany, by an Act of Parliament. However, the substantial scope of a statute of approval can only be determined in relation to its point of reference, EU primary law. This is why *ultra vires* review cannot be conceptually limited to (directly or indirectly) scrutinising the compatibility of EU law with national constitutional law, but necessarily extends to examining whether EU secondary law is in conformity with EU primary law. This twofold review standard, with its roots deep in national constitutional law but with branches stretching out into EU law, presents a fundamental conceptual problem,[78] given that the BVerfG is adjudicating in an area for which it has no competence either in a legal or in a technical sense.

In its *Honeywell* decision the Court emphasised the necessity to coordinate *ultra vires* review 'with the task which the Treaties confer on the Court of Justice, namely to interpret and apply the Treaties, and in doing so to safeguard the unity and coherence of Union law'.[79] In this light, the BVerfG specified the procedural and substantial conditions for *ultra vires* review. In terms of procedure the BVerfG made it unambiguously clear that the Court of Justice must be given an 'opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question' before the BVerfG decides on the inapplicability of an act of EU law in Germany.[80] This requirement has been met by the *OMT* reference. In terms of substance, *Honeywell* introduced a double test: *ultra vires* review can only be carried out by the BVerfG if the act of EU law in question is first 'manifestly in violation of competences' and secondly structurally significant, i.e. 'highly significant in the structure of competences between the Member States and the Union

[72] BVerfG, case 2 BvR 1107/77 et al., *Eurocontrol I*, order of 23 June 1981, BVerfGE 58, 1, 30, para. 92.

[73] BVerfG, case 2 BvR 687/85, *Kloppenburg*, order of 8 April 1987, BVerfGE 75, 223, 235 et seq., paras. 43 et seq.

[74] BVerfG, case 2 BvR 2134, 2159/92, *Treaty of Maastricht*, judgment of 12 Oct. 1993, BVerfGE 89, 155, 188, para. 106.

[75] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 353 and 400 et seq., paras. 240 and 339 et seq.

[76] BVerfG, case 2 BvR 2661/06, *Honeywell*, order of 6 July 2010, BVerfGE 126, 286.

[77] BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366.

[78] Cf. Mayer and Wendel 2014, p. 117.

[79] BVerfG, case 2 BvR 2661/06, *Honeywell*, order of 6 July 2010, BVerfGE 126, 286, 302, para. 56.

[80] Ibid., para. 60.

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with regard to the principle of conferral and to the binding nature of the statute under the rule of law'.[81] In this context the BVerfG did not only express respect for the Union's own, idiosyncratic legal methodology, but also granted the CJEU a 'right to tolerance of error'.[82]

Most recently the *Honeywell* conditions have been put to the test in the BVerfG's *OMT* reference. This decision is based on an *ultra vires* review and constitutes the first preliminary reference in the history of the BVerfG.[83] Even though the BVerfG suggests that the *OMT* decision is in line with its *Honeywell* judgment,[84] a closer look reveals several important deviations. The first consists in the explicit extension of *ultra vires* review to compliance with legal prohibitions under EU primary law – a move which is certainly not spectacular, given that a legal prohibition can always be reconstructed as a negative competence norm. The danger that this might lead to a path at the end of which stands a general EU legality review by the BVerfG could be averted if the *Honeywell* double test were applied strictly. In the aftermath of the *OMT* reference it is questionable, however, if this is the case. Although the BVerfG formally holds on to the double test in general and the condition of a manifest violation of competencies in particular, the application of the latter illustrates that substantially there is not much left of it.[85] Furthermore, with its *OMT* reference the Second Senate acknowledged for the first time a so-called 'principal *ultra vires* objection' based on the right to vote,[86] the admissibility of which depends neither on a link with a principal claim that a substantial fundamental right has been violated (as was the case in *Honeywell*) nor on a claim that the essence of the right to vote as protected by the eternity clause has been violated by an *ultra vires* act.[87]

The third judicial reservation relates to the concept of identity review. Although remaining rather obscure as a concept,[88] the notion of national constitutional identity does not only figure in Art. 4(2) TEU, but is also used by several national supreme jurisdictions.[89] In Germany the notion of constitutional identity is bound to Art. 79(3) (see above Sect. 1.3.3). On this basis the BVerfG claims to be competent to review whether an act of EU law infringes Germany's constitutional identity and is thus inapplicable in Germany. The Court has held that otherwise

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[81] Ibid., para. 61.

[82] Ibid., para. 66.

[83] By referring preliminary questions the BVerfG essentially wants to have its own legal interpretation confirmed, according to which the OMT programme, first, is not covered by the mandate of the ECB and, secondly, violates Art. 123 TFEU.

[84] BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366, 382 et seq., paras. 24–26.

[85] In more detail Wendel 2014, pp. 271 et seq.

[86] Schneider 2014, p. 222.

[87] Critically Dissenting Opinions of Judge Gerhardt, para. 6 and Judge Lübbe-Wolff, para. 17 et seq.

[88] See von Bogdandy 2003, p. 164.

[89] For a comparative overview, see Wendel 2011b, pp. 131 et seq.

> the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4(2) first sentence TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law *go hand in hand* in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles … declared inviolable in Article 79(3) of the Basic Law, have been violated. This *ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect*.[90]

In *OMT*, however, the BVerfG highlighted the conceptual differences between the protection of national (constitutional) identity at national and at EU level and tried to draw a clear conceptual distinction between the notion of constitutional identity under Art. 79(3) and the notion of national constitutional identity under Art. 4(2) TEU: while the protection of identity under EU law would be relative and could be subjected to, for instance, a proportionality review, the very essence of the principles protected under Art. 79(3) of the Basic Law must not be weighed against other principles (*Abwägungsfestigkeit*).[91] In other words, the BVerfG deemed the protection of national identity provided by the Court of Justice inadequate in terms of national constitutional law.

The first time that the Court actually carried out an identity control with regard to a domestic act implementing mandatory provisions of EU law was in its *European Arrest Warrant II* decision regarding the extradition of an American citizen who had been convicted *in absentia* in Italy (for more details cf. the last paragraphs of Sects. 2.3.1, 2.3.3 and 2.3.5).[92] The decision is ambiguous. On the one hand, the BVerfG claimed jurisdiction on the basis of an identity review and clearly marked the inalienable limits following from human dignity as protected by Art. 1(1) GG. On the other hand, the BVerfG interpreted both the EAW and the domestic statute in the light of *EU* fundamental rights and came to the conclusion that there was no need to deviate from the principle of primacy, because the interpretation allegedly demanded by EU law would be in line with the substantial requirements under Art. 1(1) GG. Relying on the *acte clair* doctrine, the Court did not refer a preliminary question to the Court of Justice, thus refusing to enter into a dialogue with Luxemburg on the right interpretation of EU law.

1.4 Democratic Control

1.4.1 The participation of the German *Bundestag* in the process of conferring competencies to the EU as well as the decision-making process at EU level is one of

[90] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 353, para. 240 (emphasis added).

[91] BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366, 386, para. 29.

[92] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 Dec. 2015.

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the cornerstones of Germany's EU-related constitutional law. As demonstrated above (Sect. 1.3.1) Art. 23(1) of the Basic Law requires that the *Bundestag* approve every conferral of sovereign powers to the EU – normally by a two-thirds majority of its Members.

Furthermore, safeguarding parliamentary rights is one of the *leitmotivs* of the BVerfG's EU-related case law. In this jurisprudence, safeguarding parliamentary rights first and foremost means safeguarding the parliamentary representation of the popular will. According to the BVerfG, the competences of the *Bundestag* must not be constrained or exercised in a manner rendering (current and future) parliamentary representation at national level virtually impossible, i.e. leading to a situation in which no substantial issues would be left for the elected representatives of the people to decide on (see above Sect. 1.3.3). As a consequence, certain decision-making rights may either not be conferred on the EU or it must be ensured that the *Bundestag* keeps a decisive influence, if necessary by a parliamentary mandate binding the acting representatives of the German Government. In this respect, the Court coined the enigmatic, albeit catchy term of parliamentary '*responsibility for integration*'.[93]

Parliamentary responsibility demands first and foremost parliamentary participation. As a consequence the BVerfG demands prior parliamentary approval for certain types of decisions at the EU level that are considered as endangering the principle of conferral by allegedly expanding the EU's competences gradually (the so-called 'dynamic treaty provisions').[94] The BVerfG takes the view that the necessary degree of democratic legitimacy of EU public authority can – at the moment – only be derived from the national sphere. The autonomous democratic mechanisms and institutions on the EU-level have, so the argument goes, a complementary character at best, but not a constitutive one. With regard to the euro crisis the BVerfG has paid specific regard to the budgetary responsibility of Parliament. Already in its *Lisbon* judgment the BVerfG highlighted budgetary autonomy as a key to the 'ability of a constitutional state to democratically shape itself'.[95] In its *Greece & EFSF* judgment, the Court consequently held that the right to vote would be violated if the *Bundestag* relinquished its budgetary responsibility by giving up the capability to decide on the budget on its own terms by authorising

[93] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 351, 356 et seq. paras. 236, 245–247.

[94] Ibid. The BVerfG distinguishes five categories of so-called 'dynamic treaty provisions': first, the simplified treaty revision procedure under Art. 48(6) TEU and several specific provisions; secondly the 'passerelle' clauses under Art. 48(7) TEU and several specific stipulations; thirdly, the flexibility clause under Art. 352 TFEU; fourthly, the so-called 'emergency brakes' under Arts. 48(2), 82(3) and 83(3) TFEU; fifthly and finally specific stipulations according to which the Council – after obtaining the consent of the European Parliament – can adopt unanimously decisions in 'sensitive' fields such as criminal law (Art. 83(3) sub-para. 3 TFEU). It is important to note that only the first and the second category concern the simplified (and insofar 'dynamic') amendment of EU treaty law. The other categories relate essentially to the legislative process at EU level.

[95] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 359 et seq., paras. 252, 256.

financial commitments.[96] Regarding the decision-making processes within the ESM, the Court considered the relevant provisions on the involvement of the *Bundestag* – specified in the Act of assent to the ESM Treaty as well as in the so-called ESM Financing Act – to comply with this requirement to a large extent.[97] Read together, both statutes provide for a detailed and differentiated framework regarding prior parliamentary approval. Above all, they ensure that the key activities of the German ESM representatives are determined and controlled by the *Bundestag* and thus provided with sufficient democratic legitimation.[98] In order to prevent any possibility of circumventing parliamentary participation, the Court has deemed it necessary to demand an interpretative safeguard under public international law, aiming at the exclusion of any interpretation of the ESM Treaty allowing payment obligations that exceed the defined maximum sum without the consent of the *Bundestag*.[99]

Furthermore, parliamentary responsibility calls for parliamentary information: no control without prior information. According to the BVerfG, the (national) constitutional principle of democracy requires access to information in a way that allows the *Bundestag* to assess the essential foundations and consequences of its decisions and thus exercise its parliamentary responsibility.[100] Like several national constitutions, the German Basic Law contains a provision on the parliamentary right to information in EU affairs: according to Art. 23(2) cl. 2 – a norm concretised by an ordinary Act of Parliament – the *Bundestag* has a right to be comprehensively informed by the Government at the earliest possible time on 'matters concerning the European Union'. In a decision of 19 June 2012, the BVerfG decided that the Federal Government had infringed this right to information with regard to certain key documents relating to the negotiations on the ESM and on the so-called Euro Plus Pact.[101] The Court interpreted the term 'matters concerning the European Union' in a broad manner, thus extending the scope of application of Art. 23(2) to 'international treaties that complement European Union law or otherwise show particular proximity' to it[102] and thus qualified the establishment of the ESM as a matter falling within the scope of application of Art. 23(2).[103] The Court also established an obligation for the German Government to provide information in a particularly comprehensive and detailed way, given that the ESM concerns the

[96] BVerfG, case 2 BvR 987/10 et al., *Greece & EFSF*, judgment of 7 Sept. 2011, BVerfGE 129, 124, 177, para. 121.

[97] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195, 269 et seq., paras. 280–299 [EN translation, version 2014].

[98] Ibid., para. 287.

[99] Ibid., para. 253.

[100] Ibid., para. 215.

[101] BVerfG, case 2 BvE 4/11, *ESM & Euro Plus Pact*, judgment of 19 June 2012, BVerfGE 131, 152.

[102] Ibid., para. 100.

[103] Ibid., para. 135.

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overall budgetary responsibility of the *Bundestag*.[104] In 2012 the BVerfG, for the very first time, put the essence of the parliamentary right to information explicitly under the protection of Art. 79(3). The 'core of the right of Parliament to be informed' is, according to the Court, 'entrenched' in the eternity clause.[105] It is on this basis that the Court demanded, in its *ESM & TSCG* case, for the second interpretative safeguard under public international law, ensuring that the provisions in the ESM Treaty on the inviolability of documents and on professional secrecy do not restrain the comprehensive information of the *Bundestag*.[106]

Another implication relates to the aspect of intra-parliamentary allocation of tasks, i.e. the question of the extent to which responsibilities may be exercised by parliamentary special committees and to what extent their exercise must be reserved to the plenary session. In a judgment of 28 February 2012, the Court established the basic rule that the *Bundestag*'s right to decide on the budget and its overall budgetary responsibility generally have to be 'exercised through deliberation and decision-making in the plenary sitting'.[107] Arguing that the constitutional rights of Members of Parliament are violated if they are excluded from substantial decisions affecting the German *Bundestag*'s budgetary responsibility, the BVerfG essentially scrapped a statute according to which the *Bundestag*'s competences to decide on certain measures within the framework of the European Financial Stability Facility (EFSF) were, in cases of particular urgency and confidentiality, to be exercised by a special parliamentary committee (*Sondergremium*) composed of nine members.[108] The Court accepted the conferral of responsibilities to the special committee only in strictly limited cases.[109]

1.4.2 The voting mode of **referendum (popular vote)** is not foreseen by the Basic Law – neither in domestic nor in EU affairs. However, if a new constitution were to be adopted by the German people, this would most likely presume a referendum. In its *Lisbon* judgment the BVerfG suggested that the limits to further European integration following from Art. 79(3) could be overcome by the adoption of a new constitution in the sense of Art. 146 – a stipulation which was amended in 1990 with the aim of paving the way for a new constitution after reunification, but which has never been applied in this context, because of the will of the overwhelming political majority to keep the Basic Law in force.[110]

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[104] Ibid., para. 145.

[105] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195, 241 et seq., para. 215 [EN translation, version 2014].

[106] Ibid., para. 259.

[107] BVerfG, case 2 BvE 8/11, *Special Parliamentary Committee*, judgment of 28 Jan. 2012, BVerfGE 130, 318, 347, para. 113 (emphasis added).

[108] Ibid., paras. 133–153.

[109] Ibid., para. 150.

[110] Until 1990 the Basic Law contained a provision (the former Art. 23) allowing the accession of East Germany to the Federal Republic of Germany and the applicability of the German Basic Law

According to the BVerfG, Art. 146 would have to apply particularly if Germany wanted to participate in a future European federal state. For the BVerfG this aspect is even justiciable: a complainant could rely on the right to vote (Art. 38(1)) in order to challenge an alleged loss of 'sovereign statehood' because the only power with the right to repeal the Basic Law and with it the German federal state, would be the constituent power of the people. In its *Lisbon* judgment, the BVerfG held that the 'pre-constitutional right' to give oneself a constitution was declaratively mirrored in Art. 146.[111] While Art. 146 thus reflects an outer-systemic right of participation to create a new system, Art. 38(1) ensures an inner-systemic right of participation within the existing system. The logical fracture is that according to the BVerfG, the electorate shall be entitled, by relying on its inner-systemic right to vote, to become the guardian of the outer-systemic constituent power reflected in Art. 146.[112] While courts like the French *Conseil constitutionnel* or the Czech Constitutional Court stay within the existing constitutional order by referring to the constitutional revisionary power, i.e. the constitutional legislator, if constitutional limits have been reached, the BVerfG virtually transcends the constitutional order by which it is itself constituted when it refers to a pre-constitutional (revolutionary?) 'right' to give oneself a constitution.[113] The Court thus leaves the Germans with quite an astonishing choice. They may either remain part of the so-called association of sovereign and 'fully democratically' (*volldemokratisch*) organised states the peoples of which remain the sole subjects of democratic legitimation, or they may participate in the creation of a European federal state, which would require the supersession of one of Germany's most vaunted post-war-inventions, the Basic Law.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 As to the background, reasons and comparative context of the (explicit) constitutional revisions relating to the EU, see above at Sect. 1.2.3. Compared to other countries the input of comparative law in the process of drafting the integration clause was rather weak. This is also due to the fact that Germany was one of the first countries to enact EU-related constitutional provisions. An exception to the wide absence of comparative influence regarding the drafting of integration clauses are the stipulations regulating the parliamentary subsidiarity control. To construe the latter as a parliamentary minority right, is an idea developed simultaneously – and with cross-border influence – in France and Germany.

in East Germany after accession. This was the clause on which the reunification was based under domestic constitutional law.

[111] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 331 et seq. and 348, paras. 179–180 and 228.

[112] Cf. Halberstam and Möllers 2009, p. 1256.

[113] See the critique of Jestaedt 2009, pp. 511–513.

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1.5.2 Not applicable.

1.5.3 In the author's view the EU-related, national constitutional case law plays an eminent role within the framework of Europe's multilevel-constitutionalism.[114] It not only regulates key questions such as the procedures for conferrals of competencies, the participation of the people, national parliaments or federal entities in the process of European integration, but also opens up the national legal sphere. It makes national constitutional law permeable and responsive. Given the specifics of EU law as an autonomous legal order claiming direct effect and primacy in application in the Member States, building on their institutional and administrative systems, creating a European citizenship with genuine individual rights and thus complementing the national constitutional sphere in many ways, one should recommend, from a comparative perspective, the insertion of EU-specific constitutional provisions addressing these issues.

Given the substantial impact of the European legal order on national constitutional law, the 'EU capability' is of highest importance for the constitutional order of a modern EU Member State. Comparative law can help to identify the need or appropriateness of reform in this field. In this light, a modern integration clause should particularly abandon misleading concepts such as the 'transfer' of sovereign powers which conceptually reduces the autonomous public authority at EU level to a mere derivative of national sovereign powers (which is why the term 'confer' or 'entrust' seem to be more appropriate, see Sect. 1.3.2). Furthermore, a modern integration clause should highlight the complementary and mutually stabilising dimension of the different constitutional levels.[115] A reformed *Integrationsermächtigung* could, for example, begin as follows: Germany can, conjointly with other European states, confer tasks and competencies to the European Union, by founding and developing a common basic order that henceforth constitutes, together with this Basic Law and with respect for its core principles, the legal basis for the exercise of public authority in Germany.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 After the total neglect of human rights during the rule of the National Socialist Party in Germany, the protection of fundamental rights became a primary concern for the authors of the Basic Law. The Bill of Rights was moved from the end of the constitution, the place that it occupied in the Weimar Constitution, to the beginning.

[114] Pernice 1999, pp. 706 et seq.; Pernice 2009, pp. 349 et seq. with further references.

[115] For suggestions how to advance the EU related national constitutional law, see Wendel 2011a, pp. 206 et seq., 270 et seq. and 409 et seq.

If this was merely of symbolic value, the decision to place a guarantee of human dignity at the top of the Bill of Rights had considerable legal relevance.

Dignity is understood as the foundation for the fundamental rights that follow. It is framed in particularly strong language. Dignity is declared to be '*unantastbar*', a term used only with regard to dignity and meaning 'untouchable' or 'sacrosanct'.[116] This qualification endows dignity with an absolute character, as has been stated in the jurisprudence of the Constitutional Court from the very beginning.[117] Differently from the rights that follow, it may not be limited and is not subject to balancing. No infringement of dignity is justifiable. If a conflict between dignity and other human rights arises, dignity always trumps. Moreover, according to the text of Art. 1, the state is obliged not only to respect but also to protect dignity. To respect dignity means that the state itself has to avoid all actions that would violate Art. 1; protecting dignity means that the state has to prevent others from endangering dignity.

Article 1 is followed by a catalogue of 18 fundamental rights, most of which are classical liberties. Unlike in the Weimar Constitution, almost no social or economic rights are adopted in the Basic Law. A few more rights considered as equivalent in rank and protection to the guarantees in the Bill of Rights are dispersed over other parts of the Basic Law (e.g. the right to vote, Art. 38, the right to be heard in court, Art. 103, several guarantees in connection with imprisonment, detention etc., Art. 104).

The authors of the Basic Law also made an effort to strengthen the legal force of fundamental rights. In previous German constitutions their impact had been rather minor. Still, during the Weimar Republic, fundamental rights were considered as not binding on the legislature. Social and economic rights were not regarded as legal norms at all, but rather as political programmes. In the Basic Law, all human rights are declared directly applicable and binding on all state powers including the legislature (Art. 1(3)). Limitations of fundamental rights require a law. However, such a law may not touch upon the very essence of a right (Art. 19(2)). All courts are constitutionally obliged to respect and enforce fundamental rights. Article 19(4) guarantees access to the courts to everyone who feels that his rights (not only fundamental rights) have been violated by a public authority. Nevertheless, the incompatibility of a parliamentary law with the Bill of Rights may only be ascertained by the Constitutional Court. If lower courts are of the opinion that a law which they have to apply in a case is incompatible with the Basic Law, they have to stay the procedure and refer this question to the Constitutional Court (Art. 100).

In addition to the norm control procedures (Arts. 93 and 100), the Basic Law provides for an individual complaint that any person can raise if the person alleges

[116] The usual translation of '*unantastbar*', i.e. 'inviolable', does not reflect the enhanced protection that dignity enjoys, because the term 'inviolable' ('*unverletzlich*') appears frequently in connection with fundamental rights.

[117] Most recently confirmed in BVerfG, case 2 BvR 2500/09, *inadmissibility of evidence obtained from illegal surveillance of private property (Verwertungsverbot Wohnraumüberwachung)*, order of 7 Dec. 2011, BVerfGE 130, 1, 22.

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that a public authority, including the judiciary, has violated one or more of his fundamental rights (Art. 93 (1) No. 4 a). Out of the nearly 7,000 cases that arrive at the Constitutional Court per year, more than 95% are individual complaints. A number of important decisions that have developed and enforced fundamental rights have been rendered upon individual complaints. The review procedures are further highlighted in Sect. 2.8.3.

The contribution of the jurisprudence of the Federal Constitutional Court to the relevance of fundamental rights for political behaviour and the everyday life of citizens can hardly be overestimated.[118] Foreign observers declare it to be exceptional and exemplary for many other jurisdictions.[119] Polls show that the BVerfG routinely has the highest confidence rate of all public institutions.

Alongside the Bill of Rights that covers the first nineteen articles of the Basic Law, a number of general principles of law are formulated in Art. 20 and also in Art. 28, which requires homogeneity between the Basic Law and the various constitutions of the German *Länder*. These principles are: republicanism, democracy, the rule of law, social state and federalism. According to Art. 79(3), they are unamendable. Most of them, with the exception of republicanism and the social state principle, are concretised in the subsequent sections of the Constitution. A number of additional guarantees have been derived from these principles by the jurisprudence of the BVerfG. This is particularly true for the rule of law principle, which has become the roof under which a number of specific legal protections have been developed, such as the non-retroactivity of laws (which is explicitly guaranteed only with regard to criminal law statutes, Art. 130(2)) and the protection of legitimate expectations.

2.1.2 Most fundamental rights are accompanied by a limitation clause. Some of these clauses are unspecified ('by law or pursuant to law'), some contain further qualifications, such as rules as to the purpose, conditions and means of limitation. Some do not have a special limitation clause at all, which, according to the BVerfG, does not mean that they are exempt from limitations, but that only limitations having a basis in other norms of the Constitution, especially in other fundamental rights, are permitted.[120] This is a consequence of the methodological premise of the BVerfG that the Constitution has to be interpreted as a unity. In addition to the limitation clauses added to certain fundamental rights, there is a general provision requiring that laws which limit a fundamental right have to be general (Art. 19(1)) and that the very essence of the right is protected against any limitation (Art. 19(2)).

The jurisprudence of the BVerfG has added some further guarantees to these rules, the most important being the principle of proportionality which originated in the jurisprudence of the BVerfG and has meanwhile been adopted by many jurisdictions all over the world.[121] According to this principle, a law that limits a

[118] For a summary, see Grimm 2015b, pp. 9–29.

[119] See Robertson 2010, pp. 40 et seq.

[120] BVerfG, case 1 BvR 435/68, *Mephisto*, order of 24 Feb. 1971, BVerfGE 30, 173, 193.

[121] See map in Barak 2012, p. 182.

fundamental right has to have a legitimate purpose (1), it must be suitable (2) and necessary (3) to achieve its purpose and strike a proper balance between the competing legal goods (4), i.e. the fundamental right that has been limited by the law under scrutiny on the one hand and the legal good that the law wants to protect (often itself a fundamental right) on the other hand. The proportionality principle also applies to legal acts, be they court decisions, administrative acts or other legally relevant behaviour of state agents. Over time, the burden of fundamental rights protection has come to rest almost entirely on the safeguards provided by the principle of proportionality. Violations of the specific limitation clauses are rare, and the guarantee of the essence of a right in Art. 19(2) is seldom relevant because the proportionality principle intervenes at an earlier stage.

2.1.3 The rule of law (*Rechtsstaat*) is explicitly guaranteed in Art. 28. Important elements of the principle are enumerated in Art. 20, yet without mentioning the term '*Rechtsstaat*'. The basic element of the rule of law is that the state has to rule not only by law but also according to the law. This means that the state is not only the creator of the law that binds the citizens, but it also submits itself, including its highest organs, to the law (the so-called '*Vorrang des Gesetzes*'). This in turn enables the citizens to foresee state actions and to plan their behaviour accordingly. As a consequence, legal certainty (*Rechtssicherheit*) is regarded as a value in itself, which means that the rule of law may enter into conflict with the demands of justice (e.g. if a perpetrator cannot be punished because evidence was obtained unlawfully). Legal certainty as an element of the rule of law requires that laws are formulated in a way that the addressee can recognise what behaviour is required or forbidden. This of course implies that laws are not only promulgated but also published. An unpublished legal rule does not take legal force.

By the same vein, retroactive laws are prohibited under the rule of law. This is explicitly guaranteed in the Basic Law with regard to criminal law (Art. 103(2)). It has been extended by way of interpretation to other laws as well, as a consequence of the rule of law. However, a distinction is made between so-called genuine and non-genuine retroactivity (*echte und unechte Rückwirkung*). Genuine retroactivity means that a law is applied to a situation or behaviour that existed or had happened before the law was enacted. Non-genuine retroactivity means a change in an existing legal situation for the future. Different criteria apply to the two forms of retroactivity. Genuine retroactivity requires a particularly strong justification. For non-genuine retroactivity good reasons are sufficient. The principle of proportionality has to be observed. The borderline between the two forms is not particularly clear, and the attempts of the BVerfG to define the two categories have varied over time.

In cases of lawful retroactivity, the rule of law principle requires that the legitimate expectations of the addressees of the law are honoured (*Vertrauensschutz*). If the citizens could have legitimately trusted in the continuation of a law or situation created by law, the legislature may be obliged to compensate for loss that addressees of the law suffer due to changes in the law or, more often, to provide temporary arrangements that would allow the addressees to adjust

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to the new situation. In such cases, the statute that disproportionately burdens citizens is not annulled, rather the legislature is obliged to amend it in due time.

However, the rule of law would be incomplete if it only required that the state rule according to law. The state would then be free to decide where it is bound by law and where it can act according to will. The '*Vorrang des Gesetzes*' is therefore accompanied by the '*Vorbehalt des Gesetzes*', which defines the areas where state action requires a basis in law (the term 'law' covers laws enacted by Parliament and decrees (*Verordnungen*) enacted by the Government upon an explicit delegation by Parliament). A law is explicitly required for limitations of fundamental rights (Art. 19). However, the BVerfG has extended this requirement beyond the limits of fundamental rights infringements. In areas covered by fundamental rights, all important decisions have to be taken by Parliament itself and cannot be left to the Government in the form of a decree (the so-called '*Parlamentsvorbehalt*'). The '*Parlamentsvorbehalt*' thus further restricts the constitutional requirements for a delegation of legislative powers in Art. 80 GG.

Finally, the rule of law means that independent courts have the power to control whether the state complies with the laws that bind its activity. This is guaranteed in Art. 19(4), as is the independence of the courts in Art. 97.

The rule of law principle, which was originally objective law (mandatory for the state, but not necessarily entitling individuals), has been transformed into subjective rights of the individual, such that elements which have not explicitly been guaranteed in the form of a subjective right (such as the right to be heard in court, Art. 103) can be invoked before the courts. They also play an important role in the individual complaints to the BVerfG. Individual complaints can only be based on alleged violations of fundamental rights. Yet once this hurdle has been overcome, the BVerfG also takes violations of objective principles into account. This is because infringements of fundamental rights are only justified if they are based on a law which is itself constitutional. This opens the door for criteria that are themselves not subjective rights. As a consequence, the rule of law plays an important role in the jurisprudence of the BVerfG, not only in cases brought by organs of the state or the *Länder*, but also in individual complaints.[122]

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 The answer to this question requires some remarks on balancing fundamental rights, especially personal and economic rights, on the national level.

The BVerfG has often declared that no hierarchy exists among the fundamental rights of the Basic Law. The only exception is dignity, which is subject to neither

[122] For an English summary of the rule of law and relevant case law of the German Constitutional Court, see Currie 1994, pp. 162 et seq. and pp. 116–134.

limitation nor to balancing. However, one can find language in the jurisprudence that relativises this assumption. In the first abortion decision, the Court admitted that different ranks in the order of values (*Wertordnung*) of the Basic Law exist. The Court continued: 'Human life represents a supreme value (*Höchstwert*) within the constitutional order; it is the vital basis of human dignity and the precondition of all other fundamental rights'.[123] Other decisions suggest a ranking in certain constellations, particularly in conflicts between freedom of speech (Art. 5) and personal honour and privacy (Art. 2 sect. I). In the *Lüth* case the BVerfG stated that freedom of speech is 'one of the most distinguished (*vornehm*) human rights of all. For a free democratic political order it is absolutely foundational … In a certain sense it is the basis of every freedom there is'.[124]

In general, the BVerfG grants stronger protection to personal and communicative rights than to economic rights. This matters in the process of balancing. In step 3, the Court examines whether there are other means that would equally fulfil the purpose of the law but affect fundamental rights less severely. The Court grants the legislature wide discretion with regard to the choice of means in the case of economic regulation. The more personal rights are limited, the more discretion shrinks. Since it is often uncertain what effect a law will have and thus only prognostic considerations are available, the legislature is under a constitutional duty to undertake a serious investigation. However, the Court will not replace the legislature's prediction with its own. It may be, however, that a risk appears so great that the legislature is constitutionally barred from taking it. This is especially true for experimental laws if it would be extremely difficult or almost impossible to revise the experiment, should it produce considerable negative effects for fundamental rights.[125]

While the second and third steps of the proportionality test concern a means-ends relationship between the purpose of the law and the ways to achieve it in which the fundamental right that is limited plays no role, the limited right is re-introduced in step 4.[126] Here a cost-benefit analysis is conducted between the cost to the fundamental right by the statutory limitation and the benefit for the legal good in the interest of which the fundamental right is limited. Since in most cases the legal good is itself a fundamental right, the weight that the Court gives to the competing rights matters.

However, the balancing is not undertaken in the abstract. The question is not which right is more and which is less important. The question is rather one of the

[123] BVerfG, case 1 BvF 1/74 et al., *Abortion I*, judgment of 25 Feb. 1975, BVerfGE 39, 1, 42.

[124] BVerfG, case 1 BvR 400/51, *Lüth*, judgment of 15 Jan. 1958, BVerfGE 7, 198, 208.

[125] See, e.g., BVerfG, case 1 BvL 89/87, *Broadcasting*, judgment of 16 June 1981, BVerfGE 57, 295, 322 et seq.

[126] This difference is often overlooked. See Grimm 2007.

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importance of the aspect of the fundamental right that is affected by the limitation and the intensity of the intrusion on the one hand, versus the importance of the aspect of the competing right that profits from the limitation and the importance of the profit on the other hand. This is a case-by-case assessment for which it is helpful that the Court distinguishes between what can be called the core and the periphery of the right. When it comes to restrictions of personality rights, a threefold differentiation can often be observed, namely between a social, a private and an intimate sphere. Similarly, an internal differentiation of economic rights is made. For example, regarding freedom of property (Art. 14), the Court distinguishes between a personal and a mere functional aspect of property. Whenever property serves as a material basis for the free development of personality, it receives the strong protection that personal rights enjoy. Where property in its function as a basis or an object of economic transactions is concerned, its weight is lower.[127] The same is true for freedom of profession (Art. 12). The individual choice of a profession is more strongly protected than the exercise of a profession.[128] In the field of regulation of the economy, in the interest of social justice, workers' protection, consumer protection, protection of the environment and the like, the laws that limit economic rights are usually upheld.

It is widely accepted that in the EU, the four economic freedoms prevailed over personal rights for a long time. The CJEU's mission to establish the Common Market gave these rights their particular strength. Even if social benefits were extended beyond the scope defined by the national laws, this was done not in the personal interest of the beneficiaries, but in the interest of free movement. The question is whether this will change after the adoption of the European Charter of Fundamental Rights (Charter). The decision of the CJEU most frequently quoted in this respect is *Omega*,[129] in which the Court agreed that the national guarantee of human dignity in the German Basic Law could justify an exception from the free movement of goods. Yet the CJEU reached this result after balancing human dignity against the free movement of goods, which means that in principle, another outcome could also have been possible, whereas in German constitutional law dignity is guaranteed absolutely so that in a conflict between dignity and any other fundamental right, dignity always trumps. The balancing is further discussed in Sect. 2.8.2.

A special problem is the relation between the European Charter and the national bills of rights. When do national fundamental rights apply and when do European fundamental rights? This will be discussed in Sect. 2.11.1.

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[127] See, e.g., BVerfG, case 1 BvR 532/77 et al., *Co-determination,* judgment of 1 Mar. 1979, BVerfGE 50, 290, 340.

[128] See, e.g., BVerfG, case 1 BvR 596/56, *Pharmacy*, judgment of 11 June 1958, BVerfGE 7, 377. BVerfGE 7, 377 (1958).

[129] Case C-36/02 *Omega* [2004] ECR I-09609.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

Implementation of the European Arrest Warrant (EAW) in Germany: the IRG

The EAW Framework Decision[130] was implemented into German law as a part of the Act on International Cooperation in Criminal Matters (*Gesetz über die Internationale Rechtshilfe in Strafsachen*, hereinafter IRG). The respective provisions can be found in Part VIII regarding the 'Extradition and Transit to Member States of the European Union' in Sects. 78–83i IRG. This particular part was introduced into the Act in 2006 after the *European Arrest Warrant I* decision of the BVerfG of 2005,[131] which struck down the former version enacted in 2004. In 2013 Germany issued a total of 1,932 EAWs, and a total of 12,091 alerts were introduced by other Member States based on the EAW.[132]

The most relevant provisions regarding the EAW in the IRG for this report are:

Section 78 IRG [Precedence of Part VIII][133]

(1) Unless this Part contains specific regulations, the other provisions of this Act shall apply to the extradition and transit to Member States of the European Union.

(2) This Part shall take precedence before the international agreements mentioned in s. 1(3) insofar as it contains exhaustive regulations.

Section 79 IRG [Duty to Grant Assistance; Preliminary Decision]

(1) Admissible requests for extradition or transit by a Member State may only be denied as far as provided in this Part. The decision refusing assistance must contain reasons.

(2) Prior to the decision of the Oberlandesgericht on admissibility the authority in charge of granting assistance shall decide whether it intends to raise objections under s. 83 b. The decision not to raise objections must contain reasons. It is subject to review by the Oberlandesgericht in the procedure under s. 29; the parties shall be heard. When being notified under s. 41(4) the person sought shall be warned that in the case of simplified extradition a judicial review under the 3rd sentence above is not available.

(3) If facts arising after a decision under subsection (2) 1st sentence above which are capable of giving rise to obstacles to admissibility do not lead to a refusal, the decision not to raise objections shall be subject to review in the procedure under s. 33.

Section 80 IRG [Extradition of German Citizens]

(1) The extradition of a German citizen for the purpose of prosecution shall not be admissible unless

[130] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[131] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273.

[132] Council of the European Union, 8414/414 REV 4, LIMITE.

[133] Translation of the IRG by Michael Bohlander and Wolfgang Schomburg. Translation of Sect. 83 (1) No. 3, (2), (3) and (4) by Tobias Reinbacher.

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1. measures are in place to ensure that the requesting Member State after a final conviction to a sentence of imprisonment or other sanction will offer to return the person sought, if he so wishes, to Germany for the purpose of enforcement and

2. the offence has a substantial link to the requesting Member State.

A substantial link to the requesting Member State typically exists if the conduct underlying the offence occurred wholly or in its essential parts on its territory and the result occurred there at least to an essential degree, or if it relates to a serious offence with a typically transborder quality which was committed at least in part on its territory.

(2) If the conditions of subsection (1) 1st sentence No. 2 above are not fulfilled, the extradition of a German citizen for the purpose of prosecution shall be inadmissible unless

1. the conditions of subsection (1) 1st sentence No. 1 above are fulfilled and the offence

2. has no substantial link to German territory and

3. would under German law also be an unlawful act fulfilling the actus reus and mens rea elements of an offence under German law or would mutatis mutandis be such an offence under German law, and if upon an individual balancing of the competing interests the interest of the person sought in his non-extradition does not outweigh the other interests.

A substantial link to the domestic territory typically exists if the conduct underlying the offence occurred wholly or in its essential parts on German territory and the result occurred there at least to an essential degree. When balancing the interests, special regard shall be had to the nature of the offence, the practical requirements and possibilities of an effective prosecution, the interests of the person sought as protected under civil liberties, taking into account the goals related to the creation of a European Judicial Space and weighing them against each other. If because of the offence on which the extradition request is based a decision by the prosecution service or by a court exists ordering the discontinuance or nonlieu of a criminal investigation, this decision and the reasons for it must be taken into account. This shall also apply if a court has listed a case for trial or has issued a summary judgment in written proceedings.

(3) The extradition of a German citizen for the purpose of enforcement shall be inadmissible unless the person sought after being notified of his rights gives his consent and this is noted in a judicial record. S. 41(3) and (4) shall apply mutatis mutandis.

(4) If the request for enforcement of a final sentence of imprisonment or other custodial sanction was preceded by an extradition because of the offence on which the sentence is based under subsections (1) or (2) above or if the request is based on the non-consent of the person sought under subsection (3) above, s. 49(1) No. 3 shall not apply. If in the case of such a request and for the purposes of conversion under s. 54 there is no maximum penalty for the offence under German law because s. 49(1) No. 3 does not apply, the maximum penalty shall be two years' imprisonment.

Section 81 IRG [Extradition for the Purpose of Prosecution and Enforcement]

S. 3 shall apply under the proviso that

1. extradition for the purpose of prosecution shall not be admissible unless under the law of the requesting Member State the offence is punishable by imprisonment or another sanction with a maximum term of no less than twelve months,

2. extradition for the purpose of enforcement shall not be admissible unless under the law of the requesting Member State a custodial sanction of no less than four months is to be enforced,

3. extradition in tax, customs and currency matters shall also be admissible if the German law does not recognise similar taxes or does not contain similar tax, customs or currency laws as the law of the requesting Member State,

4. double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting State punishable by a custodial sanction with a maximum term of no less than three years and is listed in one of the categories of offences listed in article 2 (2) of the Council Framework Decision 2002/584/JHA … .

Section 82 IRG [Non-Applicability of Provisions]

Ss. 5, 6 (1), 7 and, insofar as a European arrest warrant is concerned, s. 11 shall not apply.

Section 83 IRG [Additional Conditions of Admissibility]

Extradition shall not be admissible

(1) 1. if the person sought has already been finally tried in another Member State for the offence on which the request is based and that in the case of a conviction the sentence has been enforced, is currently being enforced or can no longer be enforced under the law of the convicting State,

2. if the person sought was at the time of the offence not criminally liable under s. 19 of the Strafgesetzbuch or

3. if in the case of a request for the purpose of enforcement of a sentence the convicted did not appear in person at the trial which resulted in the decision or

4. if the offence upon which the request is based is under the law of the requesting Member State punishable by life imprisonment or another custodial sanction for life or if the person sought was sentenced to such a penalty and there is no review of the penalty or sanction either upon request or propio motu after a period of no longer than 20 years.

(2) Subsection 1 No. 3 notwithstanding extradition shall be admissable if

1. the convicted person

a) in due time

aa) either was summoned to the trial which resulted in the decision in person or

bb) by other means actually received official information of the scheduled date and place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and

b) was informed that a decision may be handed down in absentia,

2. the convicted person, in a case where defence counsel had been appointed, frustrated the service of a summons through flight in the knowledge of the proceedings, or

3. the convicted person being aware of the scheduled trial, had given a mandate to a legal counsellor to defend him or her at the trial, and was indeed defended by that counsellor at the trial.

(3) Subsection 1 No. 3 notwithstanding extradition shall be admissable if the convicted person

1. expressly stated that he or she does not contest the decision or

2. did not request a retrial or an appeal within the applicable time frame.

The convicted person must be expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed.

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(4) Subsection 1 No. 3 notwithstanding extradition shall also be admissable if the convicted person will be personally served with the decision without delay after the surrender and will be informed of his or her right to a retrial or an appeal mentioned in Subsect. 3 sentence 2 and the of the applicable time frame.

Section 83a IRG [Extradition Documents]

…

Section 83b IRG [Obstacles to Granting an Application]

(1) Extradition may be refused

a) if criminal proceedings are pending against the person sought in Germany for the same offence as the one on which the request is based,

b) if criminal proceedings against the person sought for the same offence as the one on which the request is based, have either not been instituted or if initiated have been closed,

c) if a request for extradition by a third State shall be given precedence,

d) unless on the basis of the duty to surrender under the Council Framework Decision … on the basis of an assurance by the requesting State or based on other reasons it can be expected that the requesting State would honour a similar German request.

(2) Extradition of a foreign citizen normally living on German territory may further be refused

a) if in the case of an extradition for the purpose of prosecution the extradition of a German citizen would be inadmissible under s. 80(1) and (2),

b) if in the case of an extradition for the purpose of enforcement, after being judicially warned, the person sought does not consent on the record of the court and his interest in an enforcement in Germany prevails; s. 41(3) and (4) shall apply mutatis mutandis.

2.3.1 The Presumption of Innocence

2.3.1.1–2.3.1.2 The presumption of innocence as a particular manifestation of the principle of the rule of law laid out in Art. 20(3)[134] of the GG was expounded by Judge *Broß* in his dissenting opinion in the BVerfG's *European Arrest Warrant I* decision on the first version of the implementation of the EAW Framework Decision in the IRG.

Article 20 GG [Basic constitutional principles]

…

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

He claimed that the presumption of innocence protected the person charged with a crime 'from all disadvantages that are equivalent to a verdict of guilt or a sentence but have not been preceded by proceedings intended to ascertain the person's guilt that have been conducted under the rule of law in compliance with the code of

[134] Also cf. above at Sect. 1.2.1.

procedure'.[135] Only proper main proceedings enable the judge to determine the guilt of the accused and only a final judgment in line with criminal procedural law could rebut the presumption of innocence. In his view, the EAW violates this principle since it treats the person charged with a crime in one of the Member States as if found guilty for the purpose of the extradition even though proper proceedings have not taken place. Interestingly, the appellant did not rely on this constitutional principle and the majority of the Federal Constitutional Court did not consider it in its decision either. Its *main* concerns were of a different nature.[136] The Court did not criticise the Framework Decision itself. It only dealt with the question whether the constitutional rights of the Basic Law were respected with regard to the discretion EU law had left to the German *Bundestag*.[137]

First, it held that the basic right of German nationals in Art. 16(2) GG[138] not to be extradited to a foreign country – unless the law provides otherwise for extraditions to Member States of the EU or to an international court and the rule of law is observed – was violated, since the former version of the IRG did not include the possibility to deny extradition in cases where the respective person was charged with a crime that did not have a substantial link to German territory, i.e. the conduct or its result occurred in Germany. In such cases German nationals were protected from extradition by Art. 16(2) GG and the rule of law.[139] In other words, the *Bundestag* should have used the discretion left by the Framework Decision to comply with the German Constitution. It should be kept in mind that Judge Broß also criticised the violation of the presumption of innocence from the perspective of the Constitution's protection of citizenship, since the majority of the Court was not willing to extend it to offences with a significant connecting factor to a foreign country. But if taken seriously, the presumption of innocence as a general principle rooted in the rule of law must apply to all persons, not just German nationals.

Secondly, the IRG did and still does provide for a two-layered system[140] in which the proceedings are divided between the court reviewing the admissibility and political authorities finally granting the extradition. Since the government

[135] Judge Broß, Dissenting Opinion to the Judgment of the BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273, 323; concurring Ranft 2005 at para. 365.

[136] Other constitutional questions were addressed as well, such as the 'integration clause' of Art. 23 GG and the constitutional principles of Art. 20 GG; for a summary of the decision, see von Heintschel-Heinegg 2014, p. 666; Satzger 2012, § 8 para. 30; Sinn and Wörner 2007, p. 204.

[137] Cf. above at Sect. 1.3.4.

[138] The text of Art. 16(2) GG can be found above at Sect. 1.2.1.

[139] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273, 304 et seq.

[140] This is in itself a violation of the EAW Framework Decision! Cf. von Bubnoff 2005, p. 63; Burchard 2013, § 14 para. 12; Hackner 2012, § 79 IRG para. 1; von Heintschel-Heinegg 2014, p. 670; Reinbacher 2014, p. 544.

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authorities were afforded a margin of discretion, in the Court's view, Art. 19(4) GG required that the decision be subject to a judicial review as well.[141]

Article 19 GG [Restriction of Basic Rights – Legal Remedies][142]

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph.

Both aspects have now been accounted for in the new version of the IRG: Sect. 80 IRG distinguishes between offences with a substantial link to German territory and those with a substantial link to the requesting Member State, and Sect. 79(2) IRG provides for judicial review of the decision of the authority in charge as to whether it intends to raise objections under Sect. 83b IRG (Obstacles to Granting an Application).

Albeit the presumption of innocence did not play a major rule in the *European Arrest Warrant I* decision, the question whether German courts may review the facts and determine whether there is probable cause that the person sought has actually committed the crime he or she is charged with, is nevertheless debated among German scholars and courts. Section 10(2) IRG provides for a review of whether there are reasonable grounds to believe that the person sought has committed the crime if it is justified by 'special circumstances'.

Section 10 IRG [Extradition Documents]

…

(2) If special circumstances justify a review as to whether there are reasonable grounds to believe that the person sought has committed the offence with which he is charged, extradition shall be not granted unless a description of the facts showing probable cause for the commission of the offence has been submitted.

It is unclear, however, whether this provision is applicable to EAWs. Before the Framework Decision, this question was debated with regard to the European Convention on Extradition of 1957 as well. Since subject to Sect. 1(3) IRG international treaties take precedence over the regulations of the IRG, Sect. 10(2) IRG seemed not to apply as far as it followed from the respective treaty that there should be no review of the grounds for suspicion.[143] Although the European Convention on Extradition generally did not provide for such a review, the Federal Court of Justice (*Bundesgerichtshof*, hereinafter BGH) held that a limited application of Sect. 10(2) IRG was possible in cases where there was evidence to believe that the requesting Member State acted abusively or where it was to be feared that the

[141] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273, 309 et seq.

[142] Translation of the GG by Christian Tomuschat and David P. Currie.

[143] Vogel 2014, § 10 IRG para. 69.

extradited individual was exposed to a violation of fundamental rights and a review of the facts and grounds for suspicion could shed light on these apprehensions.[144]

Some courts[145] and commentators[146] argue that Sect. 10(2) IRG applies to EAWs as well, since subject to Sect. 78(1) IRG, other provisions of the Act shall apply to extraditions to Member States of the EU 'unless this Part contains specific regulations' – which in this regard it does not. What is more, Sect. 82 IRG specifically states that some provisions of the IRG do not apply to EAWs, but these do not include Sect. 10(2) IRG. The BVerfG demanded that the documents must be sufficient (Sect. 83a IRG) in order to determine the reasonable grounds for the suspicion but also considered Sect. 10(2) IRG as regards EAWs.[147] The Higher Regional Court (*Oberlandesgericht*, hereinafter OLG) Köln limited the application of Sect. 10(2) IRG to cases where the criteria the BGH had introduced regarding the European Convention on Extradition (abuse or violation of fundamental rights) are fulfilled.[148] It remains to be seen whether the application of Sect. 10(2) IRG is in line with the Framework Decision,[149] which is based on mutual trust and does not include a review of the facts on which the suspicion is based. Additionally, Sect. 10 (2) IRG requires 'special circumstances' for such a test. The OLG Karlsruhe, for instance, accepted an alibi for the time of the offence confirmed by several witnesses as a ground for review.[150]

Other German courts and commentators refuse to apply Sect. 10(2) IRG in matters regarding EAWs.[151] With the exception of Sect. 83a(1) No. 5 IRG, subject to which extradition shall not be admissible unless a description of the circumstances in which the offence was committed, including the time and place of its commission and the mode of participation by the person sought has been transmitted, Sects. 78–83i IRG do not include a review as to whether there are reasonable grounds for the suspicion. Therefore, some commentators interpret Sect. 83a IRG as a '*lex specialis*' precluding the review of the reasonable grounds subject to Sect. 10(2) IRG.[152] Moreover, the IRG must be interpreted in the light of the Framework Decision, which according to this view does not include a revision

[144] BGH, in: Neue Juristische Wochenschrift (NJW) 1984, p. 2048.

[145] OLG Karlsruhe, in: Strafverteidiger (StV) 2007, p. 650; Higher Regional Court Berlin (*Kammergericht*, hereinafter KG), in: Strafverteidiger Forum (StraFo) 2010, p. 191.

[146] Von Bubnoff 2005, p. 22; Hackner 2012, § 78 IRG para. 14; Lagodny 2014, § 22 para. 50.

[147] BVerfG, case 2 BvR 2115/09, *Auslieferungshaftbefehl*, order of 9 July 2009, StraFo 2009, p. 460.

[148] OLG Köln, case 6 AuslA 84/11, order of 6 October 2011; concurring Burchard 2013, § 14 para. 51.

[149] Critical Böse 2014, § 83a IRG para. 1.

[150] OLG Karlsruhe, in: StV 2007, p. 650.

[151] OLG Stuttgart, in: StV 2004, p. 547; concurring Ahlbrecht and Lagodny 2003, p. 333; Böse 2013, § 83a IRG para. 12; critical Ranft 2005, p. 365.

[152] Böse 2013, § 83a IRG para. 13.

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of the facts.[153] In 'extreme and exceptional cases', however, they would allow such a review due to a violation of Sect. 73 IRG ('*ordre public*').[154]

> **Section 73 IRG [Limitations on Assistance (Ordre Public)]**
>
> Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system.
>
> Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on [the] European Union.

These thoughts lead us to an even more debated issue: The question whether German courts can refuse to issue an EAW on the grounds that the criminal prosecution or detention in the other Member State (and therefore the extradition of the suspect) would violate basic rights of the German or the European '*ordre public*'.[155] Sect. 73 cl. 1 IRG deals with the German '*ordre public*'. Could an EAW therefore be denied on the grounds of a violation of the rights laid out in the Basic Law? Some German courts apply Sect. 73 cl. 1 IRG and deny extradition in extreme cases due to a violation of the German '*ordre public*'.[156]

However, this view is not in line with the prevailing view[157] and the motives of the *Bundestag*. When enacting Sect. 73 cl. 2 IRG, which deals with the European '*ordre public*', it stated that the German '*ordre public*' was not applicable to EAWs, since the Framework Decision did not include such a ground for refusal. Instead, cl. 2 was meant to implement Art. 1(3) of the Framework Decision as a special law for EAWs,[158] which is expressed in the phrase 'Requests under Parts VIII, IX and X'. Therefore, cl. 2 is the exclusive provision for EAWs.[159] This reflects the primacy of EU law,[160] particularly in the light of the CJEU decision in *Melloni*.[161] However, this could still mean that EAWs can be denied subject to Sect. 73 cl. 2 IRG if there is a

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[153] Ibid.

[154] Ibid.

[155] Cf. Gaede 2013, p. 1279; Reinbacher 2014, pp. 542–544.

[156] OLG Celle, in: BeckRS 2008, No. 10354 (life imprisonment for possession of small amount of soft drugs violates principle of proportionality); OLG Hamm, in: StV 2011, p. 173 (extradition violates protection of marriage and family).

[157] Vogel 2014, § 73 para. 139. Also cf. Ambos and Poschadel 2015, § 73 para. 65: cl. 1 regards international cooperation but is only applicable if there are no directly applicable provisions of an international treaty which take precedence subject to Sect. 1(3) IRG; cl. 2 regards cooperation within the EU.

[158] Bundestag Printed Paper (*Bundestagsdrucksache*, hereinafter BT-Drs.) 15/1718, pp. 11, 14.

[159] Burchard 2013, § 14 para. 47; Vogel 2014, § 73 IRG paras. 10, 139. Vogel 2014, § 73 para. 136 rightly points out that Sect. 73 cl. 2 IRG therefore should have been placed in Part VIII of the IRG among the provisions dealing with extradition in the EU instead.

[160] Cf. Ambos and Poschadel 2015, § 73 para. 65: German basic rights not applicable due to primacy of EU law; Böse 2014, Vor § 78 para. 26: German basic rights have been replaced by the European *ordre public* unless the Framework Decision leaves a margin of discretion.

[161] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para. 59: 'Rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State.'

violation of the principles of Art. 6 TEU, so that for instance Art. 6(2) of the European Convention on Human Rights (ECHR) could be invoked with regard to the presumption of innocence in accordance with Sect. 73 cl. 2 IRG.

However, since the CJEU decisions *Melloni*[162] and *Radu*[163] it has become unclear whether Sect. 73 cl. 2 IRG is in line with EU law.[164] Some interpretations of these judgments go so far as to assume that the CJEU would only accept a refusal of an EAW on the grounds laid out in Arts. 3–5 of the Framework Decision.[165] Others point out that the Court did not specifically say that a violation of the principles of Art. 6 TEU did not count as a ground for refusal, and that on the contrary, Art. 1(3) of the Framework Decision demands that the European '*ordre public*' itself be respected.[166] It should also be noted that European law, including the Framework Decision, must be interpreted in the light of the Charter of Fundamental Rights of the EU,[167] which the Member States must respect pursuant to Art. 51 of the Charter 'when they are implementing Union law'. What is more, all EU Member States are bound by the ECHR, so that individuals can ultimately apply to the European Court of Human Rights (ECtHR) pursuant to Art 34 ECHR in the case of a violation of the Convention by the extraditing state.

Most German commentators argue in favour of Sect. 73 cl. 2 IRG.[168] They claim that even though German law is to be interpreted in the light of EU law and even if the CJEU actually interprets the Framework Decision differently, there must not be an interpretation of the German provision *contra legem*, i.e. against the wording of Sect. 73 cl. 2 IRG.[169] Furthermore, if the core of the European '*ordre public*' were not respected, some commentators hold that the German Federal Constitutional Court could then evoke the emergency jurisdiction it has reserved for an identity review in exceptional circumstances,[170] since fundamental rights would no longer be protected. Some German courts also apply Sect. 73 cl. 2 IRG and consider a violation of Art. 6 TEU as a reason for denial to execute an EAW.[171]

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[162] Case C-399/11 *Melloni*, n. 161.

[163] Case C-396/11 *Radu* [2013] ECLI:EU:C:2013: 39.

[164] Ambos and Poschadel 2015, § 73 paras. 70–76; Burchard 2013, § 14 para. 49; Heger and Wolter 2015, Art. 1 RbEuHb para. 644; Reinbacher 2014, pp. 543–544; Vogel 2014, § 73 IRG paras. 137–138.

[165] Brodowski 2013, p. 56, pointing out that a conflict between the CJEU and BVerfG might arise.

[166] Burchard 2013, § 14 para. 49; also cf. Inhofer 2015, § 79 IRG para. 1.

[167] Ambos and Poschadel 2015, § 73 IRG para. 73.

[168] Ambos and Poschadel 2015, § 73 IRG paras. 70–76; Böse 2014, Vor § 78 para. 25; Inhofer 2015, § 79 para. 1, referring to Case C-105/03 *Pupino* [2005] ECR I-05285, para. 47: '… the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*'.

[169] OLG München, in: StV 2013, p. 710; Burchard 2013, § 14 para. 47.

[170] Gaede 2013, p. 1280; also cf. Brodowski 2013, p. 56; on the judicial reservations in exceptional circumstances, cf. supra at Sect. 1.3.4.

[171] Recent decisions: OLG Karlsruhe, in: BeckRS 2014, No. 11797; OLG München, in: StV 2013, p. 710; OLG Stuttgart, in: NJW 2010, p. 1617.

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Very recently the BVerfG actually decided on the matter of human rights and the EAW.[172] When assessing an EAW and the extradition of an American citizen from Germany to Italy, the Court relied upon the inviolability of human dignity arising from Art. 1(1) GG, and invoked its identity review to claim jurisdiction over the case.[173] The accused had been convicted *in absentia*[174] in Italy and claimed that he had not had any knowledge of the proceedings and would not be granted a proper (re-)trial including a hearing of evidence in Italy, even though Sect. 83 No. 3 IRG of 2006 demanded 'a trial de novo in which the charges against him will be reviewed in their entirety and where he will be given the right to be present at the trial'. The OLG Düsseldorf, however, relied on the information from the Italian Prosecutor's Office that the accused would be granted a restoration to the (missed) deadline for an appeal, and therefore held that a proper review of the case including a new hearing of evidence could not be ruled out. The BVerfG decided that the OLG had failed its obligation to investigate the matter further as to whether there would in fact be a proper hearing of evidence in the new trial. The Court explained that German courts always have to respect Art. 1(1) GG when issuing EAWs.[175] The BVerfG stated, however, that the limitations on extradition imposed by EU law requirements were identical to the limitations arising from Art. 1(1) GG.[176] As regards the IRG, the Court declared that regardless of the actual meaning of Sect. 73 cl. 2 IRG (which it left open), this provision did not prevent German courts from respecting Art. 1(1) GG when they interpret Sects. 78–83i IRG.[177]

2.3.2 *Nullum Crimen, Nulla Poena Sine Lege*

2.3.2.1 In the *European Arrest Warrant I* decision of 2005 the BVerfG also turned to Art. 103(2) GG.[178]

> **Article 103 GG [Fair Trial]**
>
> (1) In the courts every person shall be entitled to a hearing in accordance with law.
>
> (2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

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[172] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015. This decision was delivered long after this report was finalised and could therefore only be considered briefly.

[173] Cf. Sect. 1.3.4.

[174] For *in absentia* judgments and the EAW, cf. Sect. 2.3.3.

[175] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015, para. 83.

[176] Ibid., para. 84.

[177] Ibid., para. 108.

[178] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273, 308.

(3) No person may be punished for the same act more than once under the general criminal laws.

Subject to this provision an act may only be punished if it was defined by law as a criminal offence before the act was committed. The Court again considered this principle from the perspective of Art. 16(2) GG, which permits the extradition of German nationals only if 'the rule of law is observed'. The Court reported correctly that the principle of *nulla poena sine lege* as enshrined in Art. 103(2) GG only applies to substantive criminal law and not to procedural law – to which the laws on extradition in Germany belong.[179] The Court argued, however, that if a German citizen were answerable for acts that did not have a significant connecting link to a foreign country and were not punishable crimes in Germany when they were committed, 'this could be tantamount to a retroactive amendment of substantive law'.

Again, it must be pointed out that the Court was merely concerned about acts committed primarily in Germany. This is indeed a convincing perspective,[180] for if a person commits an act in a foreign country, which constitutes a punishable crime under the law of that country, the problem of *nulla poena* does not arise, since the respective criminal laws existed at the time of the act in the state where it was committed. The situation is much more problematic, however, if foreign laws apply even when the person physically acts in a country (e.g. his or her own) where the act is not a punishable offence. There are certain conditions under which criminal laws can extend to foreign countries, e.g. either because both the act and the result are considered as a 'place of the offence' – as provided for in Sect. 9(1) of the German Criminal Code (*Strafgesetzbuch*, hereinafter StGB) – and these two places differ, or because other principles, such as the active or passive personality principle, apply.[181]

Consequently, a situation can arise where a person's behaviour is perfectly in line with the laws of the country where he or she physically acts (and resides), whereas it may at the same time constitute an offence in a different country. This is for instance quite common when crimes are committed on the internet where laws of multiple jurisdictions can apply. German scholars have repeatedly given the example of Sect. 130(3) StGB, which makes it a punishable act to publicly deny or downplay any act committed under the rule of National Socialism in Germany – a particularity of German criminal law.[182] In theory, such an act could be prosecuted in Germany if it were committed online, even if the person charged with the offence physically acted in a different country that does not criminalise such behaviour.[183]

[179] Ibid.

[180] Reinbacher 2014, p. 536.

[181] Cf. Deiters 2003, p. 360; Reinbacher 2014, p. 610.

[182] Cf. Deiters 2003, p. 360; Reinbacher 2014, pp. 610, 616–618; Schünemann 2003, p. 188.

[183] This was actually the case in the BGH's famous *Toeben* decision; BGH, case 1 StR 184/00, judgment of 12 December 2000, in: NJW 2001, p. 624.

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With the EAW in force, the extradition of nationals of other EU states to Germany with regards to this particular crime becomes a possibility.

While some German scholars argue that the most punitive laws will thereby become applicable in the entire EU[184] and claim that the democratic principle – and the (constitutional) laws that prevent a country from extraditing its own nationals – imply that no one shall be punished for an offence in the enactment of which he did not participate by way of the democratic process, the problem actually predominantly arises when an act is committed in the person's own country. When acting abroad there are good reasons why foreign laws should apply because everyone has to respect the (criminal) laws of the country the person is in, regardless of the fact that the person could not vote for the parliament that enacted them. Therefore, the questions whether and when national criminal laws apply become crucial. This could lead to a broad discussion of a matter which is still far from being solved if there were enough space to elaborate on it – in short: whether and when there are reasonable grounds for a state to apply its criminal laws in relation to an act.[185]

With regards to the EAW, however, the BVerfG has excluded the admissibility of extraditions in cases that are not significantly connected to the country that seeks the extradition, and Sect. 80 IRG now implements this requirement. Subject to Sect. 80(1) cl. 1 No. 2 IRG, Germany does not extradite German citizens unless the offence has a substantial link to the requesting Member State, and cl. 2 elaborates that such a substantial link exists if the conduct underlying the offence occurred wholly or in its essential parts on its territory and the result occurred there at least to an essential degree, or if it relates to a serious offence with a typical cross–border quality which was committed at least in part on its territory. If these conditions are not fulfilled, Sect. 80(2) IRG requires that the act be an offence under German law as well. On the other hand, the catalogue of offences that do not need to be an offence under German law if there is a necessary link to another Member State has been fiercely criticised in the light of the principles of clarity and certainty,[186] particularly because the wording has been deemed to be much too broad.[187]

However, the crucial point with regards to the *nulla poena* principle is that the Member State that seeks the extradition must have established sufficient criminal laws before the act was committed.[188] As regards the European '*ordre public*' (Sect. 73 cl. 2 IRG), the requirements are not as strict as in Art. 103(2) GG, since common law is a sufficient source as well, so that an Act of the respective parliament is not necessary.[189]

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[184] Schünemann 2003, p. 188; Schünemann 2007, p. 532.

[185] German law treats the question of the applicability of German criminal law as a part of substantive criminal law in Sects. 3–9 StGB, whereas in other legal systems it is a question of criminal procedural law.

[186] Schünemann 2003, p. 188; cf. von Bubnoff 2005, p. 10; Satzger 2012, § 8 para. 26.

[187] Schünemann 2003, p. 188: 'a catalogue of key words'; also cf. Satzger 2012, § 8 para. 26: 'offences only outlined roughly'.

[188] Conrad 2013, p. 192; Heger 2007, p. 224.

[189] Vogel 2014, § 73 IRG para. 60.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 It should first be noted that German criminal procedural law in general bans *in absentia* judgments, cf. Sect. 230(1) of the German Code of Criminal Procedure (*Strafprozessordnung*, hereinafter StPO),[190] so that the respective problem does not arise for EAWs issued in Germany.

> **Section 230 StPO [Failure of the Defendant to Appear]**[191]
>
> (1) No main hearing shall be held against a defendant who fails to appear.
>
> …

The rules relating to EAWs issued by other Member States that permit *in absentia* judgments are provided for in Sect. 83(1) No. 3 IRG. Subject to this provision, extradition from Germany shall not be admissible if, in the case of a request for the purpose of enforcement of a sentence, the convicted did not appear in person at the trial which resulted in the decision. This provision implemented not only the original Framework Decision but also the view of the BVerfG, which ruled that *in absentia* judgments violate basic principles of German constitutional law and of international law, e.g. the principle of fair trial subject to Art. 103(1) GG (right to a hearing in the courts) and Art. 6(3) ECHR, or human dignity subject to Art. 1(1) GG,[192] unless certain criteria are met.[193] The Court held, however, that an extradition was admissible if the accused had fled from trial in the 'knowledge of the proceedings' and defence counsel had been appointed and able to defend the accused in line with the rule of law.[194] Accordingly, subject to the former Sect. 83 No. 3 IRG of 2006 extradition was not admissible

> if in the case of a request for the purpose of enforcement the sentence on which the request is based was issued in absentia and the person sought had not been personally summoned to or otherwise been informed about the date of the hearing which led to the judgment in absentia unless the person sought, in a case where defence counsel had been appointed, frustrated the service of a summons through flight in the knowledge of the proceedings against him, or if after his transfer he is granted a trial de novo in which the charges against him will be reviewed in their entirety and where he will be given the right to be present at the trial.

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[190] There are a few exceptions to this general rule provided for in Sect. 231 et seq., 408a and the new 329(2) StPO, which are beyond the scope of this report.

[191] Translated by Brian Duffett and Monika Ebinger.

[192] The text of Art. 1 GG can be found above in Sect. 1.2.1.

[193] Cf. BVerfG, case 2 BvR 283/05, order of 4 July 2005, in: Neue Zeitschrift für Strafrecht (NStZ) 2006, para. 102; also cf. BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015.

[194] BVerfG, case 2 BvR 1255/86, order of 17 November 1986, in: NJW 1987, p. 830; BVerfG, case 2 BvR 1704/90, order of 24 January 1991, in: NJW 1991, p. 1411; BVerfG, case 2 BvR 26/04, order of 3 March 2004, in: Neue Zeitschrift für Strafrecht Rechtsprechungsreport (NStZ-RR) 2004, p. 308.

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Section 83 IRG was amended in 2015 in order to implement Art. 4a of the Framework decision. Its new wording is almost identical to the wording of the respective EU legislation.

The new Sect. 83(2) No. 2 IRG still allows extraditions in cases where the accused frustrated the service of a summons through flight 'in the knowledge of the proceedings' if defence counsel had been appointed. This was also the case under the version of 2006, whereas under the former provision of 2004 extradition was not admissible even in cases of flight, unless the accused had been personally 'summoned to' or otherwise been 'informed about the date of the hearing', so that knowledge of the proceedings as such was not sufficient.[195] In other words: the extradition of a fugitive from justice was not admissible if he or she did not have knowledge of the actual *date of the hearing*.[196] During the legislative procedure after the *European Arrest Warrant I* decision, the *Bundesrat* was critical of the fact that extradition to Member States of the EU was thereby more difficult than to other states, since the BVerfG had allowed extradition in cases of flight if the accused had knowledge of the proceedings as such.[197] The amendment followed the *Bundesrat*'s objections.

The 2006 version of Sect. 83 IRG was enacted before Art. 4a of the Framework Decision came into force. Yet still, according to the most convincing view, it had to be read together with Art. 4a of the Framework Decision which thereby complemented the German provision.[198] Some problems stemming from the different wording have now been solved. For instance, the former Sect. 83 No. 3 IRG of 2006 allowed extradition after an *in absentia* judgment if the accused had '*otherwise* been informed' of the date of the hearing, whereas Art. 4a of the Framework Decision demands that the accused has 'actually received *official* information' and has been informed that a decision may be handed down if he or she does not appear for the trial. While some courts and commentators would simply rely on the wording of the former Sect. 83 No. 3 IRG and accept any kind of knowledge of the date of the hearing,[199] the OLG Oldenburg held that these requirements must be read into the German provision.[200] The new Sect. 83(2) No. 1 (a) (bb) now demands '*official* information'.

Before the EAW was introduced, the BVerfG and the BGH held that the right to appear before a court was an integral part of the fair trial principle, Art. 103(1) GG, and of the right to human dignity, Art. 1(1) GG, and did therefore not allow the extradition if this right was violated.[201] It has been the constant view of the BVerfG

[195] OLG Karlsruhe, in: StV 2004, p. 548; Hackner 2005, p. 313.

[196] OLG Karlsruhe, in: StV 2004, p. 548.

[197] BT-Drs. 16/1024, p. 23.

[198] OLG Oldenburg, in: BeckRS 2013, 16497.

[199] OLG Karlsruhe, in: StV 2004, p. 548; Hackner 2012, § 83 IRG para. 6.

[200] OLG Oldenburg, in: BeckRS 2013, No. 16497.

[201] BVerfG, case 2 BvR 1704/90, order of 24 January 1991, in: NJW 1991, p. 1411; BGH, in: NJW 2002, p. 228.

that the unalterable parts of the Basic Law have to be respected in cases of extradition, which it has particularly claimed in cases of *in absentia* judgments.[202] As explained above, the '*ordre public*' is provided for in Sect. 73 IRG. But since Sect. 83 IRG is a special provision that specifically deals with *in absentia* judgments so that subject to the wording of Sect. 78 IRG other provisions do not apply, some German courts have ruled that extraditions in cases of *in absentia* judgments are only to be assessed subject to Sect. 83 IRG when dealing with EAWs, i.e. Sect. 73 IRG is not applicable.[203] Some commentators agree and interpret Sect. 83 IRG as a '*lex specialis*' compared to Sect. 73 IRG.[204] However, since *in absentia* judgments may be unconstitutional not only from the perspective of the Basic Law but may also violate basic principles of international[205] and European law, such as Art. 6(3) ECHR,[206] other commentators would still rely on the principles of Sect. 73 cl. 2 IRG as a residual provision, arguing that the European '*ordre public*' was meant to be the basic standard for all EAW procedures,[207] or would at least interpret Sect. 83 IRG in the light of the European '*ordre public*'.[208] This would mean, for instance, that proceedings *in absentia* must comply with the rule of law.[209] When introducing the Bill for the 2015 version of Sect. 83 IRG the German Government explained that Sect. 73 cl. 2 IRG contains a general provision to respect the European '*ordre public*', so that, for instance, it was not necessary to include the proviso in Sect. 83 IRG that the convicted person be informed of the trial in a language he or she understands, since the right to an interpreter is a minimum right subject to Art. 6(3)(e) ECHR.[210]

Again, the BVerfG's recent *European Arrest Warrant II* decision shed some light on the Court's view on the matter – even though it regarded the 2006 version of Sect. 83 IRG. As explained above in Sect. 2.3.1, the Court stated that German courts must always respect Art. 1(1) GG (and interpret the IRG accordingly).[211] In cases of *in absentia* judgments the courts must therefore, for instance, investigate whether there will be a proper trial in the requesting state, including the hearing of evidence – if there are substantial reasons to doubt it.

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[202] BVerfG, case 2 BvR 315/83, order of 9 March 1983, in: NJW 1983, 1726; case 2 BvR 1704/90, order of 24 January 1991, in: NJW 1991, p. 1411.

[203] OLG Stuttgart, in: NStZ-RR 2008, p. 176.

[204] Ambos and Poschadel 2015, § 73 para. 91.

[205] Cf. BVerfG, case 2 BvR 26/04, order of 3 March 2004, NStZ-RR 2004, 308, 309, arguing that the core of the respective right is also a basic standard of international law, which is incorporated into German law subject to Art. 25 GG.

[206] Cf. ECtHR, *Colozza v. Italy*, 12 February 1985, Series A no. 89.

[207] Vogel 2014, § 73 IRG para. 140.

[208] Böse 2013, § 83 IRG para. 15.

[209] Ibid.

[210] BT-Drs. 18/3562, pp. 80 et seq.

[211] Ibid., para. 110.

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2.3.4 Fair Trial and Practical Challenges Regarding a Trial Abroad

2.3.4.1 Many German scholars argue that if an issuing Member State does not comply with the rule of law during the proceedings, extradition can then be denied subject to Sect. 73 IRG, as explained above at Sect. 2.3.1. As regards extradition proceedings in Germany, the basic defence rights under the IRG apply. The person sought may at any time have the assistance of counsel (Sect. 40 IRG), he or she has the right to remain silent and must be informed of these rights (Sect. 21(2) IRG). Under certain circumstances counsel will be assigned to the person sought subject to Sect. 40(2) IRG: '1.) if due to the factual or legal complexity of the case assistance appears appropriate, in proceedings according to paragraph 2 of Part VIII, especially in cases of doubt whether the conditions of Sects. 80 and 81 no. 4 have been fulfilled; 2.) if it is apparent that the person sought cannot himself adequately protect his rights; or 3) if the person sought is under 18 years of age'. Additionally, subject to Sect. 77 IRG, the rules of criminal procedure of the StPO apply as well.

On the other hand, as was explained above, German courts usually do not review the grounds for the suspicion or the lawfulness of the foreign decision, unless Sects. 10(2), 73 cl. 2 IRG apply in 'special circumstances', and therefore defence in the requesting state becomes necessary.[212] Some commentators argue that in order to comply with the rule of law, German authorities need to permit an undisturbed and unlimited communication between the accused and his or her defence counsel abroad.[213] It is not easy, however, to find counsel in a foreign country if for instance the person sought is not a national of the requesting state and is located in Germany. The German Association of Criminal Defenders maintains contacts with similar associations in foreign countries,[214] and big law firms may have branches abroad. Yet generally the accused must take these measures into his or her own hands. Some scholars have therefore demanded the establishment of an organisation on the EU level funded by the EU called 'Eurodefensor' as a pendant to Eurojust, meant to provide assistance for criminal defenders in cases with a trans-border dimension.[215]

Among the many questions regarding the practical challenges of extradition procedures, two further aspects shall briefly be dealt with: the costs of the proceedings and compensation for wrongful imprisonment. With regard to the costs of the proceedings, subject to Sect. 77 IRG, the respective provisions of the StPO apply, mainly Sects. 467, 467a StPO. In practice, this means in particular that the German state will bear the necessary costs of a chosen defence counsel if the person sought does not consent to the extradition, requests a court decision subject to Sect. 29 IRG and the court then decides in his or her favour.[216]

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[212] Vogel and Burchard 2014, § 77 IRG para. 43.

[213] Ibid.

[214] http://deutsche-strafverteidiger.de/kontakt/auslandskontakt.html.

[215] Schünemann 2004, p. 14; also cf. Reinbacher 2014, p. 622.

[216] Vogel and Burchard 2014, § 77 IRG para. 66.

Compensation for wrongful imprisonment in Germany is granted subject to the provisions of the Compensation for Prosecution Act (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*, hereinafter StrEG), which generally only applies to imprisonment in Germany. Furthermore, Sect. 77 IRG does not refer to the StrEG, thereby excluding its applicability to measures regarding extradition, so that even in the case of wrongful extradition detention in Germany, compensation will not be paid if arrest and detention were stipulated by a foreign country and German authorities were not responsible for the wrongful accusation and imprisonment.[217] This means that the affected person has a claim for compensation against the German state solely for the wrongful actions of German authorities. However, subject to Sect. 2(3) StrEG, compensation will also be granted for extradition detention or measures of search and seizure *abroad* if stipulated by German authorities. Apart from this, compensation for wrongful imprisonment in other Member States will not be granted.[218]

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.2 The transfer of the principle of mutual recognition to the field of criminal law, which also underlies the concept of the EAW, has been the object of a controversial discussion in Germany. Some scholars point out that the principle was in itself a 'neutral concept'[219] since it meant integration instead of cooperation and also provided positive effects for the accused, such as the principle of *ne bis in idem* by recognising foreign court decisions. Other commentators, however, harshly criticise the concept.[220] They claim that whereas in the Single European Market the principle of mutual recognition meant an expansion of freedom, in the field of criminal law it meant a limitation of freedom. Some scholars state that the mechanism of mutual recognition could 'cause fundamental defensive rights to go astray'.[221] The recognition of evidence as a 'marketable good' in particular is deemed to be the cause for a reduction of defensive rights,[222] since it led to a 'rag rug' of laws undermining the balance of the respective procedural laws. What is more, some commentators claim that market liberalisation and laws on the free movement of goods, etc., usually contain exceptions in order to respect

[217] BGH, in: NJW 1984, p. 1310; OLG Hamm, in: BeckRS 2009, No. 08021; OLG Köln, in: NStZ-RR 2006, p. 151; Vogel and Burchard 2014, § 77 IRG para. 63.

[218] OLG Düsseldorf, in: NStZ 1988, p. 371.

[219] Böse 2014, Vor § 78 para. 19; Gleß 2004, p. 356; Vogler 1989, p. 254.

[220] Braum 2009, p. 419; Hecker 2015, § 12 para. 63; Satzger 2012, § 8 para. 24; Schünemann 2003, p. 187.

[221] Satzger 2012, § 8 para. 24.

[222] Gleß 2004, p. 365; Hecker 2015, § 12 para. 64.

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considerations of the '*ordre public*' of the Member States, whereas in the field of criminal law such reservations are missing.[223]

Here again we reach the crucial question, which has already been dealt with in Sect. 2.3.1 and Sect. 2.3.3: do national courts simply have to execute the decisions of other Member States or can they review the decisions as to whether there is a violation of the national or the European '*ordre public*'? As a short reminder, the *Bundestag* stated that only the European '*ordre public*' as provided for in Sect. 73 cl. 2 IRG was to be taken into account when executing EAWs. Even though some would argue that it has even become unclear whether Sect. 73 cl. 2 IRG is in line with European law since the CJEU's decisions in *Melloni* and *Radu* seem to indicate otherwise, German courts still rely both on cl. 1 and cl. 2 when dealing with EAWs. As regards cl. 1, German courts have, for instance, denied an extradition due to bad conditions of detention in the requesting Member State which violated fundamental rights,[224] due to a violation of the principle of proportionality (of the sentence) as an integral part of the rule of law[225] and because an extradition would mean a violation of Art. 6 GG, according to which '[m]arriage and the family shall enjoy the special protection of the state'.[226]

While these decisions are criticised since they rely on Sect. 73 cl. 1 IRG and the Basic Law, other decisions reach similar conclusions by relying on cl. 2. In this regard courts have examined whether the conditions of detention[227] or the repeal of parole *in absentia*[228] complied with the fundamental rights protected by the ECHR, or whether the sentence was unbearably harsh.[229] This is the most interesting point, since the courts must find a way to reconcile the concept of mutual recognition with the fundamental rights of the accused, which has been the underlying question of this entire report.

On the one hand the concept of mutual recognition would be dead if every national court generally had the right to question and review the decisions of the courts of other Member States. Indeed it cannot be denied that a more intense form of cooperation is necessary when borders vanish and citizens can move freely between states. As the EU has become more integrated, it seems to be only natural that the field of criminal law cannot be spared as a 'reservation of national law'.[230] Furthermore, it was a clear decision of the EU 'legislator' to establish mutual recognition in the field of criminal law and to introduce the EAW as a significant step. This EU policy must not be undermined by the courts of the Member States.

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[223] Satzger 2012, § 8 para. 24.

[224] OLG Bremen, in: BeckRS 2014, No. 10396; OLG Hamm, in: NStZ-RR 2014, p. 228.

[225] OLG Celle, in: BeckRS 2008, No. 0354.

[226] OLG Hamm, in: StV 2011, p. 173.

[227] OLG Karlsruhe, in: BeckRS 2014, No. 11797; OLG München, in: BeckRS 2015, No. 18224.

[228] OLG München, in: StV 2013, p. 710; Sect. 83 No. 3 IRG was not applicable since the original conviction had not been an *in absentia* judgment.

[229] OLG Stuttgart, in: NJW 2010, p. 1617.

[230] Satzger 2012, § 7 para. 2.

Therefore, it must generally be accepted that the review of foreign decisions is not what the EU institutions had in mind, since this could invalidate the entire concept of mutual recognition.

On the other hand, one must not be blind towards the fact that there are still huge differences both in the law and in the conditions of detention in the Member States. Clearly, one could argue that it would be preferable to assimilate the substantive and procedural criminal laws of the Member States before mutual recognition can be enforced. In comparison, mutual recognition of criminal court decisions is a common thing in the Federal Republic of Germany, and Bavarian courts certainly recognise the decisions and arrest warrants of Hessian courts. But both German states have the same Penal and Procedure Code, since criminal law is almost entirely federalised in Germany. The situation is still very different within the EU. However, one should also keep in mind that the European '*ordre public*' is a common base for all Member States. The logic of mutual recognition implies that because all criminal law systems within the EU are based on the fundament of the ECHR, mutual trust becomes possible. In other words: simply because all Member States have to respect the European '*ordre public*' they can trust one another without any review of their respective decisions.[231] Therefore, mutual recognition is built on a presumption of compliance with fundamental rights. Yet still, unfortunately this does not mean that these rights are actually respected in all cases. In this regard Sect. 73 cl. 2 IRG reveals the scepticism of the *Bundestag* towards the concept of mutual recognition.[232]

The German courts therefore seek to find a way that is 'friendly' towards Europe but also protects fundamental rights: in general judgments of other Member States must be accepted and enforced, so that there is no review of the grounds for suspicion or of the lawfulness of the proceedings or the sentence, but in cases of evident violations of fundamental rights in the requesting Member State, the courts apply Sect. 10(2) IRG or deny extraditions subject to Sect. 73 IRG, so that they for instance need not expose extradited citizens knowingly to very bad conditions in other Member States. In other words: the presumption of compliance can be rebutted in special circumstances.

Allowing the extraditing state such a test of compliance with the European '*ordre public*' means shifting from the protection of human rights in the requesting state to a 'preventive protection' in the extraditing state. If one bears in mind both the fact that the requesting state is actually responsible for the violation of fundamental rights and that the concept of mutual recognition generally does not allow a review in the extraditing state, such preventive protection must be limited to exceptional cases. It has rightly been pointed out that the debate therefore needs to focus on finding criteria as to when such a situation actually arises.[233] The prerequisites in the field of EAWs have yet to be clarified. Even though the ECtHR and

[231] Vogel 2014, § 73 IRG para. 133.

[232] Ibid., para. 134.

[233] Burchard 2013, § 14 para. 51.

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the CJEU might develop a different approach and perspective as regards the 'preventive protection' of human rights, it is interesting to highlight that both courts require 'substantial grounds' to believe that the person will be exposed to violations of human rights.[234] Another crucial matter that then naturally needs to be resolved is the question of the *onus of proof* of such a violation.[235]

The BVerfG's recent *European Arrest Warrant II* decision again contains some interesting aspects in this regard. The Court pointed out that Member States must not assist one another in violations of human rights.[236] Therefore, German courts must look into the treatment that awaits the extradited person in the requesting state. The Court specifically mentioned *in absentia* judgments.[237] This means that in the Court's view the concept of mutual trust is only valid as long as it is not rebutted in the individual case.[238] This, however, requires an exceptional case.[239] Applying its view in matters of international cooperation, the Court stated that a binding international agreement that the requesting state will respect human rights is enough to dispel such doubts.[240] Furthermore, the accused must give sufficient and concrete evidence of the violations (of human dignity) in the individual case. It does not suffice for the accused to point out that the requesting state violated human rights in

[234] Opinion of A.G. Sharpston in Case C-396/11 *Radu* [2012] ECLI:EU:C:2012:648, para. 77; cf. ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161 regarding an extradition from the UK to the USA, and CJEU, Joined cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-13905 regarding the Common European Asylum System but demanding '*systemic flaws*'; also cf. Art. 3(2) of the Regulation (EU) No 604/2013 of the European Parliament and of the Council [2003], OJ L 180/31 (Dublin III): '… *substantial grounds* for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions'; emphasis added by Tobias Reinbacher.

[235] Cf. the Opinion of A.G. Sharpston in Case C-396/11 *Radu*, n. 232, paras. 78–85, suggesting an approach differing from the one followed by the ECtHR: The requested person 'must persuade the decision-maker that his objections to the transfer are substantially well founded'.

[236] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015, para. 62.

[237] Ibid., para. 69.

[238] Ibid., para. 68.

[239] Ibid., para. 68.

[240] Ibid., para. 70. It might be interesting to note that the OLG Karlsruhe for instance relied on the reports of the Committee for the Prevention of Torture of the Council of Europe in order to determine the conditions of arrest and detention in the country seeking extradition and that – since these reports stated that the conditions of the prisons in this country differed with regards to human rights protection – it then allowed the extradition only under the terms that the competent authority expressly agreed in an internationally binding way to detain the extradited person in a facility in line with the ECHR; OLG Karlsruhe, in: BeckRS 2014, No. 11797.

the past.[241] Concrete evidence is only dispensable if there is 'a constant practice of gross and well-known violations of human rights in the respective state on many occasions'.[242]

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

The principle of mutual recognition has been and still is one of the most controversial issues, passionately criticised by many German authors. But of course, other matters are debated as well with regard to EU criminal law and the constitutional rights in the Basic Law. The general relationship of national constitutional rights and EU law and the respective decisions of the BVerfG have been dealt with above in Sect. 1.2.1. It should, however, be pointed out that in the view of many commentators, criminal law is a specific field that particularly affects fundamental rights and therefore demands 'a different treatment', i.e. special protection against 'encroachments' from the EU. This has different implications. For instance, the 'democratic question', to which the BVerfG turned in the light of the right to vote set out in Art. 38 GG,[243] was also debated with regards to criminal law as an essential part of the principle of *nullum crimen, nulla poena sine lege* in Art. 103(2) GG. Some authors argue that the EU not only lacks the competence to enact criminal laws but also the *demos* to do so in a proper, democratic way. The basic rights of the accused give cause for earnest concerns as well when it comes to EU law and the 'Europeanisation' of national substantive or procedural criminal law. This has led to the rather sceptical attitude of many German scholars towards an EU criminal law. Various proposals have been published, of which a prominent one is the '*Alternativentwurf*' by Schünemann et al. More recently, the European Criminal Policy Initiative published two manifestos, the first dealing with substantive criminal law and the second with criminal procedural law,[244] that highlight the need for a consistent European criminal policy, including the proper protection of the rights of the accused. The multi-level system of human rights protection in the German Basic Law, the ECHR and the Charter of Fundamental Rights of the EU, and the relationship of the respective courts enforcing these rights is another matter which has given cause for critical statements, as it is feared that the standard of the constitutional rights protection of the German Basic Law which the BVerfG has established might be diminished. Space constraints do not allow a further consideration of these or other aspects of EU criminal law.

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[241] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015, para. 71.

[242] Ibid., para. 71.

[243] Cf. Sect. 1.3.3.

[244] http://www.crimpol.eu/.

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2.4 The EU Data Retention Directive

2.4.1 In Germany, the implementation of the Data Retention Directive[245] raised deep concerns in the general public and led to severe conflicts among political parties. In order to explain the agitation, it may be helpful to recall the salience that data protection has had in Germany since the 1980s. When in 1983 the *Bundestag* unanimously passed a census law that included a number of questions relating to the private circumstances of the inhabitants, a broad protest movement emerged. Demonstrations were organised nationwide. Militant groups called for a boycott of the census and gave instructions how to do this. Behind the concerns was the fear that the census might open the door to a revival of authoritarianism in Germany. In December 1983, the BVerfG declared the census law unconstitutional.[246] The judgment was based on Art. 2(1), the right to free development of personality. The BVerfG found that free development of personality would be seriously endangered if the state had the power to collect and use personal data without the individual knowing what the state knows about him.

To be sure, data protection had been recognised before the *Census* judgment as part of the protection of privacy, also derived from Art. 2(1) in connection with Art. 1(1) by way of interpretation. However, the Court found the existing protection insufficient in view of the new technique of electronic data processing, which allowed for the storage, use, synchronisation, transmittal and combination of large amounts of data within seconds. It thus became possible to produce a complete profile of a person. The distinction between harmless data that deserved no protection and sensitive data that had to be protected thereby lost its justification. The Court therefore dissociated data protection from privacy and derived an independent right to informational self-determination from Art. 2(1) in connection with Art. 1(1). Germany thus became a pioneer in data protection. The judgment had enormous consequences in many fields of the law. Dozens of laws had to be amended in order to bring them in line with the requirements of Art. 2(1).

The judgment gained particular importance when, following the seminal changes of 1989/90 and especially after 9/11, a number of laws against organised criminality and terrorism were passed. Between 1999 and 2014, the BVerfG reviewed eleven

[245] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[246] BVerfG, case 1 BvR 209/83 et al., *Census*, judgment of 15 Dec. 1983, BVerfGE 65, 1.

anti-terrorism laws or laws that had been amended in connection with the so-called fight against terrorism.[247] Ten of these laws created or enlarged the surveillance power of public prosecution, police, secret and other services or obligated private telecommunication enterprises to store and transmit personal data. Eight of these ten laws were declared unconstitutional, one was declared constitutional if interpreted and applied in conformity with the Basic Law, and one was found unobjectionable. Most of the laws violated Art. 2(1) (informational self-determination) in connection with Art. 1(1) (dignity); some violated the more specific guarantees of Art. 10(1) (secrecy of postal and telecommunication services) and Art. 13 (inviolability of the home), and some also violated Art. 19(4) (access to courts).[248] In

[247] The cases are BVerfG, case 1 BvR 2226/94 et al., *Telecommunications Surveillance*, judgment of 14 July 1999, BVerfGE 100, 313, concerning a law that enlarged the surveillance powers of the *Bundesnachrichtendienst*; BVerfG, case 1 BvR 2378/98 et al., Eavesdropping (*Großer Lauschangriff*), judgment of 3 Mar. 2004, BVerfGE 109, 279, concerning an amendment to Art. 13, which was found compatible with Art. 79 (3), and an amendment to the statute of criminal procedure which allowed the acoustic surveillance of phones in order to fight organised criminality; BVerfG, case 2 BvR 581/01, *Global Positioning System*, judgment of 12 Apr. 2005, BVerfGE 112, 304, concerning a law against organised criminality that allowed the public prosecution to perform surveillance by means of GPS; BVerfG, case 1 BvR 518/02, *Dragnet Investigation II*, order of 4 Apr. 2006, BVerfGE 115, 320 concerning a North Rhine-Westphalian law that allowed profiling; BVerfG, case 1 BvR 1550/03, *Account Master Data*, order of 12 June 2007, BVerfGE 118, 168., concerning a law that allowed automatic search of banking accounts; BVerfG, case 1 BvR 370/07 et al., *Online Searches*, judgment of 10 Oct 2007, BVerfGE 120, 274, concerning a North Rhine-Westphalian law that allowed online search (in this case the Court developed the right to integrity and confidentiality of communication systems); BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260, concerning the implementation of Directive 2006/24/EC on Data Retention; BVerfG, case 2 BvR 236/08 et al., *Law on the Revision of Telecommunications Monitoring (TKÜ-Neuregelung)*, order of 12 Oct. 2011, BVerfGE 129, 208, concerning a law that allowed the search and taping of telecommunications; BVerfG, case 1 BvR 1299/05, *Assignment of Dynamic IP Addresses*, order of 24 Jan. 2012, BVerfGE 130, 151, concerning a law that created a duty of private enterprises to retain certain telecommunication data; BVerfG, case 1 BvR 1215/07 *Law on the Establishment of an Anti-Terrorism Databank*, judgment of 24 Apr. 2013, BVerfGE 133, 273, concerning a law that established an anti-terrorism databank. See in addition BVerfG, case 1 BvR 966/09 and 1140/09, *Federal Office of Criminal Investigation (Bundeskriminalamt)*, judgment of 20 April 2016.

[248] The relevant articles read:

'Art. 1(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Art. 2(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'

Art. 10(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and the recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Art. 13(1) The home is inviolable.

(2) Searches may be authorised only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.

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almost all cases the Court found that the laws, in limiting these rights, had not stricken a proper balance between the fundamental rights of the individuals and the legitimate security interest of the state (proportionality in the narrower sense). In the judgment on online search, the BVerfG, once again in reaction to scientific and technological change, found it necessary to further develop the right to informational self-determination and derived from Art. 2(1) in connection with Art. 1(1) a constitutional guarantee of integrity and confidentiality of electronic communication systems.[249]

It does not therefore come as a surprise that many citizens challenged the law that was passed in order to implement EU Directive 2006/24. The BVerfG saw no need to refer the question whether the directive was valid under European law to the CJEU. The Court declared that, on the one hand, the Directive was extremely far-reaching, but found, on the other hand, that a number of particularly sensitive questions, such as the conditions of use, transfer and protection of the data retained, was left to the Member States and gave the national legislature ample discretion. In the Court's view, the Directive could be implemented in a constitutional way,

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(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by panel composed of three judges. When time is of essence, it may also be issued by a single judge.
(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.
(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge: when time is of the essence, a judicial decision shall subsequently be obtained without delay.
(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the Bundestag shall exercise parliamentary oversight on the basis of this report. A comparable parliamentary oversight shall be afforded by the *Länder*.
(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.
Article 19(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Art. 10 shall not be affected by this paragraph.'

[249] BVerfG, case 1 BvR 370/07 et al., *Online Searches*, judgment of 10 Oct 2007, BVerfGE 120, 274.

regardless of the primacy of EU law.[250] Thus, the BVerfG could confine itself to a review of the German implementation of the Directive, which it found to be in violation of Art. 10(1) (secrecy of telecommunications) because it did not strike a proper balance between the legitimate security interest of the state and the individual freedom guaranteed in Art. 10(1).

In spite of the annulment of the Directive by the CJEU,[251] a new law on data retention is being prepared. A compromise between the Minister of the Interior, who found such a law indispensable and the Minister of Justice, who found it unnecessary and constitutionally dubious, was recently reached.

2.5 *Unpublished or Secret Legislation*

2.5.1 There is not the slightest doubt that laws have to be published in order to take legal force.

The Basic Law distinguishes between the passing of a law (*Zustandekommen*), Art. 78, and the certification (*Ausfertigung*), promulgation (*Verkündung*) and entry into force (*Inkrafttreten*), Art. 82, of a law. Here the promulgation is of interest. Promulgation means the publication of the text of the law. Publication takes place at the very moment when the law gazette is distributed.[252] Only upon promulgation is the legislative process completed.[253] Promulgation is not a mere addition to the legislative process, but 'an integral part of the act of law-making'.[254] Should a text claim to be law without having been promulgated, the BVerfG would not declare it unconstitutional, but a legal nullity. Promulgation is regarded as a requirement of the rule of law. It has the function of enabling the public to take notice of law.[255] A distinction between an invalid law and a law that is inapplicable to individuals as made in the *Heinrich* case of the CJEU is not recognised in German constitutional law.

[250] BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260.

[251] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[252] BVerfG, case 2 BvR 457/78, *Legal Assistance Treaty*, order of 22 Mar. 1983, BVerfGE 63, 343, 353; BVerfG, case 2 BvL 2/83, *Income Tax Law,* order of 14 May 1986, BVerfGE 72, 200, 241.

[253] BVerfG, case 1 BvL 19/75 et al., *Contergan*, judgment of 8 July 1976, BVerfGE 42, 263, 283.

[254] BVerfG, case 2 BvL 38/56, *Tax Reform of Rheinland-Palatinate*, order of 19 March 1958, BVerfGE 7, 330, 337.

[255] BVerfG, case 2 BvL 25/81, *Federal Building Act (Verfassungsmäßigkeit des Bundesbaugesetzes § 12 S. 3)*, judgment of 22 Nov. 1983, BVerfGE 65, 283, 291.

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2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 The German Bill of Rights has once been amended because of a judgment of the CJEU. The Court found that Art. 12a(4) sentence 2, according to which women were barred from rendering services in the army involving the use of arms, was incompatible with EU law.[256] The amendment transformed the total prohibition into a prohibition of a *duty* to render armed services. But as far as I can see there are no cases in which the BVerfG has lowered the standard of fundamental rights protection in order to make its jurisprudence compatible with CJEU standards.[257] It seems, however, that conflicts between the European and the German standard are becoming more likely. The well-known *Solange II* formula is still valid; this and further explanations are provided in Sect. 2.8.4.

As later judgments have confirmed, there has been no *Solange III* in which the BVerfG would have given up the power to deny European law or acts of application of European law applicability in Germany if they fall short of the German standard.[258]

The area where conflicts might arise is growing. In particular, the CJEU and the BVerfG differ in their interpretation of Arts. 51 to 53 of the European Charter. This will be discussed in more detail under Sect. 2.11.1.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 The Treaty Establishing the European Stability Mechanism (ESM Treaty) was challenged in the BVerfG by several individual complaints (of which one was signed by 11,717 complainants). The targets of the complaints were the German ratification law concerning the amendment of Art. 136 TFEU; the German law regarding the establishment of the ESM; the German law regulating the financial contribution of Germany to the ESM; and the German law on stability, coordination

[256] Case C-285/98 *Kreil* [2000] ECR I-00069.

[257] The Banana market case does not contradict this statement. It is true that the Frankfurt Administrative Court – which referred the case to the BVerfG was of the opinion that the European regulation violated – among others – Art. 14 GG (freedom of property) and Art. 12 GG (freedom of occupation). However, the BVerfG decided the case on purely formal grounds: the administrative court had failed to demonstrate that the fundamental rights protection within the EU had fallen below the standard that is indispensable according to German constitutional law (cf. BVerfG, case 2 BvL 1/97, *Banana Market*, order of 7 June 2000, BVerfGE 102, 147).

[258] See in particular BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 353 et seq.

and control within the Economic and Monetary Union. The complaints were combined with an application for a preliminary injunction, which would prohibit the Federal President from promulgating the laws before the BVerfG rendered its decision on the subject matter. The complaints were based on Art. 38(1) (right to vote) in combination with Art. 20(1) (democracy) and Art. 79(3) (eternity clause). Some complaints relied additionally on Art. 3(1) (equal treatment), Art. 14(1) (freedom of property) and Art. 20(4) (right to resistance). Furthermore, the parliamentary group '*Die LINKE*' brought an '*Organstreit*' action,[259] claiming (in addition to the challenges of the said laws) that their status as Members of Parliament, guaranteed in Art. 38(1)(2), had been violated.

The BVerfG rendered two judgments, one on 12 September 2012, regarding the application for a preliminary injunction,[260] and one on 18 March 18 2014[261] on the main issue.

The BVerfG proceeds on an application for a preliminary injunction only if the main proceedings are admissible (*zulässig*) and not evidently unfounded. If these legal requirements are met, the application is decided on factual grounds, the question being which potential harm to fundamental rights or other constitutionally protected goods would be greater: the harm if the injunction were granted but it was later determined in the main proceedings that the law at stake was constitutional, or the harm if the injunction were refused and later the law was found unconstitutional. Since this decision requires predictions, the assessment of the Government is usually given strong weight.

The decision in the injunction proceedings basically follows this pattern. The BVerfG declared the individual complaints admissible insofar as they were based on Art. 38(1) in combination with Art. 20(1) and Art. 79(3). The *Organstreit* proceedings were found admissible with the exception of one of the claims. However, the judgment is unusual insofar as the question whether the main proceedings have a chance of success is treated in great length (almost 50 pages in the official publication) although the Court calls it a summary review. This was, of course, due to the immense urgency of the issue. The Court reached the conclusion that most of the claims had no chance of success. Insofar as they might have a chance of success, the Court made the ratification and promulgation of the laws connected with the ESM dependent on a binding clarification in international law that the financial obligations of the Federal Republic would not exceed the limit set in Annex II of the Treaty, that no additional obligation could be requested without the consent of Germany and furthermore that the provisions of the Treaty would not

[259] The '*Organstreit*' is regulated in Art. 93 (1) GG: 'The Federal Constitutional Court shall rule 1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body'.

[260] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195.

[261] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG, final decision*, judgment of 18 Mar. 2014, BVerfGE 135, 317.

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prevent the full information of the *Bundestag*. Given this result of the summary review, an assessment of the consequences of either granting or refusing the injunction was no longer necessary.

The opinion referred to the previous judgments of the BVerfG in European matters. As early as 1993, the Court had ruled in its *Maastricht* decision that individual complaints against amendments of the Treaties of Rome may be based on an alleged violation of the right to vote in Art. 38(1).[262] According to the opinion, the right to vote not only guarantees participation in elections, but also that the elected body, the Parliament, has sufficient power to translate the popular will into political measures. A transfer of powers to the EU that would deprive the *Bundestag* of substantive legislative powers would violate the right to vote. The measures to cope with the financial crisis gave the Court an opportunity to concretise this ruling with regard to the budgetary powers of the *Bundestag*.[263]

The Court regarded the budget as a central element of democratic will formation. It is fundamental for the self-government of the people. The budget is the place where conceptual political decisions find expression. Hence, Art. 38(1) prevents the *Bundestag* from giving up its responsibility for the budget (*Haushaltsverantwortung*) in a way that it or a future Parliament would no longer be able to exercise budgetary power in a responsible way. However, membership in a supranational organisation is not per se at odds with this responsibility. Even if treaty obligations are very high, they do not violate the *Bundestag's* budgetary power, provided that the *Bundestag* remains the place where any decision regarding a transfer of resources to a supranational entity like the EU is taken. Similarly, the duty to follow a certain budgetary or fiscal policy does not necessarily violate the principle of democracy if it is self-imposed. The decision of the *Bundestag* must be free from external determination. Budgetary responsibility may not be transferred to other actors by way of giving these actors discretion as to what is required from the Federal Republic. Blanket empowerments of international organisations are prohibited. The financial burden for the Federal Republic has to be calculable.

The Court had earlier found the rescue measures for Greece in stark tension with these principles.[264] It nevertheless reached the result that they were acceptable because the financial engagement was limited (at that time to 123 billion EUR plus a possible 20% surplus that would raise the guarantee to 147.6 billion EUR); because every single measure required the consent of the *Bundestag* and the conditionality of resource grants remained under its control; finally because the rescue programme was limited in time.

The tension increased immensely, however, with the establishment of the ESM. This was no longer a temporary but rather a permanent institution, and the amount

[262] BVerfG, case 2 BvR 2134, 2159/92, *Treaty of Maastricht*, judgment of 12 Oct. 1993, BVerfGE 89, 155, 171 et seq.

[263] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG – summary review*, judgment of 12 Sept. 2012, BVerfGE 132, 195.

[264] BVerfG, case 2 BvR 987/10 et al., *Aid to Greece & EFSF, final decision*, judgment of 7 Sep. 2011, BVerfGE 129, 124, 180.

of money to be put at the disposal of the ESM rose to around 190 billion EUR (the annual budget of the Federal Republic without the budgets of the *Länder* is around 300 billion EUR). Although in the view of the BVerfG the new Art. 136(3) TFEU leads to a fundamental change with regard to the Economic and Monetary Union insofar as the autonomy of the national budget is severely restricted, it does not amount to a loss of that autonomy, since it does not include a transfer of competences to the EU. In sum, the Court found that the basic principles of the Monetary Union were still preserved, to wit the prohibition of a financing of a Member State's budget by the ECB and the prohibition of a bail out. Some dangers that the ESM created for national sovereignty could be dealt with by a binding interpretation of the treaty. The suspension of the voting rights of Member States in default was not imminent if the ability of the *Bundestag* to provide the necessary sum was guaranteed. Ultimately, the Court overcame its concerns by mentioning that it had constantly strengthened the position of the *Bundestag* within the German political system.

After this decision in the injunction proceedings, it could not come as a surprise that the Court approved the constitutionality of the ESM Treaty in the main judgment.[265] The complainants had meanwhile extended their challenges to a number of subsequent German and European legal acts, among them the so-called Sixpack and the TARGET2-system. Before the final judgment was rendered, the CJEU had decided that the amendment of Art. 136 TFEU was compatible with Art. 48 TEU as well as with Art. 125 TFEU.[266] The ESM Member States had issued a declaration in 2012 that satisfied the conditions of the preliminary judgment of the BVerfG. This opinion is shorter than that of 2012 (35 pages). The criteria applied are the same. The individual complaints and the claim by '*Die LINKE*' were dismissed.

2.7.2 Even before the final decision in the ESM case, the BVerfG had to deal with the Outright Monetary Transactions (OMT), announced but not yet implemented by the European Central Bank (ECB). The complainants in the *OMT* case were largely identical to those in the ESM proceedings. Their complaints as well as the '*Organstreit*' procedure brought by '*Die LINKE*' were directed against the decision of the ECB of 6 September 2012, and furthermore against the failure of the Federal Republic to take action against the decision of the ECB. The '*Organstreit*' aimed at obliging the German *Bundestag* to undertake steps toward an abrogation of the ECB's decision and towards a ban of the measures announced in that decision. Because the OMT programme had not actually been implemented, the *Bundestag* and the federal Government argued that the case was inadmissible. With a 6:2 decision, the BVerfG stayed the procedure and referred a number of questions concerning the compatibility of the ECB decision with Union law to the CJEU.[267] It

[265] BVerfG, case 2 BvR 1390/12 et al., *ESM & TSCG, final decision*, judgment of 18 Mar. 2014, BVerfGE 135, 317.

[266] Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

[267] BVerfG, case 2 BvR 2728/13 et al., *OMT*, order of 14 Jan. 2014, BVerfGE 134, 366.

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was the first referral for a preliminary ruling by the BVerfG ever. The BVerfG had serious doubts as to whether the decision of the ECB was within the limits of the bank's power and stated these doubts in a 62 page opinion. The Court affirmed its position that it is prepared to deny European legal acts applicability in Germany if they are *ultra vires* or interfere with the identity of the Basic Law.

Meanwhile, the CJEU has responded, saying that provided that some provisos are observed, the decision of the ECB does not violate Union law.[268] The BVerfG is now proceeding with the case. The oral argument took place in February 2016.

Altogether there are now eight judgments from Karlsruhe concerning measures taken in order to cope with the financial crises:

- BVerfGE 125, 385 (2010) – Aid to Greece, injunction
- BVerfGE 129, 124 (2011) – Aid to Greece & EFSF, final decision
- BVerfGE 130, 318 (2012) – EFSF – Special Parliamentary Committee
- BVerfGE 131, 152 (2012) – ESM & Euro Plus Pact – Information of the *Bundestag*
- BVerfGE 132, 195 (2012) – ESM & TSCG – summary review
- BVerfGE 132, 287 (2012) – Ratification of amendment to Art.136 TFEU, injunction
- BVerfGE 134, 366 (2014) – OMT, referral to the CJEU
- BVerfGE 135, 317 (2014) – ESM & TSCG, final decision.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 (a) There is no information available on the number of applicants that have requested a preliminary ruling with regard to the validity of an EU measure in German courts.

(b) From 2006 to 2014, German courts sent 672 preliminary ruling requests to the CJEU, the highest number (97) in 2013, the lowest (59) in 2007 and 2009. No information is available as to the European measures contested.

(c) There are no figures available with regard to preliminary ruling references from German courts that have led to a partial or full annulment of the relevant EU measure.

2.8.2 In general, the CJEU submits national law to a rather strict standard of proportionality, whereas it applies a lenient standard to Union law. Consequently, the standard of judicial review of the European Court vis-à-vis Union law is lower than the standard of national constitutional courts or supreme courts vis-à-vis national law. In addition, there are differences regarding the fundamental rights or

[268] Case C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400.

principles involved. The CJEU protects the four economic freedoms and their concretisation more strictly than the Member States' courts usually protect economic rights. As a general rule, one can say that in Germany, economic rights like freedom of property and freedom of profession (which include most of the four economic freedoms) are the weakest rights unless they touch upon the preconditions of the free development of personality. This follows already from the unique formulation of Art. 14 (freedom of property). According to Sect. 1, not only the limits but also the content of the right may be determined by law. Section 2 reads: 'Property entails obligations. Its use shall also serve the public good.' Regarding Art. 12 (freedom of profession), it follows from the difference between the individual choice of a profession, which is protected strongly, and the exercise of a profession, which is subject to broad regulation.[269]

2.8.3 The BVerfG clearly takes a rigorous approach when reviewing legislation as well as regulations and administrative acts. So do the administrative courts vis-à-vis administrative acts. Perhaps the most important effect of the Court's jurisprudence and popular support is that the requirements of the Basic Law are taken into account relatively early and in a relatively neutral way in the process of legislation. In particular, if draft laws originate in the executive (which is true for the vast majority of drafts), the Constitution and the jurisprudence of the Constitutional Court are constantly present. Each draft is submitted to a constitutionality check by the Ministry of Justice and/or the Ministry of the Interior. Also the constitutionality of international agreements is reviewed early in the Ministry of Foreign Affairs in order to avoid a defeat in the BVerfG when it comes to ratification in the German Parliament.

There are three proceedings in which a legal norm can be reviewed as to its constitutionality: abstract norm control (initiated by the Federal Government, the Governments of the *Länder* and a certain portion of the Members of Parliament; for a long time this was one-third of the Members of Parliament, but as of recently, one-fourth); concrete norm control (referral by ordinary courts for a preliminary ruling) and individual complaints. The possibility for individuals to directly challenge a law is restricted; usually it is an incidental review, enabled by the requirement that a fundamental right may only be limited on the basis of a valid law. Around 96.5% of all proceedings are constitutional complaints, of which some 2 % are successful. The next most frequent proceeding is concrete norm control, representing about 35 cases per annum, whereas cases of abstract norm control are very rare (an average of 2.5 per annum).

The total number of laws that have been declared unconstitutional is: 484 federal laws, 213 state (*Länder*) laws. In the last five years, the figures are 39 federal laws and 35 state laws, which is an average of six federal laws and seven state laws per year.

[269] See, e.g., BVerfG, case 1 BvR 532/77 et al., *Co-determination*, judgment of 1 March 1979, BVerfGE 50, 290.

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Among the norms that have been declared unconstitutional, a few have failed because the legislative procedure did not meet the requirements of the Basic Law (e.g. the rights of the *Bundesrat* were disregarded). A little higher is the amount of laws that have failed because Parliament lacked the competence for the subject matter. The majority have failed because they violated fundamental rights. The vast majority of these laws have not met the requirements of the principle of proportionality. The majority among these failed at the last stage of the proportionality test (proportionality in the narrower sense, balancing).

In order to assess the impact of judicial review fully, it should be borne in mind that the BVerfG not only confirms or annuls existing laws, but also obliges the legislature to legislate if protection (or better protection) of a fundamental right is required by the Constitution. This requirement need not be explicitly provided for in the text. The BVerfG recognises an obligation of the state to protect fundamental rights from menaces emanating not from the state itself, but from private or social actors (the so-called duty to protect, *Schutzpflicht*).

2.8.4 The BVerfG not only claims the power to review national laws that implement Union law, it also exercises this power. The most recent examples are the decisions on the *European Arrest Warrant* and on the data retention law.[270] In both cases, the Court refrained from reviewing the European framework decision and the European directive respectively, but declared the German laws that implemented them unconstitutional because – within the German Parliament's area of discretion – the *Bundestag* did not provide sufficient protection of fundamental rights guaranteed in the Basic Law. However, there seems to be a different opinion regarding the delimitation of the discretion that a directive or framework decision leaves. The CJEU tends to define it more narrowly than the BVerfG.

However, the BVerfG declares referrals of national laws that implement Union law inadmissible if the ordinary court has not sufficiently clarified whether the national laws only implement Union law or act within the area of discretion.[271] Still, in the *Data Retention* case the Court found an individual complaint against a national law that implemented mandatory Union law to be admissible. The complainant had argued that the EU lacked legislative power to regulate the subject matter and in addition violated EU Charter rights. In the *Pringle* case, the CJEU had previously rejected a claim by Ireland that the EU lacked legislative competence in this subject matter.[272] It had, however, left open the question of compatibility with Charter rights. The BVerfG considered the individual complaint admissible, although it was based on Union law, because the complainants pursued the aim of obtaining a referral by the BVerfG to the CJEU in the expectation that the CJEU

[270] BVerfG, case 2 BvR 2236/04, *European Arrest Warrant I*, judgment of 18 July 2005, BVerfGE 113, 273; BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260; BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, order of 15 December 2015.

[271] BVerfG, case 1 BvL 3/08, *Investment Allowance Act*, order of 4 Oct. 2011, BVerfGE 129, 186.

[272] Case C-370/12 *Pringle*, n. 266.

would annul the Directive on Charter grounds and so pave the way for the BVerfG to review the German law.[273] The BVerfG found, however, that a preliminary ruling by the CJEU was not necessary since the European directive left sufficient room for national legislation and that the challenged norms were not determined by Union law.[274]

Solange II is not relevant in this context. It applies to Union law and its compatibility with the Basic Law. To this extent *Solange II* is still valid law:

> As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights against the sovereign powers of the Communities, which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and insofar as they generally safeguard the essential content of fundamental rights, the BVerfG will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of fundamental rights contained in the Basic Law.[275]

The BVerfG rejects individual complaints against Union law and referrals of Union law to Karlsruhe unless they specify that the European standard of fundamental rights protection is no longer equivalent to the German standard.

Some authors understand the judgment of the BVerfG in European Arrest Warrant II as a *Solange III*. In this decision the BVerfG reiterated its jurisprudence that there are insurmountable limits to the applicability of EU law in Germany, which follow from the identity of the German Constitution as laid down in Art. 79(3). Among them is the guarantee of human dignity. As a consequence, the BVerfG considers an individual complaint to be admissible if it claims a violation of Art. 1(1) of the Basic Law. In such a case the Court will review the act that is challenged 'irrespectively of its jurisprudence as to the inadmissibility of individual complaints and referrals which claim a violation of fundamental rights in the Basic Law by secondary Union law'.[276] Here the Court guarantees indispensable fundamental rights protection, unrestricted in the specific case, by way of identity control.[277] However, the Court avoided a conflict with EU law by finding no significant difference between the requirements of Art. 1(1) of the Basic Law and EU law in the case at hand.

2.8.5 In its *Solange II* judgment, the BVerfG admitted that

> compared with the standard of fundamental rights under the Basic Law it may be that the guarantees for the protection of such rights established thus far by the decisions of the European Court, since they have naturally been developed case by case, still contain gaps

[273] BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260, 306 et seq.

[274] Ibid., pp. 308 et seq.

[275] BVerfG, case 2 BvR 197/83, *Solange II*, order of 22 Oct. 1986, BVerfGE 73, 339, LS 2.

[276] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II,* judgment of 15 December 2015, para. 34.

[277] Ibid., para. 49.

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> … . What is decisive, nevertheless, is the attitude of principle which the Court maintains at this stage towards the Community's obligations in respect of fundamental rights.[278]

This statement is followed by the well-known formula that the European Court's case law has *generally* to ensure effective protection of fundamental rights, which is *substantially similar* to the protection of fundamental rights in the Basic Law and in so far as they *generally* safeguard the *essential* content of the fundamental rights. This shows that certain differences and gaps are accepted as inevitable consequences of the independence of the two courts in the different contexts – state here, international community there – in which they operate.

2.8.6 The issue of equal treatment of individuals falling within the scope of EU law and domestic law has not arisen.

2.9 Other Constitutional Rights and Principles

2.9.1 Space does not allow for consideration of further issues.

2.10 Common Constitutional Traditions

2.10.1 A book titled 'An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law' was recently published.[279] The editors developed a list of candidates for common values and asked the national rapporteurs from sixteen states (including this author as rapporteur for Germany) to report on the recognition and prioritisation of these values in their various countries. As it turned out, there is a significant amount of congruence throughout the constitutional and political systems.

This is even more true for Europe. The European Convention on Human Rights has been adopted by 47 states, the Charter of Fundamental Rights of the European Union by 28 states. If one compares the bills of rights of the various states, one finds similar rights. In states with thin or rudimentary bills of rights, the gaps are filled by referring to the European rights. On first view, a comparison between the EU Charter and the German Basic Law shows that the Charter contains about twice as many fundamental rights as the German Basic Law. But a closer look reveals that a number of rights that appear separately in the Charter are united in one article in the Basic Law (Art. 5, e.g., contains five rights: freedom of expression, freedom of information, freedom of the media, freedom of art and freedom of science).

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[278] BVerfG, case 2 BvR 197/83, *Solange II*, order of 22 Oct. 1986, BVerfGE 73, 339, 383. Quotation in Sect. 2.6.1.

[279] Davis et al. 2015.

A number of rights that are specified in the Charter are derived from enumerated rights by way of interpretation in the Member States. It is not easy to find a right in the Charter that is not recognised in Germany. What does not exist in the German Constitution is an individual right to good administration (Art. 41 EU Charter) and a number of the provisions in title IV of the Charter.

The congruence decreases, however, when it comes to the rules on limitation of fundamental rights and even more so to interpretation and enforcement. Only if these elements are taken into account does a realistic picture as to what is common and what is not develop. And here even the differences within Europe are not small, as can be seen from the jurisprudence of the European Court of Human Rights. A good example is the ubiquitous conflict between freedom of expression/freedom of the media and privacy/personal honour. When it comes to striking a balance between these commonly accepted values, the results differ from country to country. Still, it is not in vain to ask where common values are constitutionally recognised in order to have a starting point for the discourse. The fact that, unlike other continents, Europe has developed mechanisms to guarantee a minimum standard in all countries and, to a certain extent, to harmonise different standards prepares the ground for approximation.

2.10.2 Article 4(2) TEU obliges the European Union to respect the national identities of the Member States inherent in their fundamental political and constitutional structures. This includes the various traditions and standards of fundamental rights protection. Charter rights that result from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions (Art. 52(4) Charter). Already before the adoption of the Charter, the CJEU derived unwritten fundamental rights from the ECHR and the 'common national traditions' of the Member States. The latter was often lip service. There are cases where a common standard was alleged without evidence and was even asserted when in fact it was lacking.[280] The Charter which has been adopted by all Member States makes this superfluous. Now it seems more important to stress the legitimate remaining differences and to oblige the EU to respect them in the spirit of Art. 4(2) TEU and Art. 52(4) Charter. The point of departure could be the exceptions from requirements of Union law that the Treaties allow on grounds of public policy, public security, public health, etc. These public interests of the Member States find their highest expression in the national bills of rights.

It would be recommendable for the national courts, when referring questions to the CJEU, to make it clear where longstanding traditions or deep convictions form a barrier for abolishing national institutions or harmonising the law of the EU. The BVerfG was frequently criticised when, in the judgments on the Maastricht and Lisbon treaties, it explained the identity of the German Constitutional order. Yet this is precisely the information that the CJEU needs if it wants to take Art. 4(2) TEU seriously.

[280] A good example is Case C-144/04 *Mangold* [2005] ECR I-09981.

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2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 There is an extensive discussion about the exact meaning of Art. 53 of the Charter.[281] Article 53 adopts Art. 53 of the European Convention. Both pursue the same goal: European fundamental rights protection shall not lessen the standard of fundamental rights protection granted by the national constitutions. However, the two rules differ in one important aspect. In the EU, the safeguard against an interpretation of Charter rights, which restricts or negatively affects the fundamental rights of the national constitutions, is valid 'in their respective fields of application'. The interpretation of Charter rights may not lower the national standard of fundamental rights protection in the areas where they apply. Where they do not apply, the prohibition is not valid. There, Charter rights may fall short of the national standard.

This diversion reflects the difference in function and application of the ECHR and the EU Charter. The European Convention applies comprehensively. All acts of national public authority have to comply with the Convention. Yet the Convention confines itself to setting a minimum standard that has to be respected by all 47 member states. Beyond this minimum standard, it leaves the plurality of national standards unaffected. The Convention rights become relevant only where a national bill of rights or its application falls short of the European minimum standard. For member states with a high standard of fundamental rights protection, this will not often be the case.

To the contrary, the European Charter does not content itself with setting a minimum standard. It contains a fully developed catalogue of fundamental rights, even larger in number than the catalogues of many Member States. Wherever Charter rights apply they shall get full credit. Yet they do not apply comprehensively to all legal acts of national public authority. This is a consequence of the fact that the EU is a federal entity and, as in every federal entity, the demarcation of competences is of pivotal importance.

The demarcation is drawn by Art. 51 EU Charter. According to this provision, the Charter applies without exception to all institutions of the EU, whereas it applies to the Member States 'only when they are implementing Union law'. Consequently, in dealing with the European Convention, the question is whether the national standard of protection falls short of the European standard. In dealing with the European Charter this question is likewise important, but the delimitation of applicability of the Charter shifts the accent from the standard of protection to the field of application. The question where Charter rights apply and where the fundamental rights guaranteed in the national constitutions apply does not play a role under the European Convention.

The difference has an impact on the role of the two European courts. The European Court of Human Rights is an international court. It can only declare that a

[281] For some recent examples, see Britz 2015; Franzius 2015a, b; Masing 2015; Thym 2015; see also Nusser 2011.

legal act of a member state violates the Convention, but it cannot annul or reverse the act at stake. It is not an appellate court. The member states are under an obligation to eliminate the violation, but whether and how they do so depends on their domestic law. Likewise, the ECtHR has no mandate to harmonise fundamental rights protection in Europe. The CJEU, on the contrary, may harmonise fundamental rights protection in the areas where the Charter applies. It is not an appellate court either, but national law that, in its view, contravenes European law automatically loses its applicability.

Hence, the decisive question for the EU is what are the areas in which the Charter applies and what are the areas in which the national bills of rights apply. This is controversial. The controversy goes back to differences in the relevant legal texts. Article 51 of the Charter states that Charter rights apply to the Member States 'only when implementing Union law'. Yet, according to the explanation to Art. 51, Charter rights apply to the Member States 'in the field of application of Union law'. This formula is reminiscent of the jurisprudence that the CJEU developed before the Charter entered into force. It now gives the CJEU an opportunity to continue its pre-Charter line of jurisprudence, regardless of the stricter wording of Art. 51.

This is not just a variation in language, it is also a variation in meaning. Although the Charter clearly wanted to restrict the application of Charter rights to the benefit of national rights, the explanation suggests that the difference in text does not matter. To what extent it matters can be seen in the *ERT* case.[282] Greece had established a monopoly in public television. The prohibition of private television enterprises was based on a Greek law. Enforcing this law was not implementing Union law, but it was done in the field of application of Union law because the question whether Greece was permitted to restrict the free movement of services is a question of Union law.

The *ERT* example has been chosen to show that the outcome depends on which text is used as a basis for decision. A closer look shows, however, that a strict interpretation of Art. 51 would not be helpful. There are cases of implementation of national law where good reasons not to apply the national bill of rights but the Charter exist nevertheless. These are cases where the law at stake is a national law, but a national law that is determined by Union law. Under a substantive, as opposed to formal, perspective the national authorities and courts implement Union law and there is a legitimate interest in guaranteeing a uniform application of this law in all Member States, which excludes the application of domestic fundamental rights. This is widely accepted also by the national courts.

On the other hand, it is not sufficient for the application of Charter rights that the national law at stake is somehow related to Union law, as for instance the *Åkerberg Fransson* case suggests.[283] Given the degree of entanglement between European and national law, it would be all too easy to find such a connection wherever the CJEU wants. Should *Åkerberg Fransson* set the standard for the interpretation of

[282] Case C-260/89 *ERT* [1991] ECR I-02925.

[283] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

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Art. 51, this provision would lose all its contours and render the restriction contained in it virtually obsolete, and with it Art. 53, which depends on the demarcation in Art. 51 for its effect.

This is the position of the BVerfG. According to its jurisprudence, a Member State 'implements Union law' when it applies national law only insofar as the national law is 'determined' by Union law.[284] A mere relation with Union law (*unionsrechtliche Bezüge*) or an indirect impact (*mittelbare Auswirkungen*) is insufficient to supersede national fundamental rights. The BVerfG finds that this understanding is supported by Art. 51(2) of the Charter. The Court insists that this ruling does not contradict the judgment of the CJEU in the *Åkerberg Fransson* case. The cooperative relationship between the two courts prohibits an interpretation (*Lesart*) of that decision according to which it would be a clear *ultra vires* act or would endanger the identity of the German constitutional order. 'Consequently, the decision may not be understood or applied in a way that, in order to bind the member states by the Charter rights, any connection between a [national] rule and the abstract field of application of Union law or a pure factual impact on Union law would suffice.'[285]

This shows that a principle is necessary in order to distinguish between the implementation of national law where Charter rights must be observed and the implementation of national law where the national bills of rights apply. This criterion can only be the interest in a uniform application of Union law or Union-induced law in order to make it independent from the various national bills of rights and their interpretation by national constitutional or supreme courts. Hence, the decisive question is whether the uniform application of national implementation of law is indispensable as a guarantee for the Europe-wide effectiveness of the Union law that is implemented.

As a consequence, national fundamental rights apply wherever Union law leaves a field of discretion to the national lawmaker. The European lawmaker itself has indicated that uniformity is not regarded as necessary to this degree. This is usually the case with directives. They are binding with regard to the goal of the law, but they leave it to the national legislatures to determine the ways and means to reach the ends. The discretion of the Member States can be wider or narrower, but it cannot be totally absent, because this would mean that the EU has abused the legal instrument of a directive.

If this criterion is employed, decisions like *ERT* and *Åkerberg Fransson* deserve criticism. *ERT* shows that a more subtle distinction is necessary than that used by

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[284] BVerfG, case 1 BvF 1/05, *Greenhouse Gas Emissions Allowance*, judgment of 13 Mar. 2007, BVerfGE 118, 79, 95; BVerfG, case 1 BvR 256/08, *Data Retention (Vorratsdatenspeicherung)*, order of 11 Mar. 2008, BVerfGE 121, 1, 15; BVerfG, case 1 BvR 256/08 et al., *Data Retention*, judgment of 2 Mar. 2010, BVerfGE 125, 260, 300 et seq.; BVerfG, case 1 BvR 1916/09, *Extension of the Application*, order of 19 July 2011, BVerfGE 129, 78, 90 et seq.; BVerfG, case 1 BvR 1215/07, *Anti-Terrorism Databank*, judgment of 24 Apr. 2013, BVerfGE 133, 277, 313.

[285] BVerfG, case 1 BvR 1215/07, *Anti-Terrorism Databank*, judgment of 24 Apr. 2013, BVerfGE 133, 277, 313 et seq.

the CJEU. On the one hand, the European legislature has not harmonised media law. Yet it prohibits monopolies, however with exceptions. If a Member State claims an exception, it applies and interprets Union law. It may be that the conditions for an exception were not given. To decide this is a matter of Union law. But within the boundaries of the exception the national legislature enjoys freedom to decide, and this means that here not Charter rights but national fundamental rights apply.

The connection between Union law and national law that the CJEU saw in *Åkerberg Fransson* was that the Member States owe a certain portion of income tax to the EU and are therefore obliged to efficiently levy this tax. But the question whether the efficiency principle requires one or two sanctions in cases of tax evasion is not determined by Union law and is therefore open to national legislation, with the consequence that not the European Charter but the national bill of rights applies.

This case shows at the same time the danger that accompanies the jurisprudence of the CJEU. It undermines Art. 51(2) of the Charter that prohibits an extension of Union law beyond the competences conferred by the Member States and the creation of new competences. If, for example, the Charter right of data protection is at stake, this opens the doors to a lot of national competences that have not been conferred to the EU because data protection is not a limited area of the law but applies to all activities of the state. It is an all-encompassing law. If any relationship between Union law and national law were sufficient for the application of Charter rights, this would mean access to and uniformity of many legislative competencies that have not been conferred.

There are, however, some recent judgments of the CJEU that suggest the existence of an area where the Charter and the national bills of rights apply simultaneously. In the *Melloni* case the Court ruled: 'Article 53 of the Charter confirms that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.'[286]

Does this mean that areas exist where Charter rights and national constitutional rights overlap? In a strict sense this seems impossible, because in cases where the standard of fundamental rights protection differs, the question of which standard applies is inevitable. In order to avoid this, the Court has formulated a condition for the application of the national standard, namely that the primacy, unity and effectiveness of EU law are not thereby compromised. Wherever this danger appears, national fundamental rights have to give way. The overlap is thus reduced to cases where European and national rights offer the same standard of protection. In this respect it does indeed not matter which rights are applied. Where this is not the

[286] Case C-399/11 *Melloni*, n. 161, para. 60.

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case, the Charter is clearly hierarchically superior, regardless of the standard of protection.

Article 53 of the Charter has therefore a different meaning compared to Art. 53 of the European Convention. The reason for the difference lies in the fact that the Convention guarantees only a minimum standard, while the member states are free to guarantee better protection above this minimum. The Charter, on the other hand, establishes full protection in the areas in which it applies. This leaves no room for an interpretation according to which full protection would apply only to EU institutions while the Member States have to maintain but a minimum standard. The European and the national standards do not apply simultaneously, in parallel or cumulatively, rather either one or the other applies.

Thus, unlike the Convention, the Charter leaves no room for the question of which standard is higher. Article 53 does not privilege the higher standard. It only protects the national standard against diminution by EU law in areas where the national standard applies. As has been seen, this question can be very difficult to decide, in particular if a determination by EU law and discretion for national regulation are combined in one directive or framework decision. Here a particularly careful analysis is necessary, but it is an analysis of EU law. It has to be undertaken by the national authorities; however, since the area of national discretion is determined by EU law, the CJEU has the last word.

Particular difficulties arise in constellations where different fundamental rights have to be balanced against one another. Under the Convention it is difficult to comply with Art. 53 because greater protection of one right automatically means less protection for the other right. The conclusion should be that particular respect has to be paid to the result adopted by the nation states. The margin of appreciation applies here. The ECtHR should find a violation of the Convention only if the balance determined by the national court seems grossly distorted. But also the CJEU should be careful, in particular if the result would be a prioritisation of a whole group of fundamental rights over another.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 I do not remember whether the adoption of the EAW Framework Decision or its implementation by Germany was preceded by an intensive public debate. The European Data Retention Directive and its implementation by Germany were the subject of a heated debate that even divided the German Government. While the Minister of the Interior insisted on implementation, the Ministry of Justice (first under a minister from the liberal FDP, then under Social Democratic ministers) refused to submit a draft because it assumed that the directive had no basis in the European treaties and implementation would be incompatible with the Basic Law.

2.12.2 The enforcement action against Germany, in particular the amount of the fine, was used as an argument for implementation by the Ministry of the Interior, but rejected by the Ministry of Justice.

Regarding the question of sufficient space for democratic deliberation and judicial review in the Member States, it has to be noted that the duty to implement a European directive in due time should not depend on constitutional concerns in the Member States. It would be all too easy for the Member States to raise such concerns in order to escape sanctions by the EU. If the concerns have their grounds in European law, be they questions of competence or of fundamental rights, the Member States have the possibility to bring an action of annulment in the CJEU.

2.12.3 I would favour the idea that an action for annulment of a directive would suspend an enforcement mechanism such as a fine, until the CJEU has decided the matter.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 The question requires a differentiated answer. The standard of protection of the four fundamental freedoms, which are all economic freedoms, freedoms of the market participants, is very high in the EU. The same is true for some other rights such as gender equality and other anti-discrimination rules. But this high level of protection has a drawback for further, non-economic fundamental rights. In a conflict between the four economic freedoms and non-economic rights, the economic rights tend to prevail in the CJEU. The conflict arises in particular when a Member State claims an exception from the free movement principle and bases this claim on national fundamental rights. The likelihood that the Member States will lose before the CJEU is higher than the likelihood that they will win. The economic freedoms have thus become what in the US would be called 'preferred freedoms' (the example being freedom of speech in the First Amendment).

2.13.2 No state that joins a supranational entity like the EU or the Council of Europe can expect to uphold its standard of fundamental rights protection completely. This would mean that one national standard would be made dominant over all other member states. There will always be gains and losses. As far as the ECHR is concerned, which confines itself to a minimum standard that all countries in spite of their various traditions are obliged to respect, the loss will be small for countries with a highly developed standard of fundamental rights protection. This is true for Germany. Not many German decisions have been found to be in violation of the Convention. Several cases in which this has happened have concerned the balancing of conflicting fundamental rights, which the ECtHR should abstain from reviewing in the light of Art. 53, unless the balance is grossly distorted (see Sect. 2.11.1). A typical conflict that occurs in almost all member states is the

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already mentioned conflict between freedom of expression/freedom of the press and personality rights/privacy. There are many ways to solve this conflict in the member states of the Council of Europe, with one jurisdiction tending more to the communicative rights, others more to personal rights. It is not the business of the ECtHR to require a uniform attitude.

This is different in an entity like the EU that develops a genuine catalogue of fundamental rights and a genuine standard of protection, but limits them to transnational relations, leaving purely national relations to the national bills of rights and the jurisprudence of the national courts. However, since not only legal acts of the Union organs are submitted to the European Charter but in an increasing number of cases also acts of the Member States, the national constitution can no longer maintain its claim to comprehensive application on the territory of the state. Again, it would be unreasonable to expect that a national standard would survive this process unaffected.

Also in the EU it is a question of gains and losses. However, for Germany with a high standard and human dignity as the highest right of an absolute character that can neither be trumped by another right nor submitted to balancing, the danger is particularly high. This is why the losses weigh heavier for Germany than for a number of other countries. Still, the degree of loss depends on whether there are changes in detail or in principle. The CJEU's practice in giving the four economic freedoms priority over other constitutionally protected interests has a principal dimension. There are a few decisions that go in another direction, but they have not yet indicated a fundamental change. Thus, it is true that the CJEU took the special importance that Germany attributes to dignity into account in *Omega* and found that it could support an exception to free movement. However, it did so after balancing the economic freedoms against dignity, which means that in a different situation, balancing may lead to another result.[287] In *European Arrest Warrant II* the BVerfG insisted that the absolute character of dignity is part of the identity of the Basic Law and is thus not negotiable.[288]

The most important impediment to a more balanced approach by the CJEU is its self-image as the superior guardian of the process of integration, whereas the Member States are seen as potential opponents to integration. At the same time, this impediment is the most difficult one to change. It cannot be changed by legal rules but only by a re-orientation of the role that the Court attributes to itself, for which little indication can be seen.

As a matter of fact, the national courts are the only effective counterweights against the CJEU.[289] It is therefore understandable that some of them reserve the right to adjudicate on *ultra vires* matters vis-à-vis a European Court that contributes to the creeping loss of competences of the Member States and pays rather little attention to the identities of the national constitutions, as Art. 4 TEU requires.

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[287] See Sect. 2.2.1 above.

[288] BVerfG, case 2 BvR 2735/14, *European Arrest Warrant II*, judgment of 15 December 2015.

[289] See Grimm 2012.

One source of the CJEU's dominant role is little noticed: it is the constitutionalisation of the Treaties, yet a constitutionalisation of a body of law that is to a large extent not constitutional in nature, but would be ordinary law in the Member States. Because of this, the EU is over-constitutionalised, to the effect that the jurisprudence of the Court is immunised against corrections by the legislator. It would be an important step towards a better balance between the political branches of the EU and the CJEU to downgrade all provisions of the Treaties that are not of a constitutional nature.[290]

2.13.3 The style of judgments practiced by the CJEU is a good example for the importance of path dependency. The Court started its work in the mode of the French courts, which is particularly cryptic. French courts tell the result of the legal examination and mention the provisions from which the result flows, but do not tell the reader how it flows from them, let alone what alternatives existed and why they were regarded as being inferior to the interpretation chosen by the court. This has changed in the jurisprudence of the CJEU over time, but it is not a change towards the more discursive style of, for example, the German Constitutional Court or even more so of an American or English court. The CJEU answers the questions referred to it by the national courts, but it rarely enters into a discussion of the concerns that motivated the national courts to ask for a preliminary ruling.

The most recent example is the answer of the CJEU to the BVerfG's questions about the compatibility of the OMT with the Treaties.[291] The BVerfG presented its understanding of the treaty in a very thorough and well thought-out way. The CJEU's answer does not reveal an in-depth examination of the considerations of the BVerfG. The question here is not whose argument is right or wrong, but how to deal with the concerns of national courts. Many referrals from national courts are an invitation to enter into the much invoked dialogue among the courts. Yet a dialogue presupposes a non-hierarchical relationship. This is not the CJEU's understanding of its role. Again, this is difficult to change because it is the result of a certain self-image that can only be changed from within, not from outside.

2.13.4 The role of national constitutions has to be seen in context with the EU's special form of legitimation. What has now become the EU received its democratic legitimacy in the beginning exclusively from the Member States and their democratically organised political processes. The Member States were the 'Masters of the Treaties' and, in the Council, the sole legislator of the EU. But they soon lost control over the interpretation and application of the Treaties. Through the 'constitutionalisation' of the Treaties, the European institutions charged with treaty implementation had made themselves independent from the will of the Member States (see also 2.13.2 and 1.5.3). From that moment on, two paths toward integration existed, a formal one by an explicit transfer of national powers to the EU and an informal one by extensive treaty interpretation based on the judicially

[290] See Grimm 2015a, 2016a. In English, see Grimm 2017.

[291] Case C-62/14 *Gauweiler and Others*, n. 268.

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invented direct effect, supremacy and '*effet utile*'. The first path is political. It can only be tread by the Member States unanimously in accordance with their constitutions and national democratic processes. The second path is non-political and can be tread by the Commission and the CJEU irrespective of the national constitutions. It bypasses the democratic process in the Member States and also the European Parliament.

When the then twelve Member States concluded the Single European Act that allowed for majority decisions in the Council, the exclusive legitimation by the democratic processes in the Member States was no longer sufficient because it could now happen that a Member State was submitted to (secondary) European law that it had not agreed to in its domestic democratic process. This legitimacy gap was closed by the involvement of the – meanwhile directly elected – European Parliament into the making of secondary European law. From that moment on, the EU has been based on a dualist instead of a monistic legitimacy. This additional and autonomous legitimation works, however, only for the enactment of secondary law. It is unable to lend democratic legitimacy to the results of the second path towards integration. The constitutionalisation of the Treaties deprived the democratically legitimated and accountable organs both in the EU and the Member States from influencing the integration through treaty adjudication.

However, this becomes a problem only because of the special character of the Treaties. Concluded as treaties under international law, not as a constitution, the European Treaties are not confined to rules of a constitutional nature, but are full of what would be ordinary law in the Member States. Thus, the functioning of the single market is more or less determined by the interpretation and application of the Treaties (especially the four economic freedoms) by the European executive and judiciary. Here lies an often overlooked source of the European legitimacy problem. Important steps towards integration that left deep marks on the law of the Member States, their constitutions and the range of their political processes have been taken in a non-political mode and by stealth. They are neither subject to political participation nor are they amenable to political correction or re-direction. To the same extent, the source of democratic legitimacy that the EU receives from the constitutional processes in the Member States has been blocked.

However, the hetero-legitimation by the Member States is still much stronger than the auto-legitimation of the EU by the election of the European Parliament. The European Parliament and the European political parties operating within it are not embedded in a Europe-wide societal process of opinion formation and interest articulation that would keep the EU organs in touch with the citizenry. Since the legitimacy of the EU thus depends largely on the flow of legitimation from the Member States, it should have a strong self-interest in a vibrant national democracy. The attempt to solve the European legitimacy problem by extending the powers of the European Parliament or even by converting the EU into a parliamentary system according to the national pattern would provoke just the opposite. As one cannot turn the EU into a parliamentary democracy without downgrading the Council to a second house of the Parliament, one would sever the EU from the legitimation that

flows from the Member States without having sufficient resources for a European self-legitimation.

Rather, an effective means of increasing the legitimacy of the EU would consist in reducing the Treaties to those provisions that are of a constitutional nature and downgrading all provisions which would be ordinary law in the Member States to the rank of secondary law. As a consequence, the jurisprudence of the CJEU would be subject to a re-direction by way of legislation if the Member States were to find it not to be in line with their understanding of the Treaties or were to think that it produces detrimental effects. As long as this has not happened – and it is rather unlikely that it will happen – the national constitutions and their agents, the national constitutional courts, are the only counterweights to the democracy drain in the Member States and the ensuing repercussions on the legitimacy of the European Union – and also the only guardians of the democratic potential for Europe that lies in the national constitutions. They act in the interest of European democracy when they claim the power to protect the identity of the national constitutions. Article 4 (2) TEU justifies this claim.[292]

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Understandably, after the catastrophe caused by an excessive nationalism, the German Basic Law from the very beginning in 1949 was open to an internationalisation of public power. Already the preamble spoke of an integrated Europe as a contribution to peace in the world. Article 24 permitted the transfer of public powers to international organisations. It also permitted Germany to join systems of collective security and to transfer public powers in order to guarantee a peaceful and sustainable order, European as well as global. International arbitration was welcomed.[293]

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[292] For a more detailed argumentation, see Grimm (2016b). See also Grimm 2012, especially p. 92 (*Die Bedeutung nationaler Verfassungen in einem vereinten Europa*) and p. 128 (*Zur Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie*).

[293] Art. 24 reads:
'(1) The Federation may by a law transfer sovereign powers to international organisations.
(1a) Insofar as the *Länder* are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.
(2) With a view to maintain peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.
(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration.'

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Article 25 transformed the general principles of public international law into domestic law and gave them a rank above ordinary law.[294] At the same time Art. 25 stated that these principles established direct rights and obligations for the residents. Article 26 declared attempts to wage aggressive wars unconstitutional and required that they be criminalised. The export of weapons was made dependent on a permission from the Federal Government.

3.1.2 When the Maastricht treaty transformed the European Community into the European Union and declared that this treaty 'marks a new stage in the process of creating an ever closer union among the peoples of Europe', Art. 24, up to then the constitutional basis for Germany's participation in European integration, seemed no longer sufficient to legitimise the unprecedented process of creating a political entity that by far exceeded traditional international organisations. The need for a special rule concerning European integration was felt. Thus, the new Art. 23 was adopted in 1992; it is outlined in Sect. 1.2.

3.1.3 After the 1992 amendment, the first sentence of Sect. 6 was reformulated in 2006 in connection with a reform of the federal system; Sect. 1 a was added in 2008 to adjust the Basic Law to the Lisbon Treaty (see text under 1.2.1). No significant proposals for further reform have been made. It has been up to the BVerfG to concretise and develop the provisions in the light of new developments.

3.1.4 The new world order that emerged after World War II brought the identity between public power and state power to an end. In the interest of preserving peace and increasing their problem solving capacity, the states transferred parts of their authority to international organisations that exercise it more or less independently from the states, but with legal effect within them. However, the states neither disappeared nor were they marginalised. They remain the main actors also in the new international order. They convey legitimacy on the public power exercised by international organisations whose own legitimacy resources are small.

While a legalisation of the power exercised beyond the state is possible and rapidly growing, its democratisation seems much more difficult. The more global international organisations are, the less democratic they will be. The same is true for a constitutionalisation of international organisations and international law in general. Where the term 'constitutionalisation' is used in this context, it reflects a rather thin concept of constitutionalism, a mere legalisation rather far away from the achievement of constitutionalism as it developed over time in the nation states.

Although state constitutions can no longer fulfil their promise to regulate the public authority exercised on the territory of the state in a comprehensive way, they still have to play an important role. They regulate the national political process, determine the transfer of state powers to the international level and define the conditions under which acts of international organisations and international law

[294] Art. 25 reads: 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

may take effect within the state. Since the internationally exercised public power depends on authorisation, acceptance and implementation by the states, international organisations should have a self-interest in the good functioning of national constitutionalism instead of eroding it.[295]

3.2 The Position of International Law in National Law

3.2.1 The provisions of the Basic Law concerning international treaties are rudimentary. Article 59(1) gives the Federal President the power to conclude international treaties. Article 59(2) prescribes that international treaties regulating the political relations of the Federal Republic or concerning legislative competences need the consent of the *Bundestag* in the form of a law. This law (*Zustimmungsgesetz*) is confined to consent and does not contain legal provisions. The object of the consent follows from the treaty.

In practice, international treaties are negotiated by the Federal Government, ratified by the Federal President and made binding by a decision of the *Bundestag*. It is contested whether parliamentary consent transforms the treaty provisions into domestic law or only gives the order that they be applied internally. There are no provisions as to the rank of international treaties in the domestic legal order. It is therefore up to the legislature to determine the rank. It is beyond doubt that the BVerfG can review the parliamentary consent to a treaty as to its compatibility with the Basic Law. Applications for review are admissible before the treaty becomes valid under international law.

3.2.2 Regarding the relevance of monism/dualism, this has been a controversy for a long time. However, the controversy has lost importance. Today, the majority of authors accept a theory of moderate dualism. According to this theory, each body of law exists of its own right, but both are in many ways interwoven. On the one hand, international law (including European law) takes effect within the state only insofar as the state transforms it into domestic law or orders its application within the state. On the other hand, more and more international law claims direct effect in the states. To the same extent, international organisations and international courts take the lead. With regard to the EU, it is assumed that the states are the 'Masters of the Treaties' only at the moment of conclusion, but no longer when treaty provisions are implemented and enforced. A change of the CJEU's practice in interpreting and implementing treaty provisions would require an amendment to the Treaties. Since this is extremely difficult to achieve, the CJEU is immunised against being re-directed by legislation. This is a consequence of the constitutionalisation of the Treaties (see Sect. 2.13.4).

[295] For more details, see Grimm 2010 and 2015a, b.

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3.3 Democratic Control

3.3.1 In general, parliaments are the losers in the internationalisation of the law. They do not participate in negotiation on the international level. Negotiation is a matter for the executive. In some countries the executive has but a limited mandate and needs the approval of Parliament if it wants to go beyond this limit. But many countries find that this threatens to fetter the national Government, so that it cannot be fully effective in negotiations where a *do ut des* is unavoidable. Parliaments are, of course, free to reject a treaty that the Government has negotiated, but in a parliamentary system this would mean that the parties supporting the Government would disapprove of their own leadership, and consequently parliamentary refusal is rare. Rather, the importance of Parliament's involvement lies in its anticipatory effect. Governments will hesitate to risk disapproval and therefore take the position of Parliament into account when negotiating on the international level.

In Germany, the BVerfG has constantly strengthened the role of the *Bundestag* in foreign affairs. Thus, the deployment of the German army outside of NATO was made dependent on a parliamentary vote.[296] In matters European, the BVerfG assumes a parliamentary responsibility for the extent and direction of integration as well as for the organisational and procedural arrangement on the European level (*Integrationsverantwortung*), which it cannot delegate to the executive.[297] Usually this leads to intensive parliamentary debates. Since the *Bundestag* can exercise its responsibility only if it has full information of the subject matter and sufficient time to study it and form an opinion, the Government is under a constitutional duty to provide the information early and comprehensively.[298] However, it turns out that in practice the capacity of Parliament to cope with the flood of information is limited. The jurisprudence thus tries to erect a bulwark against a trend that is more or less unstoppable.

3.3.2 The Basic Law provides for referendums only in connection with a redefinition of the borders of the *Länder*. With regard to referendums regarding European integration, including the requirement by the BVerfG that a new constitution would have to be adopted by referendum to participate in a European state, see Sect. 1.4.2.

[296] BVerfG, case 2 BvE 3/92 et al., *Out-of-Area Operations*, judgment of 12 July 1994, BVerfGE 90, 286.

[297] BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 356 et seq.

[298] Concretized in BVerfG, case 2 BvE 4/11, *Obligation to Provide Information*, judgment of 18 June 2012, BVerfGE 131, 152.

3.4 Judicial Review

3.4.1 International treaties and measures under international law (acts exercising powers transferred by treaties) should be distinguished.

In Germany, international treaties are subject to judicial review via the law that expresses the consent of Parliament (*Zustimmungsgesetz*). At this stage the national Constitution functions as a filter for the obligations that Germany takes on by concluding a treaty.[299] Treaties that confer competences to international organisations change, by this very fact, the Constitution without explicitly amending the text. This is why a supermajority is required for such treaties. Thus, the constitutional constraints become relevant already in the process of negotiation, because the Government has to face a review by the BVerfG. The BVerfG has full power to review the compatibility of a treaty with the Basic Law and, unlike in the review of domestic laws which can only be reviewed after having been adopted and after having taken legal force, treaties can be reviewed before they become valid law.

Once powers have been transferred to international organisations, their exercise by these organisations no longer follows the national constitution. But this does not mean that the national constitution is completely irrelevant. The fact that a treaty itself is compatible with the national constitution does not automatically guarantee that acts or measures taken under the treaty are compatible with the constitution. Two constellations are possible: the international organisation acts *ultra vires* or it acts within the limits of transferred powers, but the concrete act or measure is incompatible with some essential features of the national constitution.

The BVerfG has reacted to both possibilities. It reserves the power of an *ultra vires* control, regardless of whether the international organisation has developed an internal control mechanism such as the CJEU.[300] It is not controversial that the CJEU has the power to review Union acts as to their compatibility with the Treaty. But the CJEU denies national constitutional courts the right to do the same. However, both view it from a different angle. While the international court asks whether the international organisation has received a competence, the national constitutional court asks whether the Member State has transferred that power. Since the object of judicial scrutiny is the same for both courts, namely the text of the treaty, this is a source of conflict. The BVerfG has tried to narrow this source by a self-limitation of its review power. It will declare Union acts inapplicable in Germany only if they *obviously* violate the Treaties and they in addition produce a

[299] See Grimm 2012, pp. 92–127.

[300] BVerfG, case 2 BvR 2134, 2159/92, *Treaty of Maastricht*, judgment of 12 Oct. 1993, BVerfGE 89, 155, 171 et seq.; confirmed in BVerfG, case 2 BvE 2/08 et al., *Treaty of Lisbon*, judgment of 30 June 2009, BVerfGE 123, 267, 352 et seq.

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power shift from the Member States to the Union. Further, it will use its power only after having referred the question of a treaty violation to the CJEU.[301]

The other alternative, international acts that are not *ultra vires* but adversely affect the very essence of the national Constitution, is the object of the *Solange* jurisprudence. In *Solange I* the BVerfG declared that fundamental rights protection is part of the core values of the Basic Law. As long as no equivalent protection exists on the international level, the BVerfG will review international acts as to their compatibility with domestic fundamental rights.[302] This jurisprudence is still valid. In *Solange II* the Court did not give up its power but only declared that it would no longer exercise it, as long as a sufficient protection of fundamental rights exists on the European level. This has been confirmed by the *Lisbon* judgment and extended from fundamental rights to other essential elements of the national constitution. The judgment *European Arrest Warrant II* specified that international (including European) law which contradicts the identity of the Basic Law as guaranteed by Art. 79(3) is not applicable in Germany under any condition.

A slightly different attitude has been developed vis-à-vis judgments of the ECtHR. This court may review national acts as to their compatibility with the European Convention and declare them in violation of the Convention. But its judgments lack direct effect within the member states. The state is under an obligation to remedy the violation. This is usually the task of the national court whose decision violated the Convention. The decisions of the national courts are subject to judicial review by the BVerfG. The leading case is *Görgülü*.[303] The BVerfG ruled that national courts have to take decisions of the ECtHR into account but are not unconditionally obliged to follow them. Since Germany adopted the Convention in the rank of ordinary law, no judgment of the ECtHR is internally binding that is incompatible with the Basic Law. But the BVerfG at the same time requires an attempt to reconcile the interpretation of the Basic Law with the interpretation of the Convention. Good examples are the *Caroline* cases.[304] Regarding ordinary law, the national courts, according to the BVerfG, are under an obligation to examine whether the European jurisprudence can be integrated into the national law. The detailed account on the internal effect of public international law and the review power of the BVerfG can now be found in a case on the Tax Treaty between Germany and Turkey.[305]

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[301] BVerfG, case 2 BvR 2661/06, *Honeywell*, order of 6 July 2010, BVerfGE 126, 286.

[302] BVerfG, case 2 BvL 52/71, *Solange I*, order of 29 May 1974, BVerfGE 37, 271.

[303] BVerfG, case 2 BvR 1481/04, *Görgülü*, order of 14 Oct. 2004, BVerfGE 111, 307.

[304] BVerfG, case 1 BvR 653/96, *Caroline von Monaco II*, judgment of 15 Dec. 1999, BVerfGE 101, 361; ECtHR *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; BVerfG, case 1 BvR 1602/07 et al., *Caroline von Monaco III*, order of 26 Feb. 2008, BVerfGE 120, 180.

[305] BVerfG, case 2 BvL 1/12, *Tax Treaty*, judgment of 15 December 2015.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 With regard to the social state, there is indeed constant concern in Germany, a state with a rather high degree of social security, which was an important element for the legitimacy of the political system. It is seen as a problem that economic policy and social policy are decoupled in Europe, at the expense of social interests. On the global level, it is seen as a problem that global economic discourses and human rights discourses have developed independently of each other.

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The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?

Giuseppe Martinico, Barbara Guastaferro and Oreste Pollicino

Abstract The Italian Constitution (1948) belongs to the group of constitutions described as 'constitutions born from the Resistance', forged to reject totalitarian experiences. According to the report, the concept of the '*Stato di diritto*' is similar to

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the *Rechtsstaat*, with two key dimensions: (a) constitutional provisions on access to courts and judicial review; and (b) the legality principle, which subordinates administrative acts to parliamentary statutes. Under the latter, the introduction of criminal offences and imposition of obligations and taxation is permissible only on the basis of a parliamentary statute. The need to protect these tenets in the context of implementing the European Arrest Warrant system gave ground to extensive concerns on the part of governmental committees and legal scholars, leading to the introduction of fundamental rights safeguards, which, however, were criticised by the European Commission. Other areas where constitutional values have come under strain include the protection of social rights and the powers of the regions. More broadly, the report explores how to ensure axiological continuity between the principles and values that govern the life of a given polity within its boundaries and those that should characterise the international community. The report also observes that the autonomous language of transnational 'constitutionalism' does not readily correspond to what constitutional lawyers mean by the same word. In Italian scholarship, a number of scholars have come to speak about 'weak' or 'post-modern' constitutionalism, typical of the era of globalisation. Constitutional amendments regarding the EU are limited; further amendments have been considered, including a reference to 'supreme principles of the Italian legal order and of the inviolable human rights'.

Keywords The Constitution of Italy · Amendment of the Constitution in relation to EU and international co-operation · The Italian Constitutional Court '*Stato di diritto*'/*Rechtsstaat* · The rule of law, the legality principle, access to courts and judicial protection · European Arrest Warrant and fundamental rights safeguards · Defence rights and *nulla poena sine lege* · Data Retention Directive Changing language of constitutionalism at the transnational level Fundamental rights · General principles of law and the principle of proportionality Supremacy and *controlimiti* · Fundamental rights protection in the international fight against terrorism

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Italian Constitution belongs to the group of constitutions that Mortati has called 'constitutions born from the Resistance',[1] as they were forged with the clear intent to deny and overcome the whole of the 'values' (or anti-values) that had characterised the Fascist (or elsewhere, totalitarian) era. By 'constitutions born from the Resistance', Mortati also referred to other documents, for instance, the French

[1] Mortati 1973, p. 222.

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(IV Republic) and German constitutions. As Carrozza[2] has recently noted, today we could include the Portuguese, Spanish and Greek constitutions that were promulgated during the 1970s within this group.

Openness is precisely one of the most evident features that characterises these texts, and it is possible to find the roots of this phenomenon even earlier, looking back at what, in the thirties, Mirkine-Guetzévitch called the 'internationalization of modern constitutions'.[3] In other words, openness seems to belong within the core of the '*nouvelles tendances du droit constitutionnel*'. It is possible to find this element in many constitutions born from the Resistance, which have been the product of a political compromise among very different democratic forces that had, as their only common point, the rejection of the totalitarian experiences, and that are characterised by a strong programmatic character, inspired by the sincere denial of the features of the previous regime and by the need for an entirely different society. Some of these constitutions (including the Italian Constitution) claimed the need for new societal models and were very rich in declarations of principle, reflecting a wish to produce a break with the past. In some cases, these so-called announced revolutions[4] have remained solely on paper, as one of the most influential members of the Italian Constituent Assembly, Calamandrei, bitterly acknowledged with regard to many provisions of the Italian Constitution a few years after it came into force.[5] This programmatic character implied the need for a real turning point in the ways of conceiving not only the values and premises of the social life within the national boundaries, but, frequently, they also induced the founding fathers of these constitutions born from the Resistance to hazard the codification of the values that should inspire the life and contribution of their nations to the international arena and community (external openness). Usually, it is said that the Italian Constitution is the result of a political compromise ('*compromesso*') among the three most important forces that acted as the engine of the constituent phase: the liberal, the Christian democratic and the socialist-communist (left-wing) traditions. They gathered together in the National Liberation Committee (CLN), and the 'glue' of this compromise was their shared anti-fascism. Indeed, the Italian case is very interesting for the study of constitutional openness that can be understood as a product of the anti-fascism[6] that had a crucial role in unifying the leading forces of the CLN. Unlike the German case, the Italian constituent experience is less known abroad and, at the same time, it is probably a more genuine case of a constituent phase because of the lesser impact of foreign influences, at least in the writing of the constitution. This does not mean that there was no foreign influence on the Italian constituent process, but scholars have shown that the Italian Constituent Assembly

[2] Carrozza 2007, p. 180.

[3] Mirkine-Guetzévitch 1931, p. 48.

[4] Calamandrei 1966, p. 421.

[5] Calamandrei 1965, p. 553.

[6] Luciani 1991, p. 191. See also Delledonne 2009.

was really free to write a new constitution that was an 'autogenous product' of the Assembly.[7]

The Italian Constitution came into force on 1 January 1948. All of the main members of the Constituent Assembly, although so different in their cultural and political backgrounds, were united around the memory of the past.

As we will see, all of the constitutional provisions that govern the foreign relations of the Italian Republic result from this idea, starting with Art. 11, which is devoted to the pacifist principle.

1.1.2 The Constitution is composed of 139 articles, with its main parts organised as follows: the first 12 articles are devoted to Fundamental Principles. Thereafter, Part I concerns the 'Rights and Duties of Citizens', while Part II is devoted to the 'Organisation of Republic' (Arts. 55–139). Part I (Arts. 13–54) contains the following subsections: 'Civil Relations'; 'Ethical and Social Rights and Duties'; 'Economic Rights and Duties', and 'Political Rights and Duties'. Part II is divided into six 'Titles': the Houses and the Legislative Process; the President of the Republic; the Government; the 'Judicial Branch', covering both the 'Organization of the Judiciary' and the 'Rules on Jurisdiction'; and 'Regions, Provinces, Municipalities' (amended in 2001). Part II also contains a section entitled 'Constitutional Guarantees', which concerns the structure, composition and functioning of the Constitutional Court (Arts. 134–137) and includes the relevant provisions concerning 'Amendments to the Constitution and Constitutional Laws' (Arts. 138–139). According to the case law of the Italian Constitutional Court (ItCC) the formula 'Republican form' included in Art. 139 (devoted, as we will see, to the impossibility to amend the 'Republican form') corresponds to the supreme principles included in the very first articles of the Italian Constitution.[8] The logic is the following: any change concerning these principles would result in a revolution in the technical sense of the word. These fundamental principles thus represent the 'centre of gravity' of our Constitution.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 At first and for a long time, the ItCC used Art. 11 in order to cover the necessary limitations of sovereignty required by the European integration process (see Sect. 3.1.1 for the full wording of the article). This was the case until 2001 when the first important amendment concerning European integration was introduced with codification of the duty to exercise legislative power in compliance with Community law. Other amendments were introduced in 2012 to constitutionalise the so-called 'golden rule'. For details see Sect. 1.2.3.

[7] Bruno 1980, p. 59.

[8] ItCC, Decision No. 1146/1988.

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1.2.2 The constitutional amendment procedure is governed by Art. 138 of the Italian Constitution:

> Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members.[9]

No other options are available and thus this was the procedure followed to change, *inter alia*, Art. 117. It is interesting to note that more recently, according to the reform proposed by the Renzi Government, it has been suggested that Art.117(1) should be terminologically amended by replacing 'Community law' with 'EU law', following the terminology adopted after the coming into force of the Lisbon Treaty.

1.2.3 The new Art. 117(1) currently reads, '[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from Community and international obligations'. A more recent amendment was introduced to change the text of Art. 81 of the Constitution to introduce an express mention of the 'balanced budget' principle through Constitutional Law No. 1/2012. Articles 97, 117 and, above all, the first paragraph of Art. 119[10] were also amended.

Looking at the judicial parameter, we will see that Art. 117(1) has provoked interesting innovations in the ItCC's case law. Soon after the reform, the interpretation of this norm created a division among scholars.[11] According to some, Art. 117(1) simply codified the pre-existing situation: it granted a sort of *a posteriori* assent to European primacy[12] as had been developed by the Court of the Justice (ECJ) and accepted across the European Union. Other scholars, on the other hand, emphasised

[9] The translations of the Italian Constitution reported in this chapter, with some limited exceptions, have been taken from the following sites: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf and http://www.servat.unibe.ch/icl/it00000.html

[10] Article 81 Italian Constitution: 'General government entities, in accordance with European Union law, shall ensure the balance of their budgets and the sustainability of the public debt'. The Italian Constitution goes on to limit the scope of action of Regions and Local Authorities in the field of matters of regional and local finance, by introducing new constraints on the local authorities. Art. 119 Italian Constitution: 'Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy, subject to the obligation to balance their budgets, and shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. …'. For a general discussion of these reforms, see Groppi, 2012.

[11] For an overview, see Chieppa 2007.

[12] Pinelli 2001, p. 194.

the importance of the constitutional status given to primacy of EU law, and asserted that Art. 117 paved the way for acceptance of the Italian monist thesis.[13]

1.2.4 It is interesting to note that there have been other attempts to revise the Constitution: for instance we can recall three *ad hoc* parliamentary committees (in 1983–1985 the so-called 'Bozzi Bicameral Committee'; 1992–1994 the so-called 'De Mita-Jotti Bicameral Committee'; and 1997–1998 the so-called 'D'Alema Bicameral Committee') that worked with no immediate outcome.[14] The D'Alema Committee (named after former Prime Minister Massimo D'Alema, who chaired the committee in 1997–1998) had a certain impact on the reforms adopted in 1999 and 2001 (especially with regard to the reform of Italian regionalism). The D'Alema Committee prepared a text which proposed the inclusion of Title VI, entirely devoted to participation of the Italian Republic in the European Union and composed of three articles (Arts. 114–116) in the Constitution. In particular, the proposed Art. 114 would have codified respect of the 'supreme principles of the Italian legal order and of the inviolable human rights' as a condition for participation in the 'European unification' (sic!) process, in order to promote and encourage 'an order based on the principles of democracy and subsidiarity'. The same provision stated that the limitations of sovereignty should be covered by a law passed by an absolute majority of the members of each House, and then added:

> The law is subject to a popular referendum when, within three months of its publication, such request is made by one third of the members of a House or eight hundred thousand electors or five regional councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

The proposed Art. 115 regulated the involvement of the Parliamentary Houses in EU affairs and the duty of the Government to inform them. Article 116 was devoted to participation of the regions in the EU integration process.[15] The wording of Art. 114 as proposed by the D'Alema Committee was recently used in some proposed amendments to Art. 11 that aimed at introducing a specific reference to the EU and the possibility of a referendum, should there be any further limitations of sovereignty, and at codifying the duty to respect the fundamental principles and inviolable rights recognised by the Italian legal order.[16] Italian scholars have emphasised the insufficiency of Art. 11 to regulate the EU integration process and have advocated for a possible reform of its wording.[17]

[13] Paterniti 2004, p. 2101; Pajno 2003, p. 814.

[14] Fusaro 2005.

[15] See the Italian version at: http://www.camera.it/parlam/bicam/rifcost/dossier/aindice.htm.

[16] See Fasone 2010.

[17] Cassese 1975, p. 583. For this debate, see Fasone 2010.

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As we will see, the conservative approach to our constitutional text, the complicated procedure for constitutional amendments and the fact that Art. 11 is included in the very first part of the Constitution are the main reasons for the failure of these attempts (so far at least).

The recent package of measures proposed by the Renzi Government has focused, among other things, on the necessity to constitutionalise the role of the parliamentary chambers in EU affairs.[18]

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The ItCC originally established that Art. 11 of the Italian Constitution was the basis for accepting Community law as supranational law with primacy and direct effect. This acceptance, however, did not come about immediately. On the contrary, it was the result of a long series of judgments. One of the reasons for this can be attributed to the absence of an explicit European clause in the Italian Constitution. In fact, Art. 11 was originally conceived to deal with Italian membership in organisations like the United Nations rather than to justify the consequence of supranationalism (a phenomenon that was unknown at the time the Italian Constitution came into force). This changed in 2001 with the constitutional reform of Title V of the Italian Constitution, with the introduction of Art. 117(1). Because of the dualist tradition, to which we will come back, international treaties acquire the same force as the domestic statutes adopted for their entry into force in the domestic legal system. This explains why, since the beginning, EU law has been considered as a primary source in the Italian legal system.

1.3.2–1.3.4 If we take a look at the history of the ItCC's case law regarding EU law, it is possible to notice a progressive departure from the pure dualist view first adopted by the Court. Over the years, this purity has been overcome and the ItCC, when referring to the domestic order and to the EC order, began to talk about two 'autonomous and separated, although coordinated'[19] legal systems. At the same time, the ECJ, in often adopting a benign and tolerant attitude, has demonstrated that it appreciates the efforts made by the national courts. Some scholars have labelled this partial convergence with the term (*limited*) *flexibilization of supremacies.*[20] Despite this rapprochement, the expansion of the European Communities' competences has often given rise to some degree of tension between

[18] See proposal A.S. 1429-A, Art. 55 It. Const ('functions of the Chambers'). See also proposal regarding Art. 70 Italian Constitution, which makes the law establishing forms and deadlines for the compliance with the obligations stemming from EU membership a constitutionally necessary law.

[19] ItCC, Decision No. 170/1984, *Granital* [1984] CMLR 756.

[20] Ferreres Comella 2005, pp. 80–89.

the domestic judiciary and the EC courts, each time that the allocation of competence on borderline issues has been at stake. First of all, the ECJ has progressively obtained the trust of ordinary national judges, who also play a fundamental role in the constitutional review proceedings at domestic level. Such influence has resulted in the deterioration of the relationship between ordinary judges and the ItCC: when ordinary judges want to obtain an explanation regarding the relationship between EC law and the national constitution, they do not refer to the ItCC, but rather to the ECJ. This is a consequence of the self-exiled status of the ItCC, which has normally preferred not to address questions concerning the relationship between legal orders. Suffice it here to recall that for instance in 2002, the ItCC decided only ten cases (of a total of 500) that were related to the EC legal order.[21] In case No. 14/1964[22] the ItCC interpreted the relationship between national and EC acts in light of the chronological criterion *lex posterior derogat priori* (since the enabling domestic act ratifying the Treaties was an ordinary legislative act); later on, in case No. 183/1973[23] the ItCC changed its position and claimed that the constitutional basis for EC law primacy can be found in Art. 11 of the Italian Constitution. As we know, this provision was originally conceived to justify Italy's membership in the United Nations, rather than in the EU. EU membership, in fact, imposes limitations of sovereignty for goals that clearly go beyond 'peace and justice between nations'. Thus the ItCC was forced to 'manipulate' the original meaning of Art. 11 in order to allow for these limitations.[24] The ItCC had kept the task of monitoring respect for primacy of EC law (as a control of indirect violation of Art. 11 occurring when national provisions are found to be in conflict with EC law), but the consistency of EC law with the Italian Constitution could not be reviewed by the ItCC, given that it can rule on the validity of Italian norms only. Confirmation of the progressive flexibilization of the Court's original position can be found in the words used in *Granital*,[25] in which the Court found it necessary to 'clarify further the way in which the relationship between the two legal systems works'[26] and recognised that 'conclusions reached in previous decisions must therefore be rewritten'[27].

An important specific feature of the approach of the ItCC to EU law is the counter-limits doctrine, devised by the ItCC in 1973, soon after the well-known *Internationale Handelsgesellschaft*[28] case before the ECJ. In that judgment, the ECJ pointed out the primacy of EU law over national law, including national constitutional principles. In this respect the Italian position – along with that of Germany

[21] Cartabia and Celotto 2002, p. 4477.

[22] ItCC, Decision No. 14/1964.

[23] ItCC, Decision No. 183/1973, *Frontini*, [1974] 2 CMLR 372.

[24] Since 2001, an explicit reference to the European Community legal order is contained in Art. 117, as noted above.

[25] ItCC, Decision No. 170/1984, *Granital*, n. 19. On this issue, see Cartabia 1995.

[26] ItCC, Decision No. 170/1984, *Granital*, n. 19.

[27] Ibid.

[28] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

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– is relevant for a complete understanding of the reasons for the 'resistance'. Constitutional courts have claimed to maintain their own role (the role of the guardians of the national constitutional identity) without exceptions. They have denied the acceptance of dangerous monist visions in order to preserve the constitutional identity of their legal orders. On the contrary, they have raised some ultimate barriers against the penetration of EU law in order to define the fundamental principles of the legal orders of which they are the guardians. Hypothetically, if an EU provision were to conflict with the fundamental principles of the national legal order, the constitutional court could strike down the national statute executing the EC Treaty, thus causing a 'rupture' between the national and supranational legal orders. Constitutional courts in fact normally have jurisdiction over national legislation (including the legal source of execution of treaties) but not over EC provisions: the latter are beyond their jurisdiction because, as they argue, they belong to another legal order. If one proceeds from this approach, one can understand why the constitutional courts have traditionally refused the possibility to strike down EU law provisions, since the acceptance of this option would imply adhesion to the monist theory of the ECJ. It is by a legal fiction that it is possible to defend the hard core of constitutional legal orders by preserving the formal autonomy of the national and supranational orders and the jurisdiction of the ECJ. The identification of these barriers to European integration represents the essence of the counter-limits doctrine ('*dottrina dei controlimiti*'), devised by the ItCC in the *Frontini* judgment[29] (but see also the *Granital* judgment[30]). The consequence of a possible declaration of invalidity could spell Italy's withdrawal from the EU. According to Cartabia, in these two cases the counter-limits test was conceived of as a way to carry out an exceptional control of respect of the conditions for constitutionality of the Italian accession to the EU.[31] Following this reconstruction, the counter-limits originally worked as conditions for evaluating the legitimacy of the limitations of sovereignty accepted by the Italian accession to the European venture. Later on (with the *Fragd* judgment[32]), the nature of the counter-limits doctrine changed and was transformed from an exceptional control into a 'simple' control of the compatibility of EU law with the Constitution which could not threaten Italy's membership of the EU. Because of the 'transformation' of this doctrine, the counter-limits have worked as a limitation to European primacy: that is why, according to the same scholarship, starting from the *Fragd* judgment, the ItCC has implicitly admitted that a possible conflict with the Constitution would not cause the invalidity of the statute adopted for execution of the EC Treaty, but just the non-applicability of the EC rule.[33]

[29] ItCC, Decision No. 183/1973, *Frontini*, n. 23.

[30] ItCC, Decision No. 170/1984, *Granital*, n. 19.

[31] Cartabia 1995, p. 110.

[32] ItCC, Decision No. 232/1989. In English: *Fragd*, [1990] 27 CML Rev. 93.

[33] See Cartabia and Weiler 2000, pp. 171–172.

Concerning the possibility to overcome such limitations of sovereignty by referendum, it is necessary to recall what the ItCC pointed out in *Frontini* decision:

> The doubt that the limitations of sovereignty consequent upon the signature of the Rome Treaty and the entry of Italy into the EEC could require the use of the procedure of constitutional amendment for approval of the ratification and implementation Bill has its exact equivalent in the analogous doubt already expressed in 1951 on the occasion of the approval of the Treaty instituting the European Coal and Steel Community: a doubt correctly resolved by the Italian Parliament deciding that the ratification and implementation of that Treaty could be made by means of an ordinary statute. In truth, as this Court has already stated in COSTA v. ENEL, Article 11 means that, when its pre-conditions are met, it is possible to sign treaties which involve limitation of sovereignty and to agree to make them executory by an ordinary statute. The provision would finish emptied of its specific normative content if it were held that for every limitation of sovereignty covered by Article 11 recourse had to be had to a constitutional statute. It is clear that it has not only a substantive but also a procedural value, in the sense that it permits such limitations of sovereignty, on the conditions and for the ends therein set out, releasing Parliament from the necessity of making use of its power of constitutional amendment.[34]

Nevertheless, more recently, with particular regard to the Treaty establishing a Constitution for Europe, Marta Cartabia has advocated the necessity to 'cover' the reform of the EU Treaties by means of a constitutional law.[35] Finally, according to the case law of the ItCC, the formula 'Republican form' used in Art. 139 of the Italian Constitution corresponds to the supreme principles included in the first part of the Italian Constitution. This means that in case of correspondence between the content of the counter-limits doctrine and that of the Republican form, no referendum may be used to surpass these limits.

1.4 Democratic Control

1.4.1 Specific measures for the involvement of the Parliament (and regional assemblies) in EU affairs have been codified in law No. 11/2005 (the so-called '*Legge Buttiglione*'), devoted to participation of Italy in EU decision-making with regard to the involvement of the State and regions in the preparatory phase of the EU decision-making process. This statute has been replaced by law No. 234-2012, which provides for measures concerning, among other things, the direct involvement of the national Parliament in the subsidiarity check of EU draft legislation and the obligation of information of the Government vis-à-vis the Parliament.[36] Further mechanisms have been implemented in the new Rules of Procedure of the Chambers. As written elsewhere in this report, in the package of measures proposed by the Renzi Government there is also a specific provision (Art. 55) aimed at constitutionalising the role of the national chambers in EU affairs.

[34] ItCC, Decision No. 182/73. See also Fasone 2010.

[35] Cartabia 2004.

[36] Committee of Regions, 2013.

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1.4.2 The ratification of EU Treaties does not require a referendum. The only EU-related referendum in Italy was held in 1989, but it was 'consultative', as it asked whether the Italian population was in favour of the transformation of the European Communities into a European Union with a Government accountable to the European Parliament, and with a European Parliament entitled to draft a Constitution for Europe. The outcome was highly positive, with 88.03% of the population in favour and only 11.97% of the population against. Nevertheless, the referendum was conceived to have symbolic value rather than any legal implication, also since in the Italian legal order referendums are only allowed either to abrogate parliamentary laws (as per Art. 75 of the Constitution) or to confirm a parliamentary constitutional law aimed at revising the Constitution (as per Art. 138 of the Constitution). In this respect, a specific constitutional law was adopted (Law No. 2 of 3 April 1989) in order to have such a 'consultative referendum' on the future of the European Union.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 As noted above, the EU–amendments have been limited in their content and have codified some of the content of the ItCC's case law. This can be explained in light of our 'conservative' approach to the constitutional text due to two technical reasons: the complicated procedure of Art. 138 and what Calamandrei calls the 'far sighted'[37] nature of many constitutional provisions. In other words, our Constitution is rich in programmatic provisions containing generic guidelines that have guaranteed the 'adaptability' of our constitutional text. The detailed provisions dealing with the new challenges of the EU integration process have been introduced by means of primary legislation.

1.5.3 At the time of its adoption, the Italian Constitution was considered a long and detailed constitution. The updating of the constitutional pact has been guaranteed by the interpretative function carried out by the relevant constitutional actors, but also by a sort of cascade system of norms designed by the constitution. In other words, in Italy, many of the issues that have been called 'constitutional' in this questionnaire have been treated, over the years, by means of primary sources that have developed the guidelines included in the Constitution (either statutes of Parliament or the internal Rules of Procedure of the Chambers). This choice has a price, of course. First of all, if the legislator is negligent many provisions may never be implemented and that is why it would be better to constitutionalise some of these matters. As stated above, it is interesting to note that the last version of the package of measures proposed by the Renzi Government contains several welcomed proposals to this effect.

[37] Calamandrei 1955a.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 As noted above, fundamental rights are codified in Part I of the Constitution and divided into three sub-groups of provisions which more or less correspond to civil, political and social rights. In terms of the position of principles, some principles are codified in our Constitution (e.g. the principle of equality) or can be traced back to some constitutional provisions (the proportionality test is frequently associated with reasonableness[38] in the case law of our Constitutional Court and employed in cases concerning discrimination). There are also some general principles that cannot be considered as 'constitutional', such as the principle of separation of powers.[39] Some of these provisions remain just on paper or have very limited justiciability. Social rights are a classic example of this.

2.1.2 Some constitutional provisions provide for the possibility of limiting fundamental rights 'in exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law'. Such restrictions are contained, for instance, in Art. 13 (personal liberty), Art. 14 (inviolability of dwelling), Art. 15 (freedom of correspondence) and Art. 16 (freedom of movement).

2.1.3 Although the core concepts of the rule of law belong to the Italian constitutional order, the Italian Constitution does not explicitly mention a constitutional category equivalent or similar to the rule of law. Nevertheless, at least two conceptualisations of the same principle can be inferred from the text of the Constitution and have been developed by scholarly literature, which usually refers to the concept of rule of law by the term '*Stato di diritto*' (similar to *Rechtsstaat; État de droit*). On the one hand, there is the *subjective* facet of the rule of law, related to access to courts and to the right of defence, enshrined in Title I of the first part of the Constitution, which is dedicated to civil rights. Article 24 states:

> All persons are entitled to take judicial action to protect their individual rights and legitimate interests. The right of defence is inviolable at every stage and level of the proceedings. The indigent are assured, by appropriate measures, the means for legal action and defence in all levels of jurisdiction. The law determines the conditions and the means for the redress of judicial errors.

The right to judicial review is also constitutionally entrenched by Art. 25, according to which '[n]o one may be withheld from the jurisdiction previously

[38] Scaccia 2007.

[39] Modugno 1966; De Marco 1996; Pizzorusso 1981.

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ascertained by law', thus ensuring that the tribunal established by law is independent and impartial. On the other hand, the second conceptualisation of the rule of law is related to the so-called '*principio di legalità*' (legality principle), which in the hierarchy of norms subordinates administrative acts to parliamentary statutes (*legge*), as the latter are an expression of the *volonté générale* according to the Rousseauian tradition. In light of this legality principle, the imposition of personal obligations, administrative charges and taxation are only permissible on the basis of a parliamentary statute (see Art. 23). When applied to criminal law, the principle of legality is connected to the principle of non-retroactivity and entails the principle that no one may be punished except by virtue of a law that is in force before an offence is committed (*nulla poena sine lege*).[40] Also another core element of the rule of law, i.e. the rule that only published laws can be valid, is covered by the concept of *Stato di diritto.*

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 It is almost impossible to have a univocal answer for the Italian context. Even if at first glance we might state that the balancing of fundamental rights with economic free movement rights has not raised significant constitutional issues, it is worth noting that many scholars have complained about lower standards for social rights at the EU level, when compared with the standard set out by many constitutions (including the Italian Constitution) which protect social-democratic values and the rights of workers.[41] The fear that the balancing of the Court of Justice may affect national judges has been raised in the scholarly literature.[42] The main criticism related to rulings such as *Viking*,[43] *Laval*[44] and *Rüffert*[45] is that the right to strike is not considered as a human right, thus lowering the standard of protection of Art. 40 of the Italian Constitution, which qualifies it as a fundamental constitutional right.[46] Indeed, in the ECJ case law, the right to strike can be balanced against internal market fundamental freedoms on equal footing (in the sense that it is considered a legitimate interest that must be protected but its possible infringement of an internal market fundamental freedom must be proportionate).

[40] For a general overview on the two concepts, see Bin 2004 and Sorrentino 2007.

[41] Gambino 2014, p. 35.

[42] Giubboni 2009; Caruso 2009.

[43] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

[44] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

[45] Case C-346/06 *Rüffert* [2008] ECR I-01989.

[46] Gambino 2014, p. 39.

Moreover, it can also be pointed out that the focus of the ECJ is on the formal facet of the principle of equality (protecting non-discrimination), while the Italian constitutional tradition strongly protects 'substantive' rather than merely 'formal' equality. In this interpretation, there is a positive obligation upon the State to remove all obstacles to equality by providing economic assistance to people who are poor or discriminated against in order to provide them equal treatment. While it is possible to say that the Italian Constitutional Court has not expressly adjusted its balancing to match the ECJ's approach, in the field of so-called reverse discrimination, its case law on the principle of equality has been affected by the jurisprudence of the Luxembourg Court.[47] In order to deal with cases of reverse discrimination the Italian Constitutional Court has progressively extended its scrutiny in light of Art. 3 (principle of equality).[48] More recently, the issue of reverse discrimination has created 'problems of coordination' between the national and supranational levels. In a decision of the ECJ that was recently strongly criticised by Peers,[49] a woman brought a claim for state compensation based on Directive 2012/29/EU 'establishing minimum standards on the rights, support and protection of victims of crime',[50] after having obtained the conviction of her attacker for sexual assault. Since the offender did not have the money to pay the compensation ordered by the national court, the victim tried to obtain compensation from the Italian state, but the ECJ ruled that the Directive in question was not applicable to purely domestic cases.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The Presumption of Innocence

2.3.1.1 The presumption of innocence is a fundamental principle in the Italian constitutional order. It is implicit in Art. 13 which is devoted to personal liberty. Article 13 first states that 'personal liberty is inviolable and that no form of

[47] Case C-35-36/82 *Morson and Jhanjan* [1982] ECR 03723; Case C-229/83 *Leclerc* [1985] ECR 00305; Case 355/85 *Cognet* [1986] ECR 03231; Case C-90/86 *Zoni*, [1988] ECR 04285; Case C-33/88 *Allué I* [1989] ECR 01591; Joined cases C-259/91, C-331/91 and C-332/91 *Allué II* [1993] ECR I-04309.

[48] ItCC, Decisions No. 249/1995, No. 61/1996 and No. 443/1997. On reverse discrimination in the case law of both the ECJ and the ItCC, see Spitaleri 2011 and Dani 2011.

[49] Case C-122/13 *C* [2014] ECLI:EU:C:2014:59. See the comment by Peers 2014.

[50] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2012] OJ L 315/58.

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detention, inspection nor any other restriction on personal freedom is permitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law'. Article 13 then continues:

> In exceptional cases of necessity and urgency, strictly defined by the law, law-enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should the judicial authorities not confirm such measures within the next forty-eight hours, they are revoked and become invalid.

In order to respect the presumption of innocence, Art. 13(5) specifies: 'The law establishes the maximum period of preventive detention'. In order to protect the presumption of innocence at the same level as in our constitutional order, Italy has introduced an additional ground of refusal when implementing the European Arrest Warrant Framework Decision[51] (EAW Framework Decision). Indeed, according to Art. 18(e) of Law No. 69/2005 implementing the EAW Framework Decision, surrender of the individual shall be refused if the legal system of the Member State issuing the European Arrest Warrant (EAW) does not stipulate maximum limits to the duration of preventive detention. Nevertheless, the Supreme Court has construed this article in a way that has sometimes undermined the level of protection of the presumption of innocence in our constitutional system, in order to provide for a consistent interpretation of domestic law with EU law. The Supreme Court has often been satisfied with the procedural rules of other Member States (even when these have enshrined lower standards of protection) which for example envisage a system of subsequent intermediate periods, which may be extended under jurisdictional scrutiny. In other words, the Supreme Court has adopted a substantive rather than a formalistic approach to the interpretation of the notion of 'maximum limits' contemplated in Italian law, so as to allow for the extradition of accused persons to countries which have a 'similar' or 'equivalent' level of protection of the individual, but not necessarily the same.[52] It is interesting to note that this position of the Supreme Court (which in the specific case allowed the surrender of an individual upon a request made by Germany) marks a shift in the case law of the same Court. It is worth noting that the Supreme Court had previously refused to surrender a citizen to Belgium because of the absence of maximum limits to the duration of precautionary detention like those in the Italian legal order.[53]

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[51] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[52] Corte di Cassazione, Sezioni Unite, *Ramoci Villaznim* Decision No. 4614 of 30 January 2007. Also the Decision No. 17810 of 24 April 2007 (Sezione sesta penale, caso *Zanotti)* has been criticised for surrendering the individual to Poland, although in that country there were no maximum limits for preventive detention as envisaged by the Italian legal order.

[53] Corte di Cassazione, Sez. VI, *Cusini*, Decision No. 16542 of 8 May 2006. On the changing orientation of the Supreme Court of Cassation, see Cavallini 2007.

2.3.1.2 The procedure for surrender of the individual is enshrined in Law No. 69 of 2005 implementing the Framework Decision (from Art. 5 to Art. 27).[54] The *Corte d'Appello* of the district where the citizen resides is the competent authority for execution of the EAW. While it must be acknowledged that the Italian courts usually execute and very rarely refuse EAW requests, Law No. 69 of 2005 envisages appropriate guarantees for the accused, which include, for example, the possibility to appeal to the Supreme Court of Cassation for a second trial in case of disagreement with the outcome of the first trial before the Court of Appeal.[55] Moreover, the accused individual has the right to have both a public defender and an interpreter, and to be judged at a public hearing.[56]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle *nulla poena sine lege* is enshrined in Art. 25 of the Italian Constitution, according to which '[n]o one may be punished except on the basis of a law in force prior to the time when the offence was committed'. In this respect, criminal legislation must satisfy the conditions of precision, clarity and predictability, allowing each person to know whether an act constitutes an offence. In this respect, the abolition of double criminality for 32 categories of crimes as provided by the EAW framework decision might be in breach of the principle of legality in criminal matters. While the issue has never reached the Constitutional Court, it has raised a significant debate in scholarly literature.[57]

On the one hand, some scholars have noted that the principle *nulla poena sine lege* is deeply jeopardised by the EAW requirement according to which the State of execution shall provide its assistance in punishing an act which may not be qualified as a crime in the domestic legal order: the focus here is on the breach of the principle according to which only parliamentary statutory law may restrict personal freedom.[58] On the other hand, there is a second line of criticism which builds on the assumption that the dual criminality rule not only protects the principle of legality but also the principle of sovereignty.[59] In this respect, abolition of the double

[54] The text of the Law is available at http://www.camera.it/parlam/leggi/05069l.htm.

[55] More generally, it is the Constitution itself, in Art. 111, which states that 'Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war'.

[56] An accurate overview of the procedure is available on the website of the Italian National Association of Judges: http://www.associazionemagistrati.it/doc/1518/il-mandato-di-arresto-europeo.htm.

[57] For a general overview, see Calvano 2007.

[58] Cf. Bartone 2003; Caianello and Vassalli 2002; Gualtieri 2004; Manacorda 2004 and 2007 amongst others.

[59] Pisa 1973.

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criminality rule may also configure a sort of 'superiority' of the criminal law of the country issuing the EAW upon the country executing it.[60]

In fact, the problematic aspect of the EAW Framework Decision lies in legal certainty. Indeed, the Framework Decision enumerates the types of crimes for which the rule of double criminality is abolished, but it does not specify the behaviours connected to those crimes, leaving definition of the constitutive elements of the crime to the Member States. Under the same label of corruption, organised crime or drug trafficking, Member States' law may define very different behaviours. In this respect, individuals who are in a foreign country that has a legal and juridical culture different from that of their home country may experience a 'journey into the unknown'.[61]

For some of the categories of offences listed in Art. 2 of the Framework Decision it is not possible to identify corresponding or common models of incrimination. Some acts may be criminalised in some national legal systems but not in others. This significantly jeopardises the principle of legality in its pivotal function: that of guiding the behaviour of individuals in the light of certain and predictable rules.[62] In order to avoid this *vulnus* to the constitutionally protected principle of legality, some proposals were put forward to revisit the Italian criminal law framework in order to create a perfect correspondence between the list provided for in Art. 2 of the Framework Decision and Italian material criminal law, to ensure legal certainty without infringing the principle of mutual recognition in the criminal sphere.[63]

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The principle of fair trial is enshrined in Art. 111 of the Italian Constitution, which is composed of a first part related to due process more broadly, and a second part specifically dedicated to criminal trials. According to Art. 111:

> Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials. In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence.

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[60] Barazzetta 2004; Picotti 2005; Selvaggi and Villoni 2002.

[61] Mitsilegas 2006.

[62] On the difficulties for individuals to be aware of the definition and scope of crimes in foreign countries, see Del Tufo 2005 and Di Martino 2006, pp. 133–135.

[63] Iuzzolino 2002; Barazzetta 2004.

While Art. 111 of the Constitution, as amended in 1999, seems to provide sufficient protection of the principle according to which the defendant shall be duly informed of the process and shall participate therein, the Strasbourg Court has on several occasions condemned Italy for *in absentia* judgments that do not comply with the procedural guarantees provided for in Art. 6 of the European Convention on Human Rights (ECHR).[64] The Italian criminal code has very recently been revised by Law No. 67 of 28 April 2014, in order to conform to the ECHR standards that allow prosecution of an alleged offender only where there is certainty of the knowledge of the process and where there is unequivocal evidence of the willingness of the alleged offender to waive the right to participate into the process. The reform significantly changes Italian traditional criminal law which looked at *in absentia* judgments as a right of the defendant, rather than as a possible infringement upon his/her rights.[65] In this respect, judges will have to collect more evidence about the effective willingness to be absent on the part of the defendant before condemning him/her with an *in absentia* judgment.

In addition, the Italian Constitutional Court has annulled a provision of the Italian criminal code related to *in absentia* judgments in that it violated Art. 6 of the ECHR which enshrines the right of the accused to participate in his or her trial and to be informed promptly.[66] More specifically, the annulled provision was Art. 175 (2) of the Code of Criminal Procedure, which did not allow the release of the accused person within the time limit for appealing against an *in absentia* judgment, where a similar appeal had previously been proposed by the public defender's office. This judgment is very important in that it marks a shift in the position of the Constitutional Court, which had earlier held that trials against individuals who had ignored allegations against them and had not been properly informed did not violate Art. 111 of the Italian Constitution, and that the ECHR did not grant guarantees greater than those provided for in this Article.[67] Moreover, it must be stressed that in this judgment, the Constitutional Court, in balancing constitutional values, attributed greater importance to the right of the defendant than to the principle of due process and of the reasonable duration of the process. By way of contrast, the Supreme Court of Cassation stated in a similar case that the reopening of the process with the possibility for the 'uninformed' alleged offender to make an appeal could jeopardise the smoothness and reasonable length of the process protected by Art. 111 of the Constitution.[68]

[64] ECtHR, *Colozza v. Italy*, 12 February 1985, Series A no. 89; *Somogyi v. Italy*, no. 67972/01, ECHR 2004-IV; *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II.

[65] Quattrocolo 2014.

[66] ItCC, Decision No. 317/2009.

[67] ItCC, Order No. 89/2008 and Decision No. 117/2007.

[68] Cassazione penale, Sezioni Unite, Judgment No. 6026 of 31 January 2008.

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2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The Italian Constitution, in Art. 111, states that in all criminal trials 'the defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted'. Nevertheless, in the opinion of many defence lawyers, extradited citizens or residents are unfortunately not provided with quality translation and legal aid or travel expenses. Introduction of a publicly funded state or non-governmental body to provide such assistance would be highly recommended. Some proposals have been made by defence attorneys in order to guarantee appropriate protection of the constitutional rights of residents who are involved in trials abroad. The focus of such proposals largely built on the 2012 Justice Report 'European Arrest Warrant – Ensuring an Effective Defence' and stressed the necessity of immediate legal assistance both in the issuing and in the executing Member State, and a high level of specialisation on the part of defence attorneys in order to ensure an effective defence. Moreover, the report suggests a proportionality test on the part of the judge, so as to ensure that the infringement of fundamental rights is proportionate in the light of the seriousness of the crime (especially in the light of the discrepancies between Member States' sanctions, which would at least require a comparative analysis of the relevant national legal frameworks).[69]

2.3.4.2 Unfortunately, there are no statistical data available to indicate how many extradited individuals have subsequently been found innocent. This is because the Ministry of Justice does not collect data on how many individuals are found innocent even in the course of domestic trials.[70] Nevertheless, information on the website of the Minister of the Economy and Finance indicates that approximately 50,000 people have been victims of injustice. This data is available since Italian law requires the state to provide such persons with monetary compensation, which is counted as an item of expenditure.[71] While we do not have statistics on extradited individuals or on individuals surrendered subsequent to an EAW request who have subsequently been found innocent, two cases have been covered in the media, both of which related to a mistaken identity. A Spanish doctor, José Vincent Pier Ripoll, was extradited from Spain to Italy and was held in jail for 8 months due to a miscarriage of justice by judges who accused him of being an international drug trafficker. He received 85,000 EUR in compensation.[72] In 2009, an Italian gardener

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[69] Barletta et al. 2013.

[70] The only statistics available are at: http://www.giustizia.it/giustizia/it/mg_1_14.wp?frame10_item=4&all=true.

[71] The so called R.I.D. (*Riparazione per ingiusta detenzione*), for which Italy paid 575,698,145 EUR from 1991 to 2013. The data are available at: http://www.errorigiudiziari.com/errori-giudiziari-statistiche-numeri-dati/.

[72] http://www.errorigiudiziari.com/?vittime=jose-ripoll-scambiato-per-narco-in-carcere-per-8-mesi-da-innocente.

was jailed for 50 days pursuant to a European Arrest Warrant from Germany in which he was accused of aggravated theft in Austria and Germany, where the gardener had never lived or even travelled.[73] In another case (*Arapi*) which was also reported in the news, the defendant was convicted of murder in his absence in Italy, although he was not aware of the trial. After surrender to the Italian authorities was ordered by a UK court, the EAW request was dropped and he received compensation in the amount of 18,000 GBP.[74]

2.3.5 The Right of Effective Judicial Protection and the Principle of Mutual Recognition in EU Criminal Law

2.3.5.1 While the application of the principle of mutual recognition in civil and commercial matters has not raised significant constitutional issues in Italy, its application in criminal law has been quite tormented. In the scholarly literature, the transposition of mutual recognition to the criminal sphere was not only considered as an attack on national sovereignty, but also as 'the first serious threat of disablement of the constitutional guarantees to the right of liberty'.[75] Following the same line of reasoning, a significant political debate concerned about a possible infringement upon fundamental constitutional rights, accompanied both the adoption and the implementation of the European Arrest Warrant Framework Decision.[76]
While it did not succeed in jeopardising the adoption of the Framework Decision during the 2001 Laeken Summit or in reducing the list of crimes provided for in Art. 2 of the Decision to only six crimes strictly related to terrorism, the Italian Government managed, together with Austria, to delay the adoption of the decision. It also requested a declaration to be recorded at the moment of the decision. In this political declaration (devoid of any legal value) the Government stressed the need to change the Italian criminal system (with respect to the constitutional principles and in particular respect for fundamental rights) to be able to adapt to what is established in the Framework Decision.[77] The Government also asked for a *parere pro veritate* from two prominent lawyers, Vincenzo Caianiello and Giuliano Vassalli, both of them former Ministers of Justice and former Chairs of the Italian Constitutional Court. Both of them found that the introduction of the mutual recognition rule in criminal law was incompatible with many of the principles enshrined in the Italian Constitution. Caianiello and Vassalli in particular lamented

[73] http://www.errorigiudiziari.com/?vittime=finisce-in-carcere-per-50-giorni-per-uno-scambio-di-identita.
[74] http://www.fairtrials.org/press/italian-shock-decision-to-drop-european-arrest-warrant-against-edmond-arapi/.
[75] Pinelli 2012, p. 2399.
[76] Salazar 2002.
[77] Barletta 2006.

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about: (a) a violation of the principle of the rule of law, in its facet of the 'principle of legality', which should ensure that crimes are foreseen in a predictable and specific way, by national statutory laws, enacted by the Parliament, rather than generically listed in the EAW Framework Decision enacted by EU institutions; (b) a violation of the constitutional principle of personal freedom as envisaged by Arts. 13, 104 and 111 of the Constitution. According to the Italian Constitution, any measure restricting personal freedom, such as for example measures for the enactment and enforcement of custody orders, shall be provided by statutory laws, in that those laws are subject to a strict scrutiny of respect for constitutional fundamental rights carried out by the Constitutional Court; (c) a violation of the rules on extradition contemplated in Arts. 10 and 26 of the Italian Constitution, aimed at protecting the fundamental rights of individuals.[78]

These constitutional concerns have all been translated into a law on implementation of the EAW Framework Decision which does not completely comply with EU law, as pointed out by the European Commission several times. Just to give an example, in order to guarantee effective judicial protection to individuals, Law No. 69 of 2005 significantly increases the grounds for refusal to deny the execution of an EAW, compared to those set out in the EAW Framework Decision. It can be argued that constitutional guarantees related to effective judicial protection have not been undermined by the introduction of the mutual recognition rule in criminal law, in the light of the fact that the Italian constitutional order has preserved some flexibility in implementing the Framework Decision.[79]

2.3.5.2 In our view, mutual recognition, when compared with harmonisation, still represents the method that best suits a pluralistic legal order, allowing for respect for the different legal traditions of the Member States in the European legal space. Nevertheless, transposition of mutual recognition from internal market matters to criminal law is problematic. While the case for mutual recognition in criminal matters was largely based on the success of the principle in the area of the internal market,[80] the so-called 'single market analogy'[81] raises the following contested issues. First of all, the freedom of movement of 'judicial decisions' may not be compared to the movement of persons, products and services: if mutual recognition requires that practices and standards of other Member States be deemed legitimate in an extra-territorial way,[82] criminal law has traditionally been considered as a national affair strictly related to national sovereignty. Secondly, while internal

[78] Caianiello and Vassalli 2002, pp. 462–467; Casetti 2005.

[79] On the implementation of the EAW Framework Decision in Italy, see Fichera 2011 and Barletta 2011.

[80] Flore 2009, p. 269.

[81] Lavenex 2007.

[82] Mitsilegas 2009, p. 118.

market fundamental freedoms considerably expand the sphere of individual rights, the free movement of judicial decisions in criminal matters does not provide an immediate benefit to the individual, but is reflected in a direct benefit for the Member State.[83] Indeed, it is the judicial decision of a sovereign Member State which can be executed and recognised in other Member States. By way of contrast, such decisions are often imposed on individuals. Nevertheless, there is an 'indirect' benefit upon citizens which comes from more security. In sum, mutual recognition represents a good instrument for guaranteeing efficiency and the security of citizens, only insofar as it does not entail an infringement of fundamental rights related to effective judicial protection. To this end, in order to ensure mutual trust among judicial authorities, the most significant discrepancies between Member States on the core elements of the rule of law should be reduced.

Some authors have given serious consideration to the possibility of combining mutual recognition with minimum approximation of offences and penalties. They usually refer to the debate during the negotiations of the EAW Framework Decision, when the choice between 'pure' or 'absolute' mutual recognition (including only formal grounds for non-execution and/or relating to only a few serious offences) and 'relative' mutual recognition was discussed. It has also been suggested that the list of types of crimes be reduced to a few core offences, for which common criteria for definition and punishment may be found more easily.[84] In addition, the EU institutions have underestimated the role of mutual trust. The initial assumption that mutual trust would be generated automatically proved wrong. There are also signs of a shift from a 'mutual trust' to an 'effectiveness' paradigm.[85]

2.3.5.3 In Italy, some criticisms of the possible change in the role of courts (from providing judicial protection against unwarranted measures by the authorities, to having become actors of loyal co-operation, efficiency and trust) were raised with regard to the Supreme Court of Cassation. This Court, indeed, in some judgments, favoured the logics of co-operation and efficiency inherent in the EAW framework at the expense of the more guarantistic procedures contemplated by domestic law.[86] Guarantism is the political doctrine developed in the nineteenth century, which aimed at protecting constitutional guarantees for individual liberty and collective freedoms against potential arbitrariness by the public authorities. In the 1960s to 1990s, guarantees in the penal process to avoid arbitrariness in political or judicial power, especially in the context of emergency legislation, became a central element of the concept.[87] Just to give two examples, the Supreme Court stated that an arrest warrant has to be executed when the requesting Member State respects the right to a fair trial, even if the degree of such protection is lower than the level ensured by the

[83] Klip 2012, p. 22; Lavenex 2007, pp. 764–765; Mostl 2010, p. 409.

[84] Fichera 2011, p. 80.

[85] Herlin-Karnell 2013, pp. 79–91.

[86] For a survey, see Barletta 2011.

[87] The key scholars behind this concept are Luigi Ferrajoli and Norberto Bobbio; for a key book, see Ferrajoli 2009.

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Italian Constitution in Art. 111.[88] Moreover, the Supreme Court of Cassation provided a restrictive interpretation of the 'safeguard clause' contemplated in Art. 2 of Law No. 69/2005 implementing the EAW Framework Decision, according to which the application of the Framework Decision shall fully respect fundamental rights as provided by international treaties and the Italian Constitution, and according to which the violation of those constitutional guarantees by the Member State issuing the EAW may result in a refusal to surrender the individual. More specifically, when the 'safeguard clause' was invoked, the Supreme Court refused to apply it, by retaining that the absence of alternative measures to detention, aimed at the re-socialisation of the detainees, did not amount to a breach of a common constitutional principle of the Member States.[89]

In our opinion, the fact that the Supreme Court limited the field of application of the safeguard clause provided by Art. 2 of Law No. 69/2005 to the domestic constitutional principles that are also mentioned in Art. 6 TEU, cannot be criticised as such. The reasoning behind this case law is not the sacrifice of constitutional guarantees to serve the goals of efficiency in the area of freedom, security and justice. More simply, the Court of Cassation has tried to mitigate the discrepancies between the EAW Framework Decision and the Italian implementing law, while providing an interpretation of Italian law that is consistent with EU law.[90]

2.3.5.4 In Italy, there have been no explicit calls to reintroduce some form of judicial review in the country of residence of the individual affected. In any case, this is inherent in the law implementing the EAW Framework Decision, which is not completely consistent with the Framework Decision, in that it provides greater protection of constitutional rights. Just to give an example, according to the Italian implementing law, the surrender of the accused individual should be subject to the existence of serious evidence of guilt. The EAW Framework Decision does not include this condition. Indeed, it could be regarded as contrary to the decision itself, to the extent that such a determination results in an undue overlap of assessments carried out by an Italian judge with respect to judgments that fall within the exclusive jurisdiction of the judicial authority of the Member State issuing the EAW. This is clearly inconsistent with the very essence of the principle of mutual recognition.[91] Shifting to the behaviour of the courts, it can be said that

> Italian Courts execute the EAW as far as the requesting State offers adequate judicial remedies to the lack of discussion and cross-examination, such as the possibility to appeal (Corte Cass., Sez, VI, *Tavano*, n. 7812/2008; Sez. VI, *Finotto*, n. 7813/2008), to ask for revision of the Judgement (Corte Cass., Sez. VI, *Bolun*, n. 5909/2007, regarding Hungary, and Sez. VI, *Salkanovic*, n. 3927/2008, regarding France) or to start a new phase of the proceedings (Corte Cass., Sez. F, *D'Onorio*, n. 33327/2007, concerning Belgium).[92]

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[88] See Corte di Cassazione, Sez. VI, *Melina*, Decision No. 17632/2007 of 3 May 2007.

[89] Corte di Cassazione, Sez. VI, *Hantig*, Decision No. 46296/2008 of 10 December 2008.

[90] See also Corte di Cassazione, SS. UU., *Ramoci*, Decision No. 4614/2007 of 30 January 2007.

[91] Selvaggi and De Amicis 2005, p. 1814.

[92] Porchia and Puoti 2013, pp. 441–442.

2.4 The EU Data Retention Directive

2.4.1–2.4.2 The implementation of the Data Retention Directive[93] has not raised constitutional issues in our country, although the decisions coming from the other countries have been addressed to a certain degree in the Italian literature,[94] and many have welcomed the decision of the ECJ.[95] The implementation occurred with some delay by Legislative Decree No. 109/2008. However, before the entry into force of this legislative decree, the Privacy Code already contained Art. 132 on Traffic Data Retention for Other Purposes. After the decision of the ECJ, some colleagues[96] pointed out the necessity to disapply (due to conflict with Art. 7 and 8 of the Charter of Fundamental Rights,) or to declare unconstitutional Art. 132 of Legislative Decree No. 2003/196 (a.k.a. 'Data Protection Code')[97] in light of Art. 117.

It has been noted that until the entry into force of the Law implementing Directive 2006/24, Italy was among the countries with the provision for the longest retention periods for data traffic, on the basis of Art. 6 of Decree Law No. 144/2005 (converted into Law No. 155/2005) on urgent measures to combat international terrorism, which modified the wording of Art. 132 of the Privacy Code. This latter provision requires that providers retain telephone traffic data for 24 months from the date of the communication to detect and suppress criminal offences, and that electronic communications traffic data, except for the contents of communications, is to be retained by the provider for twelve months from the date of the communication for the same purpose. Article 132(1bis) also allows for data retention of unsuccessful calls for thirty days. As for the modalities of transfer, under Art. 132 (3), data may be acquired from the provider by means of a reasoned order issued by a public prosecutor or at the request of defence counsel, the person under investigation, the injured party or any other private party.[98]

This provision was introduced into our legal system before the entry into force of the Directive.

2.5 Unpublished or Secret Legislation

2.5.1 The duty of public entities to publish documents is an important indicator of the true democratic character of a given legal system. In this respect, unpublished

[93] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[94] For example, see Passaglia 2010.

[95] Including Ferro 2014 and Pastena 2014.

[96] See Vecchio 2014 amongst others.

[97] For an overview of this code, see: http://www.garanteprivacy.it/home_en/italian-legislation.

[98] Porchia and Puoti 2013, p. 447.

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legislation cannot be deemed to be valid in Italy since publication is considered to be a constitutive element of parliamentary statutes, which are not considered to exist or to be valid until they are published in the '*Gazzetta Ufficiale*' of the Italian Republic. Having said that, the Italian legal order recognises the existence of state secrets, which, as defined by law,[99] include all acts, documents, facts and activities the disclosure of which may undermine the integrity, independence and defence of the State, its relations with other States, or the functioning of State institutions and bodies of constitutional relevance.[100] The Constitutional Court has ruled that the state secrets privilege is not incompatible with the Constitution, insofar as it is designed to protect national security as per Art. 126 of the Constitution.[101] The Penal Code provides that disclosure of information classified as a state secret is punishable by imprisonment of at least five years. More recently, the Constitutional Court stated that the selection of acts, documents and information to be classified as a state secret is a highly discretionary political activity that cannot be subject to judicial review.[102]

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 No specific issues with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality have arisen in Italy in relation to EU measures, although in the early days the concern about rights protection in the internal market was the main reason behind the creation of the counter-limits doctrine by the ItCC. Some of these issues have been tackled in relation to the European Convention on Human Rights, which has, for example, increased the standard of protection of property rights by providing for appropriate compensation after expropriation (more specifically, the ItCC invalidated a national parliamentary statute for violation of Art. 1 of Protocol 1 ECHR).

However, an indication that the above principles may play a more prominent role and be subject to a stricter standard of protection in Italy in comparison with the EU system of judicial review may be implied from a study by Gari and Tridimas. Their research shows that Italy's low success in challenging EU measures may be linked to the fact that Italy has based most of its arguments on violations of general principles, with the following general principles of EC law having been invoked by Italy unsuccessfully: proportionality; statement of reasons; non-discrimination and equal treatment; legitimate expectations and legal certainty; and right to a fair

[99] Law No. 124 of 3 Aug. 2007, and Law No. 133 of 7 August 2012.

[100] For a general overview see Mastroianni and Arena 2011, pp. 121–123.

[101] See ItCC, Order No. 49/1977, Decision No. 82/1977 and Decision No. 86/1977.

[102] ItCC, Decision No. 106/2009.

hearing. The authors have noted that Italy's low success rate (with 8.7% of successful cases) stands in contrast to Spain's higher success rate, which they attribute to arguments that are based on more technical grounds.[103]

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 The constitutionality of the Treaty Establishing the European Stability Mechanism (ESM Treaty) has not been questioned in our country, and even the parliamentary debate was very poor. As Pierdominici has pointed out, in both Chambers and in the relevant Parliamentary Committees, the procedure for authorisation by law of the Fiscal Compact was combined with other procedures related to the Treaty amendment in Art. 136(3) TFEU and the ESM Treaty.[104]

Some authors have tried to argue that the Fiscal Compact is invalid, but in light of its presumed conflict with the EU Treaties.[105] There has been no constitutional litigation on the validity of these measures and this 'seems to be explained first of all by the way the system of constitutional adjudication is designed'.[106] In other words, because of the absence of something like the *Verfassungsbeschwerde* or the possibility for parliamentary minorities to bring a case before the ItCC, the *Corte Costituzionale* has not had the chance to be involved in this issue. As we will see later in Sect. 3.5 concerning the impact on the welfare state dimension, the ItCC has delivered some decisions in this field.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Between 1952 and 2013, 1,227 references were sent by Italian judges to the ECJ: 2 from the *Corte Costituzionale*, 119 from the Court of Cassation, 101 from the State Council and 1,005 from other courts or tribunals.[107] According to the study by Tridimas and Gari 'the intra-judicial conversation which takes place via the preliminary ruling procedure pertains in its overwhelming majority to the interpretation of Community law and the compatibility of national action with it rather than the constitutionality of Community action'.[108] As we will see, this

[103] Tridimas and Gari 2010, pp. 171, 172 et seq. and 152.
[104] Pierdominici 2014.
[105] For instance Guarino 2014.
[106] Fasone 2014.
[107] Court of Justice of the European Union 2015, p. 108.
[108] Tridimas and Gari 2010, p. 139.

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conclusion seems confirmed in light of our data. According to the annual report of the ECJ of 2013,[109] between 2006 and 2013 there were 365[110] preliminary references from Italian courts. Our search in the ECJ online database identified 306 cases. The overwhelming majority of these preliminary references concerned the interpretation of acts of EU law. In many cases the national judges *de facto* asked the ECJ to decide on the compatibility of a national norm with an EU law norm to be interpreted. There was also one case, *Kamberaj*,[111] where the referring judge tried to obtain an argument to question the established case law of the Constitutional Court (concerning the direct effect of the ECHR, see below for further details) from the ECJ. In only 12 cases did the referring judge question the validity of an EU act, which is consistent with the findings of Tridimas and Gari, according to whom: 'The ECJ issued few preliminary rulings on the validity of Community measures with a minimum of six in 2001 and a maximum of 12 in 2004'.[112] In a nutshell, the ECJ had to deal with the presumed invalidity of EU acts in the following cases: *Fastweb*[113] (public sector); *Torresi*[114] (freedom to provide services); *SFIR*[115] (sugar industry); *Manzi*[116](transport and environment); *Nunziatina*[117] (State aid); *Azienda Agricola Disarò Antonio and Others*[118] (milk products sector); *Gowan Comércio Internacional e Serviços*[119] (agriculture); *Bavaria and Bavaria Italia*[120] (registration of geographical indications); *Nuova Agricast*[121] (State aid); *Carp*[122] (construction products); *Confcooperative Friuli Venezia Giulia and Others*[123] (agriculture) and, finally, *RAI*[124] (State aid). In not one of these cases did the ECJ declare the invalidity of the EU law measure.

2.8.2 A univocal answer to whether there is a lower standard of judicial review by the EU courts than in Italy probably does not exist. In other words, the situation created by a different standard of protection depends on the specific case. Italian scholars are of course aware of some deficiencies in the EU legal system. It is likely

[109] Court of Justice of the European Union 2015, p. 106.

[110] References by year: 34 (2006); 43 (2007); 39 (2008); 29 (2009); 49 (2010); 44 (2011); 65 (2012); 62 (2013).

[111] Case C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233.

[112] Tridimas and Gari 2010, p. 140.

[113] Case C-19/13 *Fastweb* [2014] ECLI:EU:C:2014:2194.

[114] Case C-58/13 *Torresi* [2014] ECLI:EU:C:2014:2088.

[115] Case C-187/12 *SFIR e a.* [2013] ECLI:EU:C:2013:737.

[116] Case C-537/11 *Manzi e Compagnia Naviera Orchestra* [2014] ECLI:EU:C:2014:19.

[117] Case C-138/09 *Todaro Nunziatina & C.* [2010] ECR I-04561.

[118] Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [2009] ECR I-04023.

[119] Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-13533.

[120] Case C-343/07 *Bavaria and Bavaria Italia* [2009] ECR I-05491.

[121] Case C-390/06 *Nuova Agricast* [2008] ECR I-02577.

[122] Case C-80/06 *Carp* [2007] ECR I-04473.

[123] Case C-23/07 *Confcooperative Friuli Venezia Giulia and Others* [2008] ECR I-04277.

[124] Case C-305/07 *RAI* [2008] ECR I-00055.

that the future accession of the EU to the ECHR will contribute towards solving these, and some weaknesses related to the original, purely economic nature of the EU integration process will be challenged (for instance the problematic issue of the application of insufficient review when dealing with the Commission's determinations in competition proceedings).[125] Scholars have also pointed to the important factor of 'incoherence' in the case law of the ECJ due to an oscillating use of proportionality, depending on whether the measure under review was taken by an EU institution or by a Member State. In the first scenario, the ECJ rarely declares the illegality of the measures, and generally acts as a third party arbiter at best. In contrast, with regard to the Member States, the Court adopts a stricter stance, and often derives additional duties from the interests of integration, declaring a violation of the duty of loyal co-operation set by the Treaties.[126] However, cases like those treated in the *Kadi* saga[127] should be taken into account before condemning the EU legal system *in toto* from this point of view.

2.8.3 The ItCC has a limited jurisdiction, since it may adjudicate cases concerning the constitutional legitimacy of laws and enactments having the force of law issued by the State and Regions. This excludes other administrative or regulatory acts. The only acts of the Government that may be subject to the jurisdiction of the Court are its decree laws and legislative decrees (governed respectively by Arts. 77 and 76 of the Italian Constitution). The former are acts issued in case of necessity and urgency and adopted under its own responsibility by the Government. They are provided with the force of law. The latter are the product of the exercise of the delegation of the legislative function on the basis of some principles and criteria established in an enabling act of the Parliament. Article 77 of the Italian Constitution provides that decree laws lose effect from the beginning if they are not transposed into law by Parliament within sixty days of publication. In 1996 the ItCC declared decree laws that reiterated the contents of other decree laws that had not been converted into law by Parliament to be unconstitutional.[128] After a long period in which the Constitutional Court seemed to not scrutinise the prerequisite of necessity and urgency of decree laws, the ItCC has more recently begun to declare decree laws unconstitutional for a manifest lack of necessity and urgency.[129]

As for regulations (which are from a formal point of view administrative acts), the consistency between these measures and the law is guaranteed by the administrative judges who are empowered to annul them in these cases. In theory, the

[125] Bernatt 2014.

[126] Harbo 2010, p. 172, 'Proportionality in the narrow sense – *stricto sensu* – is, according to the claim, applied whenever the court finds it suitable in order to promote the desired outcome. Accordingly, the proportionality analysis conducted by the court is not objective in the sense that it is value-neutral. On the contrary, the analysis is informed by a very strong substantial bias, namely that of promoting European integration'. In Italian, see Galetta 2005.

[127] Avbelj, Fontanelli and Martinico 2014.

[128] ItCC, Decision No. 360/1996.

[129] ItCC, Decision No. 171/2007.

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notion of 'violation of law' in this case also covers cases of violation of the Constitution, but if the regulation in question has been adopted on the basis of a law, the administrative judge will probably prefer to refer a question of constitutionality to the ItCC.

No statistical data on constitutional and judicial review by Italian courts was available at the time of writing (August 2014).

2.8.4 We discussed the issue of the extent to which the Constitutional Court and Supreme Court review measures that implement EU legislation when dealing with questions 1.3.2 and 1.3.3. After *Internationale Handelsgesellschaft*, the ItCC was the first court to react to the doctrine of absolute primacy by raising the walls of the counter-limits and threatening to exercise an indirect review of EU legislation. As we know, the counter-limits doctrine in Italy was primarily prompted by fundamental rights protection.

2.8.5 We do not think that an unequivocal answer to the question of potential gaps in judicial review exists. It depends on the specific field and on the structure of the balancing in the specific case. Of course, because of the origin of its legal order (law of the common market), the ECJ still sometimes establishes a lower standard, but in other cases the standard employed by the Luxembourg Court might appear higher. This is inherent in the logic of a system in which each level contributes to improving the protection of the multilevel fundamental rights in the other, and is part of the normal dialectic between the levels. On accession of the EU to the ECHR, see Sects. 2.13.1–2.13.2.

2.8.6 In Italy, there is an important judgment of the Constitutional Court that tackles the issue of equal treatment of individuals falling within the scope of EU law and those falling within the scope of the domestic protection of constitutional rights. Notoriously, Law No. 69/2005 implementing the EAW Framework Decision has significantly expanded the grounds of refusal that an Italian Court of Appeal can invoke to deny the execution of a European Arrest Warrant, and it has also rendered mandatory a ground that is deemed to be optional in the EAW Framework Decision. Article 18 of Law No. 65/2009 lists the grounds of refusal and states in letter r) that the surrender of Italian citizens sentenced to custody, or security measures involving deprivation of liberty can be refused but must be subordinated to the execution of the detention order or of the sentence in Italy. The Italian Constitutional Court, with its judgment No. 227 of 2010, found this provision discriminatory in that it did not apply to non-Italian citizens. The limitation provided by Art. 18 was indeed declared incompatible with the equality principle enshrined in Art. 3 of the Italian Constitution, with Arts. 11 and 117 of the Italian Constitution and with the principle of non-discrimination codified in Art. 18 TFEU. Indeed, with regard to the EU principle of non-discrimination, the Court underscored that using the criterion of nationality to determine the applicability of this ground of refusal was disproportionate and, ultimately, contrary to the *ratio* of Art. 4(6) of the EAW Framework Decision.

2.9 Other Constitutional Rights and Principles

2.9.1 There are no other significant issues that have arisen in Italy with regard to constitutional rights or the rule of law, apart from those arising from the questionnaire.

2.10 Common Constitutional Traditions

2.10.1 Undoubtedly the Charter of Fundamental Rights of the EU represents a good starting point for identifying the rights that form part of the common constitutional traditions. However, we must consider that, according to certain literature, general principles (as inspired by common constitutional traditions) have a scope of application or a content which might be broader than that of the Charter. A good example of this inexact correspondence is represented by the principle of good administration as pointed out by Hofmann and Mihaescu.[130]

This imperfect correspondence between common constitutional traditions and the Charter would also explain why the ECJ might still refer to them in the future, even when fundamental rights are codified by the Charter. In other words, reference to general principles would be a way to use general principles as a Trojan horse to enlarge the scope of EU law by circumventing Art. 51 of the Charter. A confirmation of this reading might be found in the approach followed by the ECJ in some cases where it has adopted the general principles as a starting point for its reasoning, and has recalled only subsequently that the given principle is also codified by the Charter. In this way, it might appear to recognise a mere codificatory value of the Charter.[131] The written nature of the Charter will of course open the door to a sort of integrative function for the unwritten common constitutional traditions, especially in the future.

2.10.2 The natural instrument for rendering the common constitutional traditions more relevant would be the preliminary ruling mechanism; this would be particularly true if the constitutional courts that have so far refused to send a preliminary reference to the ECJ were to change their practice. However, Member States might have an important role in this field even if they rely on other procedural instruments, for instance if they try to justify apparent violations of EU law in light of the national identity argument. Although 'national'[132] (or, according to another terminology 'constitutional'[133]) identity and common constitutional traditions are two different concepts, the former might serve as a source of inspiration for the latter.

[130] Hofmann and Mihaescu 2013.

[131] On this debate, see Safjan 2012.

[132] Guastaferro 2012.

[133] Saiz Arnaiz and Alcoberro Llivina 2013.

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2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 There have been no issues in terms of the standard of protection comparable to *Melloni*[134] in our country (except for EAW issues as set out in previous sections). More problematic is the answer with regard to the ECHR. Our Constitutional Court has sometimes departed from the interpretation given to a particular right of the ECHR by the Strasbourg Court. When doing so, the ItCC has taken into account the case law of the European Court of Human Rights (ECtHR) in order to find a solution to the case, but then has decided not to follow the conclusion reached by the ECtHR, and has justified this decision either in light of the particular national context or in light of the different structure and type of balancing. In other words, like other courts have done elsewhere,[135] the ItCC has distinguished the type of balancing struck by an international court from the balancing by the Constitutional Court. For instance in *Maggio*,[136] the ECtHR considered a retroactive legislative act of 'authentic interpretation' to be in breach of Art. 6 of the ECHR. In confirming the constitutionality of the same act, the ItCC recalled:

> In contrast to the European Court, this Court carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone.[137]

In Decision No. 223/2014, the Court added that

> in the field of fundamental rights, the respect of international obligations can never cause a decrease of protection in comparison with the protection guaranteed by domestic law … on the other hand, Art. 53 of the ECHR expressly states that the interpretation of the provisions of the Convention may not limit or impair human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party (or under any other agreement to which it is a party): confirming, thus, that the guarantee scheme of the Convention aims to strengthen the protection offered at national level, and never impose limitations, as would claim the a quo judge.[138]

2.12 Democratic Debate on Constitutional Rights

2.12.1 While the adoption of the EU Data Retention Directive did not raise significant political debate, the adoption of the EAW Framework Decision was quite

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[134] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[135] UKSC, *R v. Horncastle and Others* [2009] UKSC 14, para. 11.

[136] *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011.

[137] ItCC, Decision No. 264/2012.

[138] ItCC, Decision No. 223/2014.

problematic (see the reconstruction of the political and legal debate surrounding the implementing law No. 65 of 2009 in Sect. 2.3.5.1).

2.12.2–2.12.3 In our view, the accommodation of important constitutional issues should occur at the *political* level both in an *ex ante* phase (trying to strengthen the influence of national parliaments upon their respective Governments voting in the Council) and in an *ex post* phase (namely during the parliamentary debates on the adoption of domestic laws transposing EU directives). While we would not recommend suspension of the application of EU law or a review of EU measures where important constitutional issues have been identified by a number of constitutional courts, we think that within the framework of an infringement proceeding constitutional arguments should be put forward in a Member State's defence and should be taken seriously both by the European Commission and by the European Court of Justice.[139]

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.2 We do not have a clear answer as to concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law, and this depends on the oscillating case law of the ECJ and on the different reactions of the national constitutional courts. The ECJ has alternated between very 'sensitive' (those for instance based on Art. 4(2) TEU)[140] and 'muscular' decisions (the majority now, we would say). With regard to the second group, the *Melloni* decision has been seen as a return to an 'absolute conception of primacy'.[141] This decision is in line with other recent rulings of the ECJ in which the Luxembourg Court has not shown great deference towards the national constitutional courts. We are referring for instance to the *Filipiak*[142] and *Winner Wetten*[143] cases. This does not seem to be coherent with another recent trend which sees constitutional courts more and more open to Art. 267 TFEU and with another series of decisions which can be traced back to a sort of margin of appreciation doctrine of the ECJ.[144] However, if *Melloni* represents the bad side of the coin, more recently

[139] A call for a possible *ordinary* use of the identity clause, recommending the use of Art. 4(2) TEU (requiring the EU to respect national identities) both in Member States' defences in the context of infringement proceedings and in national Parliaments' reasoned opinions in the framework of the early warning system, can already be found in Guastaferro 2012 and 2014.

[140] See Guastaferro 2012 for relevant case law.

[141] As recently suggested by Von Bogdandy and Schill 2011.

[142] Case C-314/08 *Filipiak* [2009] ECR I-11049.

[143] Case C-409/06 *Winner Wetten* [2010] ECR I-08015.

[144] Sabel and Gerstenberg 2010.

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the ECJ has decided cases like *Google*,[145] *Kadi II*[146] and *Digital Rights Ireland*,[147] whereby it acted as a constitutional court that was very keen to protect fundamental rights. This combination of factors impedes us from giving a precise answer to the question, but we do think that only a more co-operative relationship between the ECJ and the national constitutional courts could improve the burning issue of the multilevel protection of fundamental rights. Perhaps the accession of the EU to the ECHR (but this is more difficult now after the delivery of Opinion 2/13[148] of the ECJ) will improve the situation at EU level, although it is difficult to foresee the effective impact that such accession will have, not only in terms of the relationship between the Strasbourg and Luxemburg Courts, but also in terms of the 'usability' of the ECHR by national judges where the direct effect of the provisions of the Convention is recognised. In this sense, *Kamberaj* seems to confirm our doubts.[149]

2.13.3–2.13.4 An example which is partially related to bringing national constitutional concerns to the ECJ is the *Berlusconi* case.[150] A recent comment on this case concerns the use of comparative arguments by the ECJ. Comparative law and a general openness towards the arguments coming from the national courts could improve the situation of fundamental rights in this field, although in *Berlusconi* the ECJ did not make any explicit reference to the national legal materials which were taken into account.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 There are two fundamental provisions in the Italian Constitution regarding the relationship between international and domestic law. Article 10 provides that '[t]he Italian legal system conforms to the generally recognised principles of international law'. Article 11 provides that

> Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.

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[145] Case C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317.

[146] Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v. Kadi* [2013] ECLI:EU:C:2013:518.

[147] Joined cases C–293/12 and C–594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[148] Opinion 2/13 pursuant to Article 218(11) TFEU [2014] ECLI:EU:C:2014:2454.

[149] Case C-571/10 *Kamberaj*, n. 111. See Bianco and Martinico 2014.

[150] Case C-387/02 *Berlusconi* [2005] ECR I-03565.

These two articles provide the first important distinction existing in this field in Italy, the distinction between the general rules of international law and international treaties. As for the former, Art. 10 provides for an automatic procedure of adoption, in the sense that such norms are directly incorporated into the Italian system. In this field considerations similar to those made with regard to EU law are applicable. While Art. 11 does not contain any specific reference to the North Atlantic Treaty Organization or the United Nations (although the members of the Constituent Assembly wrote Art. 11 with the possibility of joining the UN in mind), we could say that it includes some guidelines to be followed in case of limitations of sovereignty. Nevertheless, Art. 11 has been used to cover all of the relevant international memberships of the Italian Republic. Since this approach has worked so far, we do not think that it is necessary to introduce specific references to any specific international organisations in Art. 11. The intervention of the national legislature is not required for all treaties, since Art. 80 provides for the necessity of legislation enabling the ratification only with reference to some particular treaties.[151] The procedure for ratification is also governed by Art. 87, which empowers the President of the Republic to ratify international treaties.[152] When the intervention of Parliament is required, it intervenes with a normal legislative statute. According to the majority of scholars, this confers a primary force in the national hierarchy of law to norms derived from international treaties.

3.1.2 Apart from the reforms already addressed when dealing with EU law (Art. 117 of the Constitution), there have been no other constitutional reforms concerning the 'external dimension' of the Constitution.

3.1.3 Reforms relating to international law and global governance have not been at the heart of the constitutional reform agenda. This could be partly explained by the elasticity of Art. 11 and by the fact that these issues have been covered by primary norms (this is the case e.g. as regards international development co-operation policies).

3.1.4 So far, Art. 11 has proven to be broad enough to guarantee the participation of the Italian Republic in the international context. Moreover, all of the recent attempts at amending the Italian Constitution have renounced dealing with the first part of the text. There has been a kind of silent agreement about the necessity to avoid reforms concerning the very first part of the Constitution (which codifies, so

[151] Article 80 of the Constitution: 'Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation.'

[152] Article 87 of the Constitution:

'The President shall: …

- ratify international treaties which have, where required, been authorised by Parliament.

Article 72 Italian Constitution, provides that: 'The ordinary procedure for consideration and direct approval by the House is always followed in the case of … ratification of international treaties … .'

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to say, the axiological part of the Constitution). As written in Sect. 3.1.3, we do not think it is necessary to amend Art. 11.

The Italian Constitution is based on an evident parallelism between the values inspiring the domestic activity of the Italian Republic and those inspiring the external dimension. This is because of the axiological (desired) continuity that exists between the domestic and international levels, and because of the efforts made to construct a better society, even at the international level. This double orientation (internal and external) of the constitutional project was crystal clear to the members of the Italian Constituent Assembly. There are, for instance, at least three reasons for the codification of the pacifist principle in the Italian Constitution. The first is connected to political realism: Italy could not be considered a military power, so the constitutionalisation of an imperialistic foreign policy was not an option.[153] The second reason was, in a manner of speaking, ethical, and finds expression in the words used, among others, by Don Luigi Sturzo, who defined war as 'immoral, illegitimate and prohibited'.[154] But the main reason was the intent 'to transfer, to the international level, those principles of freedom, equality and substantive respect for the human person' that were to be affirmed and implemented in the domestic order.[155]

In light of the above point on parallelism of values, one new challenge for constitutional lawyers, which has been explored in greater detail elsewhere,[156] may be how to continue the existence of an axiological continuity between the principles and values that govern the life of a given polity within its boundaries and those that should characterise the international community, while retaining constitutional values in efforts to construct a better society, even at the international level. In Italian scholarship, a number of scholars also speak about the 'weak' or 'post-modern' constitutionalism typical of the era of globalisation as something dispersed and disconnected from popular initiative rather than being entirely lost.[157]

While no immediate solutions are available, elsewhere[158] we have also noted that the idea of constitutionalism propounded by leading pluralists such as Krisch[159] does not readily correspond to what constitutional lawyers mean by the same word. In international law, 'constitutionalism may be conceived as an autonomous concept of international law rather than a concept derived by analogy from the domestic conception of constitutionalism'.[160] The problem is that some scholars in this field have too heavily emphasised only the connection between

[153] See Nenni 1946, p. 104.
[154] Sturzo 1954, p. 144.
[155] Cassese 1980, p. 519.
[156] Martinico 2014.
[157] Carrozza 2007, p. 172.
[158] Martinico 2014.
[159] Krisch 2010.
[160] Deplano 2013, p. 68.

hierarchy and constitutionalism. This may be explained by taking into account the origin of the debate at the international level, where constitutionalism has been seen as an antidote to the issue of international fragmentation.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 Italy is usually seen as a country characterised by a strong dualist tradition, according to which the international and national legal systems are conceived of as autonomous.

As for international treaties, it is necessary for there to be a national act transforming the international act into national law. Another important feature of the Italian legal order is the fact that, unlike in other countries like Portugal and Spain, no specific status is accorded to treaties devoted to human rights. However, as we will show below, dualism has partly been eroded by the importance acquired by some human rights treaties (above all the European Convention on Human Rights) in the national case law of the ItCC. If one looks at the Italian Constitution, one can perceive a sort of tension between the constitutional openness of the Italian Constitution (see above) and the choice in favour of the dualist paradigm. However, the ItCC has only recently relied on external sources (primarily the ECHR and EU law) to review the constitutionality of domestic norms. In terms of protection of fundamental rights, the ECHR has been by far the international agreement with the most evident impact on our national system, which has also created tensions and disagreements between the *Corte Costituzionale* and the ECtHR. If this openness (understood as friendliness towards the international community) gives us the idea of the axiological continuity between the domestic and the external dimension, the choice made in favour of dualism seems to emphasise, on the contrary, the discontinuity and impermeability between the internal and the external spheres. Further developments (especially concerning the application of EU law and of the ECHR) have radically questioned the validity of the traditional dualist category. With regard to EU law, the position of the ItCC is emblematic of a broader trend. With regard to the ECHR, it is necessary to briefly recall its case law to appreciate the departure from the original dualism. As regards the ECHR, the original position of the *Consulta* reflected a dualist conception of the relationship between the ECHR and domestic law. Since the entry of the ECHR into the Italian legal order was enacted by an ordinary law (Law No. 848/1955), for a long time and with some exceptions,[161] the ItCC considered the ECHR as a source with primary force and the consequent application of the *lex posterior derogat legi priori* rule in case of conflict between the law regarding the ECHR and another Italian norm. This was the case until the 1990s when the *Corte Costituzionale* started to change its

[161] See, for instance, ItCC, Decision No. 10/1993, where the *Consulta* described the ECHR as an 'atypical source of law'.

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approach and began to make a distinction between the content and the form of the laws giving effect to international treaties.[162] In other words, since from a material point of view the content of the ECHR aims at protecting rights codified in the Italian Constitution, it seemed necessary to readjust the previous case law. Another turning point was the reform of 2001 to adopt a new version of Art. 117(1) of the Constitution. Indeed, also on the basis of this new provision, as the literature has already stressed,[163] the Italian 'common' judges started to disapply domestic norms that conflicted with the ECHR.[164] Thus, they extended a mechanism accepted as a consequence of the *Simmenthal* judgment,[165] and aimed at solving the conflicts occurring between national norms and EU law provisions provided with direct effect. This practice induced the ItCC to give two key judgments in 2007.[166]

Without going into details,[167] the main content of these two decisions can be summarised as follows:

(a) The ECHR has a supra-legislative value (i.e. its normative ranking is halfway between statutes and constitutional norms);
(b) In some cases, the ECHR can serve as an 'interposed parameter' for reviewing the constitutionality of primary laws, since the conflict between them and the ECHR can result in an indirect violation of the Constitution (Art. 117);
(c) This (b) does not imply that the ECHR has a constitutional value; on the contrary, the ECHR itself has to respect the Constitution;
(d) The ECHR cannot be treated domestically in the same way as EU law, as we will see below;
(e) The constitutional preferential treatment accorded to the ECHR implies the necessity to interpret national law in light of ECHR provisions.

More recently, the ItCC has confirmed the preferential treatment to be acknowledged to the case law of the ECtHR.[168] Another indicator of the importance of the case law of the ECtHR in the national legal system is the recent Decision No. 113/2011 of the Constitutional Court.[169] In this judgment the *Consulta* declared Art. 630 c. 1 (a) of the Code of Criminal Procedure to be unconstitutional to the extent that it did not allow the re-opening or review of a case decided for good (and thus with a ruling covered by *res iudicata*), which was subsequently found to be in breach of the Convention.

[162] ItCC, Decision No. 388/1999.
[163] Biondi Dal Monte and Fontanelli 2008.
[164] See Ibid., p. 891.
[165] Case 106/77 *Simmenthal* [1978] ECR 00629.
[166] ItCC, Decisions No. 348 and No. 349/2007.
[167] For a detailed analysis of these decisions, see Biondi Dal Monte and Fontanelli 2008, and Pollicino 2008.
[168] See ItCC Decisions No. 311/2009, No. 317/2009 and No. 80/2011 amongst others. However, disagreement has not been missing. See for instance ItCC, Decision No. 49/2015.
[169] ItCC, Decision No. 113/2011.

Nevertheless, although EU law and the ECHR have partly questioned the assumptions of the dualist approach, dualism is still formally the premise of the reasoning of the ItCC in many cases. Even the counter-limits doctrine is based on a dualist fiction. In other words, the fact that, in the case of violation of the counter-limits, the ItCC would exercise its jurisdiction over the national acts giving effect to the EU treaties in our legal order, is an evident legacy of the dualist approach.

3.3 Democratic Control

3.3.1 Apart from what has been written in the section addressing EU law, as recalled above, the intervention of the national legislature is not required for all treaties, since Art. 80 provides for the necessity of legislation enabling ratification only with reference to particular treaties. As we saw above, the procedure for ratification is also governed by Art. 87, which empowers the President of the Republic to ratify international treaties. With regard to international organisations that differ from the EU, the monitoring functions performed by the national chambers have been included in their rules of procedure according to the cascade system of norms recalled above. An example is given by the provisions concerning the examination and possibly the adoption of resolutions on resolutions and recommendations adopted by international assemblies in which the national delegations of the Chamber of Deputies (Art. 125 r .C) or the Senate (Art. 143 r. S.) participate (for instance the NATO, Council of Europe and OSCE assemblies). Another important provision concerns the examination of the judgments of the European Court of Human Rights and of their national follow-up. In 2004, the Chamber set up a Permanent Observatory of judgments of the ECtHR. There is also a duty of the Government to transmit the annual report on the execution of the decisions of the ECtHR against Italy to both Houses.[170]

3.3.2 Article 75 of the Constitution prohibits referendums on laws 'authorizing the ratification of international treaties'. Apart from what we have already recalled with regard to EU law, the only way to have a referendum on a treaty would be to cover the authorisation of the ratification with a constitutional statute which would permit a referendum according to Art. 138. We already recalled what the ItCC said in *Frontini*, but one could argue that the opinion expressed in that judgment should be limited to EU law due to its particular nature and impact on Italian constitutional law.

[170] For more info: http://leg16.camera.it/494?categoria=084; http://www.senato.it/static/bgt/listadocumenti/17/1/1323/0/index.html?static=true.

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3.4 Judicial Review

3.4.1. According to Italian scholars, the general rules of international law (which correspond to customary international law) belong to the constitutional level.[171] According to some scholars, the international customary law that existed before the entry into force of the Italian Constitution could prevail over the constitutional provisions (because of the application of the chronological criterion), but this does not apply with regard to the principles belonging to the untouchable core recalled in Art. 139 of the Constitution,[172] as the ItCC has seemed to confirm in its recent case law.[173]

Apart from what we have already written about EU law, another interesting case is the ECHR in light of the decisions of 2007 that have already been mentioned. In those decisions, the ItCC specified that the ECHR is considered to be a particular form of public international law. From this, the Court inferred that the 'constitutional tolerance' shown by the Italian legal order towards the ECHR is weaker than that shown towards EU law. While 'counter-limits' represent, in the ItCC's case law, a selected version of the domestic constitutional principles (this implies the possibility to decide constitutional conflicts in favour of EU law provisions in some cases), in the case of the ECHR, the Italian Court seems to be less generous. It apparently asks the ECHR to respect the entire Constitution as such:

> The need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged.[174]

In Judgment No. 230 of 2012, the ItCC emphasised the specific features of the domestic legal order vis-à-vis those characterising the system of the Convention,[175] and thus pointed to the possibility of episodic divergences.

According to the ItCC, an important distinction still exists between EU law and the ECHR, and this difference provided the basis of its reasoning:

> This is because, according to the constitutional judges, the ECHR legal system has distinct structural and functional legal features as compared to the European legal order. According to the Italian Constitutional Court, the ECHR is a multilateral international public law Treaty which does not entail and cannot entail any limitation on sovereignty in the terms provided by Article 11 of the Constitution.[176]

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[171] De Vergottini 2004, p. 32.

[172] For an overview of the debate, see Cassese 1975, p. 502. According to Quadri, the automatic procedure shall be applied to the international treaties but this remains a minority view. This theory was based on the fact that one of the general rules of international law is the principle *pacta sunt servanda*. Quadri 1989, p. 64.

[173] ItCC, Decision No. 238/2014.

[174] Biondi Dal Monte and Fontanelli 2008, p. 915.

[175] Ruggeri 2012.

[176] Pollicino 2008, pp. 374–375.

This explains the different treatment reserved for the ECHR both in terms of disapplication and in terms of the necessity to be consistent with the whole Constitution rather than with the counter-limits alone.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 Italy has never been in the position to declare a bailout and no issue has arisen with regard to IMF or World Bank conditionality. So far the most important factors to impact the constitutional welfare dimension have been the EU anti-crisis measures.

With regard to the anti-crisis measures taken at EU level, in Italy, constitutional lawyers[177] have been more interested in the impact of the anti-crisis measures on the sustainability of the welfare system, on the protection of social rights and on the effect of such measures on the relationship between the centre and the periphery.

In order to understand the case law of the ItCC, it is necessary to make a premise. As Fasone has explained,

> [t]he Italian Constitutional Court has not had the opportunity to judge directly on the constitutionality of EU and international Euro-crisis law. Nor was the constitutional review of the international Euro-crisis law measures really feasible.[178] … The only way these agreements can become relevant within the Italian system of constitutional adjudication would be if the Constitutional Court is willing to recognize them the rank of interposed norm between ordinary legislation and the Constitution – Art. 117.1 Const.[179]

It must also be recalled that the constitutional balanced budget rule was not in full effect until 1 January 2014, and thus could not form a standard for constitutional review of legislation.[180]

The only relevant interventions of the ItCC in this field have regarded (primarily at least) the development of the Italian regional state. The Italian government introduced several cuts, and some of these measures have also impacted on the regional structures.

This discipline has been questioned before the ItCC, which, in Decision No. 151/2012[181] rejected the very centralising interpretation that the state had given of the measures in Decree Law No. 78/2010. These are just a few examples that show the risk of centralisation in the Italian system induced by the EU anti-crisis measures.[182] As Pierdominici has noted, '[i]f one can be tempted to read this last case as the symbol of a strong judicial opposition of the Constitutional Court against

[177] Gambino and Nocito 2012.

[178] See however ItCC, Decision No. 88/2013.

[179] Fasone 2014.

[180] Ibid.

[181] ItCC, Decision No. 151/2012.

[182] See also Falcon 2012, p. 11.

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national legislative reforms prompted by the financial crisis, a comprehensive reading tells us, in fact, the opposite'.[183]

There are some interesting decisions concerning the protection of social rights. In Decision No. 248/2011 the ItCC deemed the right of medical assistance to be financially conditional, since its protection depends on the available resources. Another important decision is Decision No. 10/2010 concerning the so-called 'social card', a bonus accorded to guarantee the primary needs of the most disadvantaged members of the population. The ItCC upheld the constitutionality of the decree law and recognised that the intervention of the state was necessary to protect the value of human dignity in a uniform manner in light of Arts. 3, 38 and 117(2) of the Constitution, due to the extraordinary, exceptional and urgent situation following the international economic and financial crisis that in 2008 and 2009 also hit our country. In other words, as Fasone has pointed out, '[i]n a time of scarce resources even social rights must be preferably protected at State level [so] as to set [a] common standard and to decide at the centre how to use those resources.[184]

In Decision No. 80/2010, the Constitutional Court declared unconstitutional a provision of the State Financial Act of 2008 impeding public schools from contracting teachers for physically impaired students due to budgetary reasons. In another decision (No. 264/2012) about the calculation of pensions of cross-border workers, the ItCC acknowledged the possibility to limit social rights. According to the Court,

> [t]he effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, in accordance also with the requirement laid down by Art. 81(4) of the Constitution' (old version), 'and the need to ensure that the overall system is rational', thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others. In doing so it guarantees respect for the principles of equality and solidarity which, due to their foundational status, occupy a privileged position within the balancing operation against other constitutional values.[185]

Another important decision regards the so-called 'golden pensions'. In this case, the Court dealt with some decree laws aimed at collecting resources from the pensions or the incomes of the most advantaged segments of the population. The Court declared unconstitutional Decree Law No. 78/2010 concerning blockage of the salary adjustment mechanism for magistrates. On that occasion, the 'Court considered the reduction of the allowance as a form of taxation and declared them in contrast with the Constitution for the violation of the principle of equality (Art. 3) and of Art. 53, about the progressive nature of the tax system'.[186]

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[183] Pierdominici 2014.

[184] Fasone 2014.

[185] ItCC, Decision No. 264/2012, para. 5.3.

[186] ItCC, Decision No. 223/2012, and reported by Fasone 2014.

In Decision No. 310/2013, which departed from its previous decision,[187] the ItCC dealt with Decree Law No. 78/2010, in a case concerning blockage of the salary adjustment mechanism for non-contracted workers in the public sector. The Court concluded that this blockage was a reasonable sacrifice, necessary in a phase of economic crisis. Fasone has found it interesting that the challenge of unconstitutionality was rejected by using *ad adiuvandum* (although not as the main ground for the decision), the new Art. 81 of the Constitution as amended in 2012 and Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.[188]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 Italian scholars have questioned the compatibility between some anti-terrorist provisions and our standards of protection of fundamental rights, especially when looking at issues connected with the principle of fair trial. For instance, as Porchia and Puoti have pointed out:

> Italian scholars consider the issue of the legal proof of the terrorist purposes of an association, as a fundamental challenge for the interpreter in the struggle against terrorism, while ensuring the protection of fundamental rights of the defendants. The proof that a certain activity is pursued for terrorist purposes and not for other reasons (like belligerent actions, violent actions for criminal purposes etc.) is very difficult to achieve in a way that can be used as an admissible evidence in court.[189]

An interesting case concerning the burning issue of extraordinary renditions is the famous *Abu Omar* case which also led the ItCC to give an important decision[190] on state secrets, in which it acknowledged that the Italian 'Prime Minister' has a broad discretionary power to invoke the state secrets privilege in cases where Governmental agents are involved in extraordinary renditions. The ItCC also stated in that case 'that any review of the substantive merits of that classification [of the relevant information] was a matter for Parliament and not the courts'.[191] The referring court thus ordered the release of five members of the Italian Military Intelligence Agency involved in the kidnapping of Mr. Abu Omar. The ItCC came back to the issue of state secrets in 2014, and confirmed the essence of the decision given in 2009.[192] These decisions are part of a judicial trend which has been

[187] Fasone 2014.

[188] Fasone 2014.

[189] Porchia and Puoti 2013, p. 427.

[190] ItCC, Decision No. 106/2009.

[191] From the website of the ItCC: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2009106_Amirante_Quaranta_en.pdf.

[192] ItCC, Decision No. 24/2014.

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described as 'dangerous'[193] since it 'keeps the balance between security and protection of constitutional fundamental rights, leaning in favour of the needs of the former, invoking the State secret in order to hide criminal conducts of Governmental agents'.[194]

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[193] Porchia and Puoti 2013, p. 427.

[194] Ibid.

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The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance

Joan Solanes Mullor and Aida Torres Pérez

Abstract Although the constitutional text has remained nearly untouched – only twice has the Spanish Constitution been amended since its enactment in 1978 – global and European governance have deeply transformed the constitutional order. The impact of the process of European integration upon the Constitution is an open and evolving phenomenon, encompassing the challenge to constitutional supremacy, the incorporation of new sources of law, an imbalance between the legislative and executive powers, the enhanced role of the judiciary, the multilevel protection of fundamental rights and the transformation of regionalism as a model for organising the territorial power. First, this report will analyse the constitutional amendments regarding EU membership and the constitutional limits to European integration. Indeed, the only two constitutional amendments were both prompted by the EU. Secondly, the impact of EU integration upon the protection of constitutional rights will be critically examined, with special emphasis on the economic crisis. The obligations deriving from the EU might undermine the protection of constitutional rights, as the introduction of the European Arrest Warrant, the Data Retention Directive and the austerity measures adopted in the context of the economic crisis have shown. Thirdly and more generally, global governance has had constitutional implications, for instance regarding the strengthening of the executive power vis-à-vis the legislative, pressures on the welfare state, the fight against terrorism, the curtailing of powers of the Autonomous Communities and the response to immigration. In this context, it is necessary to recast the relationship

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between the Global-European spheres and the national constitutional order to ensure respect for the principles of the rule of law, the separation of powers and the protection of fundamental rights.

Keywords The Constitution of Spain · Constitutional amendments regarding European integration · The Spanish Constitutional Court · Constitutional review statistics · Fundamental rights · The rule of law as defined in Art. 9 of the Constitution · The principles of legal certainty and legitimate expectations European Arrest Warrant · Data Retention Directive · Privatisation of public services · European Commission and IMF austerity and restructuring programmes, social rights and trade union rights · Curtailing of the powers of autonomous regions

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Spanish Constitution of 1978 was drafted in the transitional period to democracy in the aftermath of Franco's dictatorship. General Francisco Franco died on 20 November 1975, putting an end to a long dictatorship established after the Civil War in 1939.[1] The Constitution was the outcome of a consensus among the main political parties represented in Parliament after the 1977 June elections.

The drafters were conscious of the need to reach a broad agreement about the basic structural principles of the newly established political order. The main goal was to design a stable democratic system and to ensure the protection of individuals' fundamental rights. The need to reach a consensus about highly controversial issues, such as the model of political decentralisation, on occasion led to ambiguous constitutional provisions in need of further interpretation and political negotiations. The Spanish Constitution was very much influenced by the German and Italian constitutions, regarding for instance the centralised model for the judicial review of legislation. Eventually, the Constitution was ratified in a referendum on 6 December 1978.

1.1.2 On the whole, the key elements of the rationale of the Constitution include (a) a system of representative democracy, separation of powers and the rule of law, (b) protection of constitutional rights and liberties and (c) the territorial decentralisation of political power in Spain. The model of territorial organisation was particularly contested and eventually a sort of quasi-federal state was established, i.e., the *Estado de las autonomías.* The allocation of powers between the central state and the autonomous communities has been a permanent source of conflict, and today this model is under pressure by the secessionist movement in Catalonia.

[1] See generally Ferreres Comella 2013a, pp. 1–24.

The Constitution managed to provide a framework for democratic political contestation and the protection of individual rights. Moreover, Art. 10(2), which indicates that constitutional rights need to be interpreted according to the Universal Declaration of Human Rights and other human rights treaties ratified by Spain, opened up the Constitution to international human rights law.

For a long time, the amendment of the Constitution was regarded as a 'taboo' since the priority was to secure the stability of the democratic system.[2] The fear was that any attempts to modify the Constitution would put the achievements of the democratic regime at risk, and the shadow of the dictatorship still loomed large. Nonetheless, after almost forty years since its enactment, there are more and more voices calling for an overall constitutional amendment regarding issues such as the territorial decentralisation of power, the Senate and the Crown.

1.2 Constitutional Amendments in Relation to the European Union

1.2.1 The Spanish Constitution has been amended only twice since its enactment in 1978. Both amendments were prompted by the process of European integration. Whereas these amendments were specific in their scope and nature, a more profound amendment of the Constitution in light of the constitutional transformations ensuing from EU membership has not yet taken place.[3] Indeed, only the amended Art. 135 explicitly refers to the EU in the whole constitutional text (see Sect. 1.2.3).

1.2.2 In terms of the process for constitutional amendment, the Spanish Constitution is rigid. There are two amendment procedures: the general procedure (Art. 167) requires a qualified majority of three-fifths of both parliamentary chambers (Congress and Senate), and a referendum is not compulsory. Nonetheless, a referendum shall be convoked if at least one-tenth of the representatives in Congress or in the Senate request it.

The Constitution provides for a more demanding procedure (Art. 168) in order to amend certain parts: the Preliminary Title – which includes provisions on the main principles of the constitutional order – basic fundamental rights, the Crown, and for the total revision of the Constitution. According to Art. 168, a qualified majority of two-thirds is required to support the initiative, a general election has to take place and, after the election, the support of a two-thirds majority of both chambers for the final text must be secured. Ratification by referendum is compulsory. In practice, the required qualified majorities generally involve the agreement of the two main political parties represented in Parliament (*Partido Popular*, PP and *Partido Socialista*, PSOE).

1.2.3 The first constitutional amendment took place in 1992 and was deemed to be necessary in order to ratify the Maastricht Treaty. The Maastricht Treaty

[2] Ferreres Comella 2000, p. 32.

[3] See Cruz Villalón 2006a, pp. 23–25.

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represented a turning point from an economic to a political union and introduced EU citizenship. EU citizens were granted the right to vote and stand as candidates in local elections in their place of residence.

According to Art. 13(2) of the Spanish Constitution prior to 1992, foreigners could be granted the right to vote in local elections (*sufragio activo*), but were deprived of any right to stand as candidates (*sufragio pasivo*). After the Maastricht Treaty was signed and before its ratification, the Government asked the Constitutional Court (CC) about the compatibility of the Maastricht Treaty with the Constitution. The Constitution provides a special procedure for the constitutional review of international treaties prior to ratification.[4] If a treaty is found to be in breach of the Constitution, the treaty may only be ratified after a constitutional amendment. In this case, in Declaration No. 1/1992 of 1 July, the CC held that the Maastricht Treaty was incompatible with the Constitution with regard to the right of foreigners to stand as candidates in local elections.

Eventually, the amendment of Art. 13(2) was enacted on 27 August 1992. Actually, only two words ('*y pasivo*') were added to enable foreigners to stand as candidates in local elections.[5] No specific reference to EU citizens was included. The amendment took place through the general procedure (Art. 167) and without holding a referendum.

The second constitutional amendment was enacted in September 2011 in the context of the European crisis to incorporate the 'balanced budget' rule and limitations to the public debt and deficit in Art. 135 of the Constitution.[6]

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[4] For a more detailed explanation about this procedure, see Sect. 3.1.

[5] After the amendment, Art. 13(2) of the Constitution reads as follows:

'Only Spaniards shall have the rights recognized in section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity'. The English translation used in this report is available at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

[6] After the amendment, Art. 135 of the Constitution reads as follows:

'1. All public administrations will conform to the principle of budgetary stability.

2. The State and the Self-governing Communities may not incur a structural deficit that exceeds the limits established by the European Union for their member states.

An Organic Act shall determine the maximum structural deficit the state and the Self-governing Communities may have, in relation to its gross domestic product. Local authorities must submit a balanced budget.

3. The State and the Self-governing Communities must be authorized by Act in order to issue Public Debt bonds or to contract loans.

Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority. These appropriations may not be subject to amendment or modification as long as they conform to the terms of issue.

The volume of public debt of all the public administrations in relation to the State' gross domestic product may not exceed the benchmark laid down by the Treaty on the Functioning of the European Union.

4. The limits of the structural deficit and public debt volume may be exceeded only in case of natural disasters, economic recession or extraordinary emergency situations that are beyond the control of the State and significantly impair either the financial situation or the economic or social

The constitutional amendment was prompted by the so-called Euro-Plus-Pact, a package of measures adopted by the European Council in March 2011 to respond to the crisis and preserve financial stability,[7] and, more particularly, by the French-German summit held on 16 August 2011.[8] Several months after the constitutional amendment, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed on 2 March 2012, incorporated the so-called 'golden rule', i.e., the requirement that 'the budget position of the general government must be balanced or in surplus' (Art. 3(1)(a)). Moreover, according to Art. 3(2), there is an obligation to give effect to the financial provisions of Art. 3(1) in national law 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.

The accelerated process through which Art. 135 of the Constitution was amended may well be contested in terms of democratic deliberation. Indeed, several scholars pointed out that the process had been carried out too quickly and without any public debate.[9] Article 135 of the Constitution was amended in a record time of thirteen days[10] by the end of the summer. Apparently, the President of the Government at the time, José Luis Rodríguez Zapatero, and the leader of the main opposition party, Mariano Rajoy, agreed on the constitutional amendment during a phone conversation.[11]

The amendment took place by means of the general procedure and without a referendum. The proposal for the constitutional amendment, submitted jointly by the PSOE and PP parliamentary groups, followed an urgent and special procedure

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sustainability of the State, as appreciated by an absolute majority of the members of the Congress of Deputies.

5. An Organic Act shall develop the principles referred to in this article, as well as participation in the respective procedures of the organs of institutional coordination between government fiscal policy and financial support. In any case, the Organic Act shall address:

a The distribution of the limits of deficit and debt among the different public administrations, the exceptional circumstances to overcome them and the manner and time in which to correct the deviations on each other.
b. The methodology and procedure for calculating the structural deficit.
c. The responsibility of each public administration in case of breach of budgetary stability objectives.

6. The Self-governing Communities, in accordance with their respective laws and within the limits referred to in this article, shall take the appropriate procedures for effective implementation of the principle of stability in their rules and budgetary decisions.'

[7] European Council Conclusions, 20 April 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

[8] Ridaura Martínez 2012, p. 238.

[9] See, among others, Blanco Baldés 2011, pp. 12–15; Jimena Quesada 2012, pp. 350–353; Ridaura Martínez 2012, pp. 249–259; García-Escudero 2012, p. 165.

[10] This was the time from submission of the proposition to amend the Constitution on 26 August 2011 to approval by the Senate on 8 September 2011.

[11] Ferreres Comella 2013b, p. 233.

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according to which the proposed amendment was only discussed and voted by the full chamber of the Congress and Senate (without being discussed in the respective parliamentary commissions), and the timelines were reduced. Consequently, the role of minority groups and the parliamentary debate were curtailed.[12]

Twenty-nine deputies and seven senators asked for a referendum, but they did not reach the minimum of one-tenth of all members as required by Art. 167 – which would have meant at least thirty-five deputies or twenty-seven senators.[13]

Hence, the constitutional amendment was not the outcome of an open and broad process of deliberation involving the people, but rather was enacted under pressure from other European governments and the markets.[14] The main goal was to signal Spain's commitment to the balanced budget rule and to the implementation of the ensuing austerity measures in accordance with the limits placed on public debt and deficit. The constitutional amendment was not an occasion for public debate, but the result of an agreement behind closed doors by the leaders of the two main political parties. Paradoxically, in November 2014, the current leader of the PSOE, Pedro Sánchez, announced that he was willing to amend Art. 135 again to ensure the protection of social rights and in particular public education, healthcare and pensions.[15]

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1–1.3.2 Article 93 of the Constitution enables the transfer of powers 'derived from the Constitution' to international organisations. According to this Article, '[a]uthorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution'. Despite the fact that the EU is not expressly mentioned, this provision was drafted with the future accession of Spain to the EU in mind.

Following this provision, the ratification of an international treaty that transfers sovereign powers to an international organisation needs to be approved by an organic law. This means that the transfer needs to be approved by an absolute majority of Congress. Hence, this clause merely sets the procedure in order to authorise the transfer of sovereign powers, but it does not include any substantive

[12] See García-Escudero 2012, p. 179. Indeed, two deputies of the parliamentary group ERC-IU-ICV submitted an individual complaint before the CC, but the complaint was found inadmissible.

[13] García-Escudero 2012, p. 172.

[14] Ferreres Comella 2013b, p. 233.

[15] Europa press 24 November 2014.

limits or requirements regarding the values, principles or objectives that should be respected by international organisations of which Spain is a member.

1.3.3 Nonetheless, the CC has interpreted this provision to contain implicit substantive limits to integration: the respect for state sovereignty, basic constitutional structures, and the system of values and fundamental principles enshrined in the Constitution, in particular fundamental rights.[16] In this decision, the CC established its counter-limits doctrine, following the lead of the German and the Italian Constitutional Courts.[17] The limits to integration were formulated rather broadly, since the Court did not spell out what 'basic constitutional structures' were considered to be or how to understand 'respect for state sovereignty' at a time in which this concept is constantly being revised and reshaped.

1.3.4 The foregoing decision was delivered in the context of the ratification of the Treaty Establishing a Constitution for Europe (TECE) in 2004, when the Spanish Government consulted the CC about the compatibility between the Constitution and the principle of primacy of EU law, expressly stated in the so-called European Constitution.[18] The CC resolved the potential conflict by crafting a distinction between the primacy of EU law and the supremacy of the Constitution. The CC found that the primacy of EU law did not impinge upon the supremacy of the Constitution, since the former referred to the applicability of domestic legislation clashing with EU law, whereas the latter referred to the validity of domestic legislation in light of the Constitution.[19] Following previous case law, the CC stated that the primacy of EU law was grounded on Art. 93, which allowed the transfer of powers to an international organisation. In turn, the CC declared for the first time that Art. 93 contained substantive limits to integration. Eventually, the CC concluded that the TECE was compatible with the Spanish Constitution and that no constitutional amendment was required. In the end, the process of ratification failed after the negative referendums in France and the Netherlands in 2005.

1.4 Democratic Control

1.4.1 The level of democratic control, in particular parliamentary oversight, over the ratification of EU treaties and the subsequent treaty amendments is rather low. As

[16] Declaration CC No. 1/2004, of 13 December, para. 2.

[17] Prior to 2004, scholars had criticised the formalist understanding of Art. 93 of the Constitution adopted by the CC, see Pérez Tremps 1994, pp. 36–37. After 2004 and the development of the counter-limits doctrine under Art. 93, scholars understood that the CC had given some teeth to this provision, see Saiz Arnaiz 2005, pp. 56–70.

[18] Article I-6 TECE.

[19] Previously, the Council of State (*Consejo de Estado*) – the supreme consultative body of the Government – had concluded that a conflict existed and the Constitution should have been amended to give priority to EU law. Council of State Report of 21 October 2004.

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mentioned above, the ratification of EU treaties needs to be authorised through an organic law, which requires an absolute majority in Congress. The requirement of an absolute majority indicates the need to reach a broader consensus than is necessary to pass ordinary legislation. Still, this majority is lower than the majority for constitutional amendment (three-fifths pursuant to Art. 167 or two-thirds pursuant to Art. 168). In practice, the need to achieve an absolute majority has not prompted a more profound debate regarding the ratification of EU treaties.

Besides the ratification process, the Constitution does not attribute a specific role to Parliament in the European policymaking process or in monitoring the Government when acting at the European level. It is not constitutionally mandatory for the Government to consult or inform Parliament when dealing with EU affairs. The Council of State (*Consejo de Estado*) – the supreme consultative body of the Government – has advocated for a constitutional reform that would enhance the role of Parliament in European affairs.[20]

1.4.2 Moreover, a referendum is not compulsory and the ratification of EU treaties does not usually spur public debate. The Constitution provides for a consultative referendum in Art. 92. The President of the Government may decide to convoke a referendum of a non-binding nature regarding 'political decisions of special importance' with the authorisation of Congress. Indeed, the Government decided to call for a referendum regarding the TECE given the relevance of the constitutional treaty as a crucial moment in the European integration process.[21] In practice, the debate in other Member States and the potential failure of the Constitutional Treaty pushed the Spanish Government to hold a referendum – without much doubt regarding a positive outcome – in order to bolster the legitimacy of the European Constitution.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The only two constitutional amendments that have been made were prompted by the EU for the reasons elaborated in Sect. 1.2.3. The first amendment was due to the decision of the Constitutional Court that declared an incompatibility between the Constitution and the Maastricht Treaty regarding the right of EU citizens to stand as candidates in local elections. The second amendment took place in the context of the economic and financial crisis mainly with the goal of enhancing the trust of the markets and European institutions and leaders regarding the limits to the public debt and deficit in Spain. Thus, the constitutional amendments regarding the EU have been rather limited in their scope, and the EU is only explicitly mentioned in Art. 135.

[20] Council of State Report of 16 February 2006 on the amendment of the Spanish Constitution, pp. 108–113.

[21] See Sect. 3.3.

1.5.3 As a consequence of EU integration and the transfer of sovereign powers to the EU, national constitutions no longer regulate the exercise of public power within the state comprehensively. The scope and understanding of several constitutional clauses have been transformed, even though the wording remains the same.[22] EU integration has had a major impact on the constitutional legal order.[23] For instance, domestic judges have acquired the power to set aside legislation that clashes with EU law, whereas under the Constitution they are not allowed to review legislation and must make a reference to the Constitutional Court. The system of sources of law now incorporates EU law, which has primacy and direct effect. The powers of the executive have been expanded vis-à-vis the legislative power, since the Government participates in law-making at the EU level as part of the Council and has an important role in the implementation and execution of EU law. Finally, in the field of fundamental rights, the Charter applies alongside the constitutional bill of rights when national authorities implement EU law.

Given the relevance of the process of integration from a constitutional perspective, several authors have argued that the Constitution should incorporate a specific 'European integration clause'.[24] The current Art. 93 simply regulates the process for the ratification of international treaties, and it does not even explicitly mention the EU. A newly framed 'integration clause' might well include a procedural and a substantive prong. Procedurally, it would be advisable to reinforce the democratic legitimacy of the transfer of powers to the EU and the ensuing constitutional transformations by requiring a broader parliamentary majority and the holding of a referendum if a certain percentage of representatives ask for it. From a substantive standpoint, this clause might include the constitutional limits to integration and the basic principles of interaction with the EU.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Title I of the Spanish Constitution, entitled 'Fundamental Rights and Duties', enshrines the Spanish bill of rights.[25] Title I is rather comprehensive since it

[22] Walter 2001, pp. 193–196; von Bogdandy 2001, pp. 212–213.

[23] For an analysis of the impact of integration upon the content of the Constitution, see Pérez Tremps 2004, pp. 112–120; Bustos Gisbert 2009, pp. 401–428.

[24] Solazabal Echavarría 2005, pp. 44–46; Albertí Rovira 2006, pp. 457–482; Alonso García 2006, pp. 557–561; Cruz Villalón 2006b, pp. 70–74; Escobar Hernández 2006, pp. 483–489; López Castillo 2006, pp. 501–532; Mangas Martín 2006, pp. 533–556. See also the Council of State Report of 16 February 2006, on the amendment of the Spanish Constitution, pp. 40–108 (with a proposal to amend the Constitution and to add a 'European integration clause').

[25] For this section, see Ferreres Comella 2013a, pp. 235–251.

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includes civil, political and social rights. The level of protection granted to those rights, however, varies. From the perspective of the robustness of constitutional protection, one can identify three groups of rights: (i) rights included in Chap. II, Sect. 1; (ii) rights included in Chap. II, Sect. 2; and (iii) principles on social and economic policy included in Chap. III.

All rights and freedoms in Chap. II are deemed to be directly binding on all public authorities and thus they are directly enforceable by courts; additionally, the regulation of these rights is reserved to Parliament (*reserva de ley*; Art. 53(1)).

Among the rights listed in Chap. II, those included in Sect. 1, such as the right to life, physical integrity, free speech, privacy and association, the right to vote and fair trial, among others, are granted a heightened protection. In the case of an alleged violation of these rights, after exhausting the available judicial remedies before the ordinary courts, individuals may submit an individual complaint to the Constitutional Court (*recurso de amparo;* Art. 53(2)). Also, these rights need to be regulated by an organic law, which requires an absolute majority in Congress (Art. 81). Furthermore, they can only be amended following the extraordinary procedure set out in Art. 168 of the Constitution.

Finally, Chap. III includes the so-called principles on social and economic policy, such as the right to healthcare and the right to housing. These rights are not directly enforceable by courts and following Art. 53(3) 'they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them'. The same provision lays down that '[r]ecognition, respect and protection of the principles recognised in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities'. They are thus interpreted as mandates to public authorities and must be taken into account upon the interpretation of other norms.

2.1.2 Even though there is no general constitutional provision stipulating the conditions under which restrictions on rights can be imposed, the Constitutional Court has addressed the issue in its case law. Although some rights, such as the right to be free from torture, might be regarded as absolute, rights can generally be restricted in order to protect other rights or general interests. Any restriction needs to be provided by law and justified under the proportionality principle. The principle of proportionality includes three steps according to which it is necessary to ask: 'first, whether the restriction is useful to achieve a legitimate goal; second, whether the restriction is necessary, in that no more moderate measure could be chosen to sufficiently satisfy that goal; third, whether the costs that the restriction entails are offset by the benefits that are to be achieved'.[26]

Besides the possibility of restricting rights, the Constitution allows the Government to suspend certain rights in specific circumstances (Art. 55). First, in the course of an investigation of 'armed bands or terrorist groups' three rights may be suspended under certain conditions: the right of the arrested person to be brought

[26] Ibid. p. 246.

before a judge no later than 72 hours after arrest; the right to privacy regarding one's home and the secrecy of communications. Secondly, when the Government declares a state of emergency or siege, a list of rights may be suspended, which is very exceptional and in practice has never happened.

In general, according to Art. 10(2) of the Constitution, constitutional rights need to be interpreted according to the Universal Declaration of Human Rights and other international human rights treaties ratified by Spain. This provision has been commonly used with regard to the European Convention on Human Rights (ECHR) and the corresponding European Court of Human Rights (ECtHR) case law.[27]

2.1.3 The principle of the rule of law is encapsulated in Art. 1(1) of the Constitution,[28] and further specified in Art. 9. In short, the principle requires that all public authorities abide by the law. Broadly, the principle requires respect of the separation of powers and the protection of individual rights. Indeed, Art. 9(1) confirms the binding nature of the Constitution upon public authorities and citizens, which was paramount after the dictatorship. As opposed to the constitutional tradition over the nineteenth century, the Constitution was no longer conceived as a political document of a programmatic nature, but rather as a binding norm at the top of the legal order.

More specifically, Art. 9(3)[29] lays down a set of techniques for the realisation of the rule of law principle. First, the hierarchical principle orders the norms in the legal system according to which superior norms prevail over inferior norms (*lex superior derogat legi inferiori*). Basically, the Constitution is at the top, followed by parliamentary legislation and finally governmental regulations. Respect for the hierarchical principle is a condition of validity of any legal provision.

Secondly, Art. 9(3) includes the principle of legal certainty and the principle of publicity. As such, a norm may only enter into force after publication. The main instrument for these purposes is an official bulletin called *Boletín Oficial del Estado.* Individuals cannot be bound by norms that are secret. Moreover, according to the principle of legal certainty, individuals need to be able to foresee what the applicable norms are and how they are going to be interpreted. The principle of legal certainty is key in the civil law tradition (see also Sect. 2.5).

Thirdly, the Constitution bans the retroactivity of norms that establish sanctions or restrict individual rights. Thus, the legislator may enact retroactive norms except in these circumstances. This ban on retroactivity is especially relevant in criminal

[27] Saiz Arnaiz 1999, pp. 156–169; Torres Pérez 2011, pp. 160–164.

[28] See Ferreres Comella 2013a, pp. 26–29.

[29] Article 9(3) reads as follows: 'The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.'

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law and is linked to the principle of *nulla poena sine lege*. Finally, public authorities must exercise their power according to the principle of responsibility and non-arbitrariness.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 In the last decade, the Spanish legislator has worked to enhance the economic freedoms recognised in EU law. This has generated tensions with the subnational territorial entities and some groups – such as professional associations – which have rooted their opposition in the constitutional text.

The context, however, is clearly imbalanced in favour of the economic freedoms of EU law against other constitutional principles. The transposition of the Services Directive[30] has altered the competences scheme of all levels of the public administration. The competences of subnational territorial entities, *inter alia*, to establish authorisations for private services and to regulate the protection of the environment regarding hazardous private activities, have been curtailed. The Law 20/2013 of 9 December on the Guarantee of the Internal Market has accelerated this trend and has implemented the freedom of services far beyond the requests of the Services Directive – to all kinds of 'economic activity', in the words of this legislation.[31] These initiatives have altered significantly the constitutional distribution of competences and the principles of political and administrative autonomy of Autonomous Communities and Municipalities.

Another example of these tensions is the debate surrounding the Draft Legislation on Professional Associations.[32] The Draft, based on the freedom of services at the EU level and aimed at bolstering the free movement of services and persons, sought to dismantle several Professional Associations and to reduce their capacity to regulate and intervene in the spheres of activity of their members. The Professional Associations claimed that Art. 36 of the Constitution provided a special recognition of such associations and that the restrictions of the Draft were thus unconstitutional. Finally, the pressure led the Spanish Government to announce the withdrawal of the Draft.[33]

[30] Directive 2006/123/EC of the European Parliament and of the Council of 12 December on services in the internal market, [2006] OJ L 376/36.

[31] Several constitutional complaints against Law 20/2013 have been lodged before the CC by the Autonomous Communities of Andalusia, Canarias and Catalonia.

[32] The Government issued a first Draft Legislation on 20 December 2013 and a second proposal on 11 November 2014.

[33] Cinco Días 15 April 2015.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

The Framework Decision on the European Arrest Warrant[34] (Framework Decision) was first implemented in Spain by Law 3/2003 of 24 March on the European Arrest Warrant. This law was later replaced by Law 23/2014 of 20 November on Mutual Recognition of Criminal Decisions in the European Union. Law 23/2014 includes a new general clause, according to which this law will be applied with respect for the fundamental rights, freedoms and principles enshrined in the Spanish Constitution, Art. 6 of the TEU, the Charter and the ECHR (Art. 3).

The relevant provisions in the Constitution are as follows:

> Article 17
>
> 1. Every person has a right to freedom and security. No one may be deprived of his or her freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law.
>
> 2. Preventive arrest may last no longer than the time strictly necessary in order to carry out the investigations aimed at establishing the events; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.
>
> 3. Every person arrested must be informed immediately, and in a way understandable to him or her, of his or her rights and of the grounds for his or her arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during police and judicial proceedings, under the terms to be laid down by the law.
>
> 4. An habeas corpus procedure shall be provided for by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. Likewise, the maximum period of provisional imprisonment shall be determined by law.
>
> Article 24
>
> 1. All persons have the right to obtain effective protection from the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.
>
> 2. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent.
>
> …

[34] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

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Article 25

1. No one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanour or administrative offence under the law then in force.

…

3. The Civil Administration may not impose penalties which directly or indirectly imply deprivation of freedom.

2.3.1 The Presumption of Innocence

2.3.1.1 In Spain, the competent authority to issue a European arrest warrant (EAW) is any judge or court hearing a criminal case. Law 23/2014 has set some specific conditions for the issue of an EAW, in addition to the general requirements established in the Framework Decision. The conditions are as follows: first, the case needs to meet the requirements laid down in the Law on Criminal Procedure to hold a person in preventive imprisonment, or the requirements of Organic Law 5/2000 of 12 January on the Criminal Responsibility of Minors, to decide on detention as an interim measure; secondly, a judicial authority may only issue an EAW to enforce a sentence of imprisonment if the substitution or suspension of imprisonment is not possible; and finally, the judicial authority may issue an EAW only if the prosecutor or the private accusation consider it necessary (Art. 39). These additional requirements contribute to specifying the proportionality principle as it is applied at the moment of issuing an EAW and to a better protection of the presumption of innocence.

According to Law 23/2014, the competent court to execute an EAW is the *Juez Central de Instrucción de la Audiencia Nacional.* Thus, execution is centralised in a single court for the whole national territory.

2.3.1.2 The European Commission Report on the implementation of the EAW offers data on the number of EAWs that have been issued and executed by each Member State.[35] According to the latest report, between 2005 and 2009, on average, Spain issued 533.8 EAWs per year and executed 73.4 EAWs per year.

The Centre for European Policy Studies Special Report offers valuable quantitative information in this regard. In the period between 2005 and 2011,[36] Spain issued 3,766 warrants, which means that Spain issued the fifth largest number of EAWs of all the Member States. Only 563 resulted in effective surrender, which represents a success rate of 14%. The entry into force of Law 23/2014, which as

[35] Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2011) 175 final]: http://ec.europa.eu/justice/criminal/files/eaw_implementation_report_2011_en.pdf.

[36] See Carrera et al. 2013, p. 6.

mentioned sets additional conditions for the issue of an EAW, might contribute to reducing the number of EAWs issued.

In turn, Spain received 8,702 requests for surrender (third largest number of EAWs received among the Member States), and 5,279 people were surrendered (in absolute terms, Spain is the state that has surrendered the largest number of people).[37] There is no provision for compensation due to surrender for people who are later acquitted.

The cases in which the execution of an EAW might give rise to the violation of fundamental rights might go unreported. NGOs and the media have denounced abuses in several countries. For instance, in Spain a documentary was launched about the case of Óscar Sánchez, who was accused of drug-trafficking and surrendered to Italy.[38] He spent 20 months in prison until it was discovered that he had been wrongly identified and he was eventually released. Cases such as this show that the right to the presumption of innocence might also be impinged upon as a consequence of the automaticity of the execution of EAWs.

2.3.2 *Nullum crimen, nulla poena sine lege*

No significant issues have arisen in Spain.

2.3.3 The Right to a Fair Trial and *In Absentia* Judgments

2.3.3.1 As it is widely known, the execution of the EAW for *in absentia* judgments has been a source of constitutional conflict in Spain. According to settled constitutional case law, the extradition of a person who has been convicted *in absentia* without making the surrender conditional on the opportunity to apply for a retrial violates the right to a fair trial (Art. 24(2) of the Constitution).[39]

This interpretation of the right to a fair trial clashed with the 2002 Framework Decision on the EAW, and even more clearly after its amendment in 2009. According to the Framework Decision, if the person had information about the trial or had been represented by an appointed lawyer, surrender may not be refused or subjected to conditions.

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[37] See also the quantitative information provided by the Council of Europe, *Note from the General Secretariat to the Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant): Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2013*. 8414/2/14 REV 2 LIMITE COPEN 103 EJN 43 EUROJUST 70, Brussels, 31 July 2014: http://www.statewatch.org/news/2014/aug/eu-council-eaw-ststs-2013-8414-rev2-14.pdf.

[38] See: http://blogs.ccma.cat/senseficcio.php?itemid=53778.

[39] Judgment CC No. 91/2000, of 30 March, paras. 12–13 (this interpretation was contested within the Court, see the dissenting opinions).

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In 2009, the CC was confronted with a case in which an English national, resident in Spain, had been sentenced in Romania to four years of imprisonment in his absence, although he had been represented by a lawyer of his choice. In its judgment, the CC held that the surrender of a person who has been condemned *in absentia* without making the surrender conditional on the possibility to obtain a retrial violates Art. 24(2) of the Constitution. Unfortunately for the applicant, he had already been surrendered by the time the CC decided the case.[40]

Two years later, in a similar case involving an Italian national who had been condemned *in absentia* to ten years of imprisonment for the crime of bankruptcy fraud in Italy, the CC decided to make a preliminary reference to the Court of Justice of the European Union (CJEU) for the first time ever. This is the well-known *Melloni* case. The reference included three questions about the interpretation and validity of the relevant provision of the EAW Framework Decision and the interpretation of Art. 53 of the Charter.[41]

In a nutshell, the CJEU upheld the validity of the Framework Decision in light of Arts. 47 and 48 of the Charter.[42] It did not even consider the CC's suggestion to interpret the Charter as providing a more extensive protection than the ECHR. The CJEU was satisfied with stating that the level of protection in the EU was compatible with the ECHR.[43] However, while states are allowed to provide for better protection than the ECHR, the CJEU rejected the possibility for the CC to grant a higher level of protection than the Charter in this case.[44]

Eventually, the CC overturned previous case law and revised the interpretation of Art. 24(2) of the Constitution regarding *in absentia* judgments with the consequence that the standard of constitutional protection was lowered.[45]

2.3.4 The Right to a Fair Trial

Within the domain of the right to a fair trial, the CC has held that, when a person has already consented to the execution of an EAW, the addition of new grounds for surrender without a previous audience amounts to a violation of the right to a fair

[40] Judgment CC No. 99/2009, of 28 September. See Izquierdo Sans 2010, pp. 218–225; Cedeño Hernán 2010, pp. 1–15; Fontanelli 2010, p. 372; Torres Pérez 2010, pp. 441–472.

[41] About the preliminary reference, see among others, Arroyo Jiménez 2011, pp. 1–25; Revenga Sánchez 2012, pp. 139–150; González Pascual 2012, pp. 161–178; Pérez Manzano 2012, pp. 311–345; Torres Muro 2013, pp. 343–370.

[42] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107. For comments on the CJEU preliminary ruling see, among others, De Boer 2013, pp. 1083–1104; Martín Rodríguez 2013, pp. 1–13; Skouris 2013, pp. 229–243; García Sánchez 2013, pp. 1137–1156; Groussot and Olsson 2013, pp. 7–35; Brkan 2013, pp. 139–145.

[43] For a critical appraisal of the CJEU reasoning regarding this issue, see Torres Pérez 2014, pp. 314–315; Díez-Hochleitner 2013, pp. 21.

[44] For the interpretation of Art. 53 of the Charter, see Sect. 2.11.

[45] Judgment CC No. 26/2014, of 13 February.

trial.[46] Also, the CC has held that the lack of a right to appeal the decision to execute an EAW does not violate the right to a fair trial, since this is not a decision about the merits of the case.[47]

For the statistics and individual cases reported, see Sect. 2.3.1.2.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition

Regarding the tension between mutual recognition and constitutional rights see Sect. 2.3.3 about trials *in absentia*.

2.3.6 Other Aspects of EU Criminal Law – The Principle of *Ne Bis in Idem*

According to the Framework Decision, the principle of *ne bis in idem* can, depending on the circumstances, be a ground for either compulsory (Art. 3(2)) or optional (Art. 4(2), (3) and (5)) non-execution of an EAW.

In a case before the CC, the applicant argued that the EAW issued by France to enforce a sentence of 20 years of imprisonment regarded the same acts for which a petition of extradition had been rejected in 1989. At that time, the extradition had been rejected on the basis of the principle of reciprocity, since the person accused was a Spanish national. The CC held that decisions in extradition procedures do not have the effect of *res iudicata* and may, in certain circumstances, be replaced by others. In that case, the reason to refuse the execution had to do with the existing legal framework, which had been modified following the Framework Decision on the EAW. In addition, the reason to request the surrender was not the same, since extradition had first been sought to prosecute the person and the subsequent EAW was issued in order to enforce the sentence.[48]

2.4 The EU Data Retention Directive

2.4.1 The Constitution recognises the right to private and family life (Art. 18(1)), and provides as follows:

> Article 18
>
> 1. The right to honour, to personal and family privacy and to the own image is guaranteed.

[46] Judgment CC No. 181/2011, of 21 November.

[47] Judgment CC No. 177/2006, of 5 June.

[48] Ibid.

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> 2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of *flagrante delicto.*
>
> 3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order.
>
> 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.

Under this broad wording, the Constitution protects individuals from interferences by public authorities in the spheres of personal and family life. In addition, the Constitution enshrines two other more specific rights that are relevant in the overall constitutional debate about the EU Data Retention Directive.[49]

First, the Constitution guarantees the secrecy of communications, with the exception of searches and seizures previously authorised by a court order (Art. 18 (3)). In well-established case law, the CC has held that this right protects the act of communication itself, without a necessary link to private life.[50] In other words, this right offers a formal protection of the communication process regardless of its content. Secondly, the Constitution contains a clear mandate for the legislator to limit the use of data processing in order to protect the private and family life of individuals (Art. 18(4)). Although it is formulated as a mandate, the CC has interpreted this provision as a truly individual fundamental right similar to the other rights recognised in Chap. II, Sect. 1.

These constitutional provisions have conditioned the implementation of the EU Data Retention Directive in the period 2006–2014, but only in relation to the safeguards on the access to data. The rule of blanket data retention has not been disputed. In this regard, the legislator has considered that the constitutional protection of personal data is fulfilled with the obligation to obtain a court order in the context of a criminal investigation of a serious crime.[51] The legislator understands, in line with the spirit of the Directive, that the data to be retained do not reveal the content of the communications and, therefore, these are only circumstantial data. Nonetheless, and due to the specific formal protection of all types of communications guaranteed by Art. 18(3) of the Constitution, a court order is compulsory in the event of access to data by public authorities. Three exceptions to the compulsory court order regime should be highlighted: access to the International Mobile Subscriber Identity (IMSI) data regarding especially prepaid mobile phones;[52] the

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[49] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[50] The landmark judgment is Judgment CC No. 114/1984, of 29 November.

[51] Article 7, Law 25/2007 of 18 October regarding the Retention of Telecommunications Data and Public Communications Networks.

[52] Single Additional Provision Law 25/2007. The IMSI data is a combination of algorithms which prevents telecommunications fraud (it allows the identification of the mobile phone). However, the IMSI itself does not allow the identification of the buyer of the phone or the content of the communication. A court order is required to access this information beyond the access of the mere

investigation of terrorism and organised crime,[53] and the possibility of suspension of these rights when a state of emergency or siege is declared.[54]

On the other hand, Spanish courts have only added a cautious interpretation of the scope of Law 25/2007 of 18 October implementing the EU Data Retention Directive. The legitimate aim of the access and use of the data retained, i.e. 'investigation, detection and prosecution of serious crime', must be determined case by case considering the nature of the offence and in accordance with the proportionality principle.[55] Spanish courts have declared that the expression 'serious crime' cannot automatically be interpreted in the sense of serious crimes as defined in criminal law (i.e. the formal definition under criminal law of a serious crime does not imply *per se* the existence of a legitimate aim for the purposes of Law 25/2007, which must be determined case by case). Yet ordinary courts have raised neither a constitutional challenge before the CC nor a preliminary reference to the CJEU. Only one, timid constitutional concern regarding Law 25/2007 has been voiced, *obiter dicta*, by the Spanish Supreme Court (SC), and this referred to the type of law regulating the data retention measures: since a fundamental right was at stake, the SC deemed an organic law to be more appropriate than an ordinary law.[56]

The annulment of the EU Data Retention Directive by the CJEU[57] has not led to the invalidation of Law 25/2007. This implementing measure is still in force. After the annulment of the EU Data Retention Directive in 2014, the legislator has only introduced minor amendments regarding the sanctioning measures and the procedure for access to data. The procedure shall operate through an electronic format and only government agents – police, customs surveillance and intelligence officers – are able to request 'essential information for the aims of the Law'.[58] There is no change to the rule of blanket data retention – or the data to be retained – and, therefore, in light of the inaction on the part of the Spanish legislator, it appears that the initiative of the EU legislator will be necessary to change the national law implementing the EU Data Retention Directive.

IMSI data, as well as to access the specific register of prepaid mobile phones created by the Single Additional Provision Law 25/2007 (Judgment SC No. 249/2008, of 20 May, para. 4).

[53] See Art. 55(2) of the Spanish Constitution and Art. 579(3) of the Law on Criminal Procedure, approved by the Royal Decree of 14 September of 1982.

[54] Article 55(1) of the Spanish Constitution allows the search and seizure of all types of communications in the case of a declaration of one of the two more serious exceptional situations (states of emergency and siege, but not the state of alarm). See also the Organic Law 4/1981 of 1 June regarding the States of Alarm, Emergency and Siege.

[55] Order of the Provincial Court of Madrid (Section 30) No. 572/2013, of 11 July, para. 2.

[56] Judgment SC No. 249/2008, of 20 May, para. 4. Under Art. 81 of the Constitution, an organic law is required to regulate the essential elements of some fundamental rights (rights under Art. 18 of the Constitution are included). As stated in previous sections, an organic law is a source of law with the force of legislation, which needs an absolute majority to be passed.

[57] Joined cases C–293/12 and C–594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[58] New Art. 6(2) Law 25/2007, as amended by Final Additional Provision 4(1) of Law No. 9/2014 of 9 May regarding Telecommunications.

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The origin in EU law of the rule of blanket data retention may have well facilitated its incorporation into national law. It is uncertain whether an analysis based only on constitutional grounds would have led to a declaration of unconstitutionality. Arguably, the formal protection of communications, well established in the case law of the CC under Art. 18(3) of the Constitution, raises some doubts about the constitutionality of the rule. Ordinary courts, however, have not raised any constitutional challenge in the CC and, even for the cases in which a court order is not needed – in the case of the three exceptions mentioned above – they have upheld the measure.[59] It appears that for Spanish courts, the safeguard of a court order is enough to sustain the compatibly between the Constitution and the rule of blanket data retention. However, it should be pointed out that in the cases before the SC in which Law 25/2007 has been applicable, the SC has emphasised its nature as a national norm implementing EU law.[60] This nature has had an important impact on the reasoning of the SC and might have deterred it from submitting a constitutional challenge before the CC.

2.5 Unpublished or Secret Legislation

2.5.1 As seen in Sect. 2.1.3 on the rule of law, the publication of legal norms is a constitutional obligation established under Art. 9(3) of the Constitution. Moreover, Art. 2(1) of the Civil Code establishes that this general principle is applicable to all kinds of norms. This overall mandate is further reinforced by the Constitution with the obligation to publish State legislation (Art. 91) and international treaties (Art. 96 (1)). The legislation of Autonomous Communities must also be published according to each Autonomous Statute. Finally, administrative regulations with general and binding effects must also be published.[61]

Taking into account these constitutional and legislative references to the principle of publicity of norms, the CC has established a direct connection to the requirements of a democratic state.[62] The CC has declared that only the publicity of norms guarantees the subjection of citizens to the legal system and the exercise of

[59] See Judgment SC No. 249/2008, of 20 May.

[60] Ibid. This SC judgment covers all the EU legislative history and the ECHR Convention system approach in the field of personal data. It also confronts, in some way, the case law of the CC with the aforementioned standpoints. The SC ultimately relied heavily on the new framework of Law 25/2007 and the EU Data Retention Directive, and considered all the previous considerations to have been overcome.

[61] Article 52 of Law 30/1992 of 26 November of Rules on Public Administration and Administrative Proceedings. In October 2016, this provision will be derogated and replaced by a provision with identical effects: Art. 131 of Law 39/2015 of 1 October of Rules on Public Administrative Proceedings.

[62] Judgment CC No. 179/1989, of 2 November, para. 2.

their rights.[63] In practice, secret or unpublished legislation has not been an issue in Spain under the 1978 Spanish Constitution.

In view of the above, it seems plausible to say that secret norms and measures in Spain would be declared at least – in line with the CJEU decision on the *Heinrich* case – to be without general and binding effects on citizens. Moreover, in light of the well-established constitutional principle of publicity and the strong position of the CC, secret norms would be declared invalid.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 In the last two decades Spain has faced the liberalisation of several markets on the impulse of the EU. The telecommunications, energy and transport markets are examples of the decisive influence of the EU. In this transition from public monopolies to liberal markets, property rights, and principles like non-retroactivity, legal certainty and proportionality have been affected, *inter alia*, by unexpected changes in the regulatory framework and the imposition of public service obligations on private companies, the alteration of property rights and new regulatory bodies. Indeed, these troubles are commonly shared by all European countries that have faced liberalisation on the impulse and under the supervision of the EU.[64]

As an example, changes in the legal framework of the renewable energy market have raised a huge debate in Spain. First, the elimination of the incentives to the renewable energy sector in 2012[65] and, secondly, the unexpected changes in the payment scheme of energy in 2014, which diminished the expected incomes of pre-existing renewable energy premises,[66] have led the renewable-energy sector to challenge these decisions before the Spanish courts alleging, *inter alia*, the infringement of the principles of legitimate expectations and legal certainty. EU law is at the forefront of this debate because these changes were made in order to implement Directive 2009/28/EC.[67] The resolution of this conflict, with the possible intervention of the European institutions, is still pending.[68]

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[63] Ibid.

[64] For a general overview of the liberalisation of certain markets piloted by the EU and the issues of national reception – from the political, institutional, cultural and legal points of view – see the seminal work of Majone 1996.

[65] Royal Decree-Law 1/2012, of 27 January.

[66] Law 24/2013, of 26 December and Royal Decree 413/2014, of 6 June.

[67] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L 140/16.

[68] Several Autonomous Communities have lodged constitutional challenges and conflicts of competence (Catalonia, Andalusia and Extremadura) before the CC. Also, renewable energy companies and environmental associations have brought several actions for judicial review of the

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2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 The Treaty Establishing the European Stability Mechanism (ESM Treaty) imposes on Spain a mandatory contribution in the capital stock that amounts to 11.9037% of the total capital stock of the ESM.[69] Spain would be obliged to contribute 83,514 million EUR should the maximum calls allowed under the ESM Treaty be made. This corresponds to 19.73% of Spain's yearly budget for 2014 and 7.89% of its GDP in 2014.[70]

These data show that the ESM Treaty, if the calls were activated, would heavily determine the budget, and Spain's financial and expenditure obligations. The budgetary autonomy of the State, specially the prerogatives of the Government and Parliament regarding the drafting and approval of the State's general budget, as well as the financial autonomy of the Autonomous Communities, could be jeopardised by the capital calls from the ESM.[71] The ESM Treaty, the imposition of limits to the public debt and deficit (in the TSCG), the European Commission supervision of Member States' budgets prior to their approval (Two-Pack obligations) and the imposition of additional measures to fix macroeconomic imbalances (MIP framework) are factors which challenge the principle of financial autonomy of the Member States.

Despite this significant impact, a serious constitutional debate about the ESM Treaty provisions has not been launched. The possibility to submit this Treaty to an *ex ante* review by the CC –pursuant to Art. 95 of the Constitution – was not even raised, and the CC has not addressed the issue after the ratification and entry into force of the Treaty either. In the context of the debate about the TSGC, the CC has

administration (more than 100 have been heard by the SC since 9 September 2014). The Association to Support Renewable Energies (*Coordinadora de Apoyo a las Energías Renovables*), which includes more than 50 entities from this sector, has stated that it is preparing legal action at the EU level against the measures taken. Nonetheless, until now, the international strategy lead by international investors has been to present actions before international arbitrators under the Energy Charter Treaty: several actions have been brought before the International Centre for Settlement of Investment Disputes (ICSD), the Stockholm Chamber of Commerce (SCC) and the United Nations Commission on International Trade Law (UNICTRAL).

[69] Annex I ESM Treaty, Contribution Key for the Kingdom of Spain. The capital stock after the contributions of all the states amounts to 700,000 million EUR.

[70] The total amount of the yearly budget for 2014 is 423,231 million EUR (Law 22/2013 of 23 December regarding the General Yearly Budget for 2014). The yearly GDP for 2014 was 1,058,469 million EUR according to data provided by Eurostat and *Instituto Nacional de Estadística* (the Spanish Statistical Office).

[71] In Spain, the Government drafts the general state budget and Parliament approves it by passing a law. Parliament can amend the budget during the legislative process, but any amendments implying an increase of the expenditures or a decrease in the incomes must be approved by the Government (Art. 134 of the Constitution). In relation to the Autonomous Communities, the Constitution recognises their financial autonomy and they are entitled to draft and approve their own budgets (Art. 156 of the Constitution).

declared that the central Government – based on its coordination powers and competence on general economic planning – can intervene and supervise the Autonomous Communities' budgets, to guarantee budget stability, and that these powers do not unlawfully impinge upon the financial autonomy of the latter.[72]

In this regard, the incorporation of the fiscal compact golden rule (budget stability or surplus) in national law, 'preferably', in the words of the TSCG,[73] by means of a constitutional provision, is another example of a mandate coming from the EU without being preceded by a thorough constitutional and democratic debate as discussed in greater detail in Sect. 1.5.

The need to gain access to financial markets at reasonable interest rates moved Spain to go further in the introduction of the golden rule of budget stability. Instead of passing a bill, Spain established at the constitutional level the absolute priority of the payment of public debt over other national expenditures in the amendment to Art. 135 (see Sect. 1.2.3), which included para. 3 according to which: '… Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority. These appropriations may not be subject to amendment or modification as long as they conform to the terms of issue. …'.

Spain changed its priorities and expressed a strong payment commitment to the financial markets over other public expenditures, for instance in the social, education or welfare fields. Again, this important rule, meaning a shift in the balancing of the rights of citizens with those of the international creditor community, especially in the economic, social and cultural spheres, was introduced together with the incorporation of the golden rule and without a thorough constitutional and democratic debate.

In short, the severe impact of the economic and financial crisis in Spain have placed the country in a difficult position in negotiating and discussing the economic and financial measures to fight the crisis at the European Union level.

2.7.2 Other initiatives such as Eurobonds and the Banking Union were seen in Spain as alleviating measures to overcome the economic and financial crisis, especially to decrease dependence on the financial markets to get loans. For these reasons, the measures were generally uncontested from the constitutional perspective.

2.7.3 Nonetheless, some debates and contestation from the constitutional perspective have taken place in relation to certain austerity measures introduced by the Spanish Government. Despite the fact that Spain has not been subject to an official bailout, the banking rescue programme of Spanish financial institutions in 2012, the negative alert mechanism reports and the recommendations of the European Commission and the Council to carry out structural reforms have obliged Spain to launch several austerity programmes that have affected civil servants and other

[72] Judgment CC No. 215/2014, of 18 December.

[73] Article 3(2) TSGC.

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public employees, and the quality, access and organisation of public services. Some of the measures and their origin will be addressed in greater detail in Sect. 3.5.

From the constitutional perspective, public employees have challenged the suspension of certain benefits before Spanish courts on the grounds of legitimate expectations and the prohibition of retroactivity. One of the contested measures was the suppression of the 'extra pay' of December 2012 by Royal Decree-Law 20/2012 of 13 July (the extra pay is included in the annual salary of an employee but is paid in two specific months, normally in December and June, together with the monthly payment). The decision was taken on 15 July and, therefore, the period between 1 June and 14 July could have generated a proportional payable right of the 'extra pay'. Lower judges and courts had decided differently on the issue, and finally several of them requested the CC to rule on the constitutionality of this measure. The Spanish Government and some Autonomous Communities had decided, before the resolution of the case by the CC, to reinstate this proportional amount of the 'extra pay'. Therefore, the CC declared the constitutional questions referred by the ordinary courts to be extinguished – without entering into the merits – since the object of the claims in these cases no longer existed.[74]

The reform of the labour market as a consequence of the austerity programmes has also had a special impact on public employees.[75] Most notable were the 5% reduction in the wages of public employees[76] and the possibility for the public administration to suspend or unilaterally modify collective agreements in the public sector for economic reasons.[77] Both measures have been contested based on arguments of their incompatibility with the right to collective bargaining and trade union freedoms (Arts. 28 and 37 of the Constitution). However, the CC upheld the decrease in salary,[78] and the new power of the public administration to suspend or modify collective agreements has only been condemned by the International Labour Organization (ILO).[79]

Finally, the healthcare reform introduced by the Government as part of its austerity measures has also been challenged before the CC.[80] The exclusion of illegal immigrants from the public healthcare system, except in cases of emergency situations, pregnancy and minors, and the pharmaceutical co-payment mechanism have been contested from the point of view of the constitutional right to

[74] Judgment CC No. 83/2015, of 30 April, regarding the extinction of the preliminary reference sent by the *Audiencia National* (National High Court). The other preliminary references will follow this same result.

[75] See Luz Rodríguez 2014, pp. 128–139.

[76] Royal Decree Law No. 8/2010, of 20 May.

[77] Article 32, Law 7/2007, of 12 April of the Basic Public Employees' Statute (as amended by Royal Decree Law n° 20/2012 of 13 July).

[78] Judgment CC No. 85/2011, of 7 June.

[79] 371st Report ILO, of 13–27 March 2014.

[80] Royal Decree Law No. 16/2012 of 20 April.

healthcare.[81] The European Committee of Social Rights has considered that such denial of access to healthcare for illegal immigrants is contrary to Art. 11 of the European Social Charter.[82] Moreover, several Autonomous Communities have decided to secure universal access to healthcare for illegal immigrants. The Government has challenged the norms adopted by the Basque Country and Navarra before the CC. The judgment is still pending but, in the meantime, the CC has lifted the suspension of these norms.[83] Also in relation to the healthcare system, the CC has declared unconstitutional the legislation of the Autonomous Communities of Catalonia and Madrid establishing the obligation to pay one euro per prescription.[84] However, this judgment should be read in light of a conflict of competences, i.e. the Autonomous Communities cannot impose extra charges in the healthcare system on their own (or without the intervention of the national Government).

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Judicial review of EU measures in Spain through the preliminary ruling mechanism is, in practice, very limited due to the inaction of national judges. In the period 2006–2014, national courts submitted a total of 178 references for a preliminary ruling, out of which only one was a request for a preliminary ruling on the validity of an EU measure.[85] Lower courts have been the most active in submitting references about the interpretation of EU law, with the submission of a total of 140,[86] while the SC has submitted 37 requests. The sole submission of a request for a preliminary ruling on the validity of an EU measure was made by the CC in *Melloni* (see Sect. 2.3.3). These data show that Spanish courts are very reluctant to ask the CJEU to decide on the validity of an EU measure.

2.8.2–2.8.5 On the other hand, the CC has sustained a long-standing position of not assessing the legality of EU measures: conflicts between EU law and national law,

[81] To date, the only decisions of the CC are the Orders CC No. 239/2012, of 12 December and No. 114/2014, of 8 April, in which the CC partially lifted the suspension of the legislation of the Autonomous Communities of the Basque Country and Navarra on the ground that the benefits of the exclusion of illegal immigrants cannot outweigh the right to healthcare. See also Sect. 3.5.

[82] Conclusions XX-2 of the European Committee of Social Rights, November 2014.

[83] Order CC No. 239/2012, of 12 December; Order No. 114/2014, of 8 April.

[84] Judgments CC No. 71/2014, of 8 May and No. 85/2014, of 29 May.

[85] Data extracted from search in http://curia.europa.eu/ (Period of search: 1 January 2006 to 1 September 2014).

[86] The *Audiencia Nacional* (National High Court) has sent 3 references; the *Tribunales Superiores de Justicia* (High Courts of Justice of Autonomous Communities) 33; the *Audiencias Provinciales* (Provincial Courts) 22; *Juzgados de primera instancia de todos los órdenes jurisidiccionales* (Courts of First Instance) 80. Other administrative courts have sent 2 references.

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and the validity of EU measures have been considered non-constitutional issues.[87] Therefore, these conflicts and their resolution have been left to the ordinary courts. In this line, the CC's recent case law shows an effort to emphasise the role of ordinary courts as EU judges. In this context, the CC has stated that the failure to submit a preliminary reference when mandatory and to disapply national law that is in conflict with EU law could amount to a violation of the constitutional right to a fair trial (Art. 24 of the Constitution).[88] Moreover, the CC has declared that, in certain cases, EU law has constitutional relevance and, therefore, the CC itself might submit a preliminary reference.[89] Notwithstanding these recent developments and the efforts of the CC, ordinary courts remain quite inactive in submitting preliminary questions regarding the validity of EU law.

It is difficult to compare the standard of national judicial review to the one deployed by the CJEU. There are neither official statistics nor scholarly work regarding the success rate of challenges against legislative measures brought before the CC. The data obtained from a statistical research carried out by the authors shows an indicative success rate of approximately 30% of challenges against legislative measures (period from 2006–2014).[90] This rate includes legislation declared partially or fully invalid or declared constitutional following a specific interpretation in conformity with the Constitution. This indicative success rate shows that the national standard of review is higher than the one sustained by the CJEU with regards to the annulment of EU law by the EU courts in 2001–2005 (success rates of 6.8% in the General Court and 16.1% in the CJEU).[91]

In relation to ordinary courts, there is also a lack of official statistical data and scholarly research regarding the standard of judicial review of administrative regulations and acts. Some studies suggest that the standard of judicial review varies depending on the field of administrative action. In areas like licensing or sanctions, ordinary courts exercise a strict scrutiny,[92] while in areas like economic regulation – telecommunications and the energy sectors – courts maintain a more deferential approach, with success rates of less than 25% against acts of the regulatory bodies.[93] These rates in the regulatory field could indicate a softer national judicial

[87] For all, see the judgments CC No. 28/1991, of 14 February; 64/1991, of 22 March; 147/1996, of 19 September; 13/1998, of 22 January.

[88] Judgments CC No. 78/2010, of 20 October (*Metropole* case) and No. 145/2012, of 2 July (*Iberdrola* case).

[89] Order CC No. 86/2011, of 9 June (preliminary reference to the CJEU, case *Melloni*) and the derived judgment of the CC on the merits No. 26/2014, of 13 February.

[90] This research has been carried out based on the Annual Reports and Statistics published by the CC. However, this data is partial and therefore the conclusions and the success rate calculated by the authors are not definitive and should be taken as mere indicators.

[91] Tridimas and Gari 2010, p. 170.

[92] Fernández Rodríguez 2009, pp. 34–79.

[93] Esteve Pardo 2009, pp. 899–902; Betancor Rodríguez 2012, pp. 619–620.

review standard than the one sustained by the General Court and the CJEU when reviewing the decisions of the European Commission (success rate of 35%).[94] However, the national standard of review cannot adequately be compared with the CJEU standard due to the lack of publicly available data. Thus, it is not possible to make a conclusive assessment of this issue.

2.8.6 No significant issues have arisen in Spain.

2.9 Other Constitutional Rights and Principles

2.9.1 The implementation of EU law has entailed challenges in Spain regarding the rule of law, the separation of powers doctrine and the territorial distribution of power. Three examples in this regard include: the obligation imposed by EU law to create independent regulatory bodies in certain markets, the increase of administrative regulations to implement EU measures and the weakening of the political autonomy of the Autonomous Communities.

In the energy and electronic communications sectors, the 2009 EU legislation has left no room for Member States to design their regulatory bodies: they must be separated and independent from the legislative and the executive powers.[95] In countries like Spain, unfamiliar with such administrative agencies outside the banking and financial sectors, the incorporation process of this new institutional design has been uneasy and has altered the traditional balance among the three branches of power. Several scholars have voiced concerns regarding the independence and judicial and parliamentary oversight of these regulatory bodies.[96] Following its creation, the European Commission expressed doubts about the independence and attribution of powers to the new Spanish super-regulator – with powers to regulate the energy, telecommunications, audiovisual, transport and postal sectors, as well as its monitoring and sanctioning powers to ensure effective competition in the market.[97] The Spanish Supreme Court has recently referred a

[94] Tridimas and Gari 2010, p. 170.

[95] Article 35(1)(4), Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, [2009] OJ L 211/55; Art. 39(1)(4) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, [2009] OJ 211/94; Art. 3 Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, [2009] OJ L 377/37.

[96] Solanes Mullor 2014, pp. 443–463.

[97] Before 2013, Spain regulated these sectors through specialised and separate independent regulatory bodies. In 2013, Law 3/2013 of 4 June created the National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*), which merged almost all the

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case to the CJEU for a preliminary ruling on the compatibility of the creation of the new super-regulator with EU law in these fields.[98]

A similar problem arises also in relation to the increasing prominence of the executive vis-à-vis the legislative branch in implementing EU law. The obligation to comply with the deadlines for the implementation of directives and the necessity to directly apply EU regulations have justified the use of governmental regulations instead of legislative acts and, especially, the use of Royal Decree-Laws.[99] Royal Decree-Laws are in theory an exceptional legislative prerogative of the Government for 'extraordinary and urgent situations' (Art. 86 of the Constitution). A clear example of the misuse (and abuse) of Royal Decree-Laws is the implementation of the Services Directive by some Autonomous Communities whose Governments transposed it by Royal Decree-Law when the transposition deadline had already elapsed.[100]

The approval of several national legislative measures under the pressure of EU law has undermined the political autonomy of the Autonomous Communities. First, Organic Law 2/2012 of 27 April on Budget Stability and Financial Sustainability has regulated the implications of the golden rule incorporated in Art. 135 of the Constitution and limited the financial autonomy of the Autonomous Communities. Article 135 of the Constitution requires the Autonomous Communities to pass balanced budgets, limits their capacity to issue public debt and, overall, imposes the supervision of their financial system by the Central Government and European institutions. In addition, the material powers and competences of the Autonomous Communities have been constrained as a consequence of legislative measures at the central level such as Law 20/2013 of 9 December on the Guarantee of the Internal Market (see Sect. 2.2). Finally, some austerity measures launched by the Central Government have had an impact on the self-organisation and personnel of the Autonomous Communities. For instance, the Central Government has imposed a reduction of the salaries of the civil servants of the Autonomous Communities, and recently the CC has upheld this measure declaring that the Central Government is

existing specialised independent regulatory bodies (only the Stock Exchange Commission – *Comisión Nacional del Mercado de Valores* – was excluded). The European Commission raised doubts about the transition process and the independence of the appointed members of the existing regulatory bodies, which were dismissed before their mandate had expired. The powers of the new body were curtailed and some regulatory powers were reassigned to the Government. See in this regard the joint letter of the General Directorates of Competition, Energy, Telecommunications, Economy and Finance of the European Commission, sent to the Spanish Government on 29 November 2012, as well as the letter by Neelie Kroes, Vice-President of the European Commission, sent to José Manuel Soria, Spanish Minister of Industry, Energy and Tourism, on 11 February 2013.

[98] Order SC No. 5896/2015, of 3 July. The Spanish Supreme Court relied on the Hungarian case in which the CJEU decided that the dismissal of the appointed members of independent regulatory bodies before their mandate had expired was an attack against the independence of the regulators, and ruled that the creation of one super-regulator could not justify the dismissals (see Case C-288/12, *European Commission v. Hungary* [2014] ECLI:EU:C:2014:237).

[99] Sánchez Gutiérrez 2012, pp. 1–21; Alonso García 1990, pp. 297–302.

[100] Jiménez Asensio 2010, pp. 197–224.

entitled to take such measures and, therefore, to delve into the organisational structures of subnational entities.[101]

2.10 Common Constitutional Traditions

2.10.1 The CJEU has repeatedly declared that the constitutional traditions common to the Member States were one of the main sources of inspiration behind the interpretation of EU fundamental rights as general principles of EU law. Reference to the common constitutional traditions became a rhetorical clause that contributed to the legitimacy of sheer judicial activism in creating fundamental rights for the EU. The Lisbon Treaty retained the general principles of EU law as sources of fundamental rights 'as they result from the constitutional traditions common to the Member States' (Art. 6(3) TEU). Nonetheless, after the entry into force of the Lisbon Treaty, the Charter has displaced the general principles of EU law as the main source of EU fundamental rights in the CJEU case law. Still, Art. 52(4) of the Charter declares that '[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'.

2.10.2 The use that the CJEU has made of the comparative method has been sharply contested in the literature and regarded as discretionary and superficial.[102] Despite the erratic use of the 'common constitutional traditions' clause, taking into account the pluralist nature of the EU compound polity, the coexistence of the Charter and the national constitutions, and the supranational nature of the CJEU, there are good reasons to make use of the comparative method in order to give meaning to Charter rights. Without denying the autonomy of EU fundamental rights, the CJEU ought to take into consideration the existence of common trends and divergences regarding the interpretation of fundamental rights. As argued elsewhere,

> [t]his inter-state comparison would help to transcend superficial differences and to strengthen common understandings, while fostering an in-depth appraisal of pervasive particularities. In this way, the CJEU should seek to capture elements of commonality and assess elements of divergence in order to articulate an interpretation that reflects a synthetic understanding.[103]

In order to perform this comparative analysis, the CJEU could obtain the information needed from several sources, including the CJEU Service of Research and Documentation, the Advocate General Opinions; non-judicial actors in procedures before the CJEU such as the Commission, Member State Governments and the parties; and also judicial actors, such as the national courts and the ECtHR.[104]

[101] Judgment CC No. 81/2015, of 30 April 2015.

[102] Torres Pérez 2009, pp. 158–159; De Witte 1999, p. 878.

[103] Torres Pérez 2009, p. 168.

[104] Ibid., pp. 162–166.

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2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 In *Melloni*, the CJEU had the chance to interpret Art. 53 of the Charter for the first time and held that:

> Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[105]

Following the CJEU's interpretation of Art. 53 of the Charter, the chances to provide for more protective standards under national constitutions are rather limited.[106] Arguably, in situations not totally determined by EU law, such as in *Åkerberg Fransson*,[107] it might be possible to allow for better protection according to the national constitution, but only as long as the primacy, unity and effectiveness of EU law are not undermined, as the CJEU also stated in *Åkerberg Fransson*.

In practice, it will not always be easy to determine the margin of manoeuvre left to the Member States. Moreover, whether primacy, unity and effectiveness are compromised is a matter of interpretation. Indeed, we believe that the CJEU should not exclude the possibility for restrictions on those principles to be justified in certain circumstances, such as the need to respect national constitutional identity (Art. 4(2) TEU).

In cases where higher constitutional levels of protection are at issue, a more balanced and deferential approach by the CJEU would be advisable, instead of giving absolute preference to primacy, unity and effectiveness. Article 53 of the Charter could be interpreted as incorporating a mandate for the CJEU to allow for higher levels of constitutional protection, if there are no other rights or general interests that should prevail in the particular case.[108] A more deferential approach would allow the CJEU to accommodate diversity. For instance, the CJEU could have shown more deference in the review of affirmative action measures, such as in *Kalanke*[109] or *Abrahamsson*.[110]

In Spain, there are some instances in which EU law has had the effect of lowering the standards of rights protection. In addition to the EAW and the Data Retention Directive, in joined cases *ASNEF* and *FECEMD* for example,[111] the CJEU was questioned about the compatibility between the Data Protection

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[105] See the *Melloni* case, supra n. 42, para. 60.

[106] Torres Pérez 2014, pp. 329–331, has criticised the CJEU's approach.

[107] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2012:340.

[108] Torres Pérez 2014, p. 331.

[109] Case C-450/93 *Kalanke v. Frei Hansestadt Bremen* [1995] ECR I-03051.

[110] Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-05539.

[111] Joined cases C-468/10 and C-469/10 *ASNEF* [2011] ECR I-12181.

Directive[112] and a domestic provision according to which data had to appear in public sources in order for the processing of personal data to be allowed in certain circumstances. The CJEU declared that 'Member States cannot add new principles relating to the lawfulness of the processing of personal data to Article 7 of Directive 95/46 or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in Article 7'.[113] In particular, the CJEU considered that the national provision was precluded by the Directive since 'it excluded in a categorical and generalised manner, the possibility of processing certain categories of personal data, without allowing the opposing rights and interests at issue to be balanced against each other in a particular case'.[114]

Thus, national legislation was precluded from providing better protection. The case did not reach the Constitutional Court, and it might actually be that the level of protection set by the EU legislator was compatible with the Constitution. Still, as a result of European integration, the level of protection of the right to privacy has been lowered.

Also, in the context of immigration, EU law might have had the effect of restricting certain fundamental rights. According to the Return Directive,[115] third country nationals can be detained up to 6 months while they are awaiting expulsion. This period may be extended for a further 12 months. Several Member States amended their respective legislation following the transposition of the Return Directive to increase the maximum length of detention, such as Greece, Italy, Spain and Hungary. In Spain, the maximum length of detention increased from 40 to 60 days. Greece and Italy went from 6 months and 3 months, respectively, to 18 months each. Thus, in some countries, the room for manoeuvre left by the Directive had the effect of worsening restrictions on the right to liberty.

Also, according to Art. 15(3) of the Return Directive: 'In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.' In the *Mahdi* case,[116] the CJEU held that 'EU law does not preclude national legislation from providing … that the authority which reviews the detention of a third-country national at reasonable intervals … must adopt, on the conclusion of each review, an express measure containing the factual and legal reasons justifying the measure adopted. Such an obligation would arise solely under national law'. Given the serious restriction on a fundamental right allowed by the Directive, revision should

[112] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

[113] Joined cases C-468/10 and C-469/10 *ASNEF*, supra n. 111, para. 32.

[114] Ibid. para. 48.

[115] Directive 2008/115/EC of the European Parliament and the Council of 16 December on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

[116] Case C-146/14 *Mahdi* [2014] ECLI:EU:C:2014:1320.

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not be limited to rubber-stamping a previous decision to hold a person in custody. Indeed, a reasoned decision should be required as a matter of EU law, and this should not just be left to the Member States to decide. To be sure, in this context, the CJEU allowed for better protection at the Member State level, but it did not require it as a matter of EU law. This approach, however, might have an adverse effect and lead to a lowering of the standards of rights protection in other Member States.

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1–2.12.3 The adoption (and implementation) of the Framework Decision on the EAW and the Data Retention Directive have not spurred a robust democratic debate, and public deliberation has been rather lacking. However, scholars have shown concern and adopted a critical position towards these instruments.[117]

In Spain, to our knowledge, there has been no situation in which constitutional issues have arisen and have been referred to the Constitutional Court at the stage of implementing EU law. In any event, we would support a recommendation to suspend the application and carry out a review of EU measures, if important constitutional issues were raised by a number of constitutional courts.

If an infringement proceeding has been initiated against a Member State and it alleges that implementation is hindered because an unconstitutionality has been identified in accordance with the domestic system of control of constitutionality, EU institutions should take this argument seriously and examine the possibility to embrace the interpretation of the fundamental right at stake at the EU level or rather to accommodate diversity, along the lines developed in the previous section. Moreover, the constitutional identity clause (Art. 4(2) TEU) may well have some bite in this context.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 While EU law has contributed to furthering the protection of constitutional rights in certain fields, it has undermined the level of protection in others. On the one hand, for instance, the protection afforded by the Spanish Constitution to the right to non-discrimination has been enhanced by making reference to EU law

[117] Regarding the EAW, see Arangüena Fanego 2003, pp. 11–95; Fonseca Morillo 2003, pp. 69–95; De la Quadra-Salcedo Janini 2006, pp. 277–303. Regarding the Data Retention Directive, see Rodotà 2006, pp. 53–60; Vilasau 2006, pp. 1–15.

provisions and the CJEU case law. As such, the notion of indirect discrimination on grounds of sex is built on the CJEU case law and the relevant Directives.[118] Also, regarding non-discrimination on grounds of sexual orientation, which is not explicitly mentioned in the Constitution, the CC has referred to the Charter and several Directives that explicitly ban discrimination on this ground.[119]

Moreover, the CJEU case law has had an important impact regarding the protection of the right to housing in the context of the economic crisis and the creeping number of evictions in Spain. However, the CJEU has approached these cases from the perspective of consumer protection and the right to a fair trial, rather than the right to housing as such.[120]

On the other hand, EU integration might also have the effect of undermining the national standard of rights' protection. In Spain, the *Melloni* case stands out as a clear example of the lowering of standards of constitutional protection to fulfil obligations under EU law, since the CC had no choice but to overrule settled case law after the preliminary ruling.

Regarding the right to privacy and the protection of personal data, while the CC had made use of the Charter to reinforce the constitutional protection in certain cases, the implementation of the Data Retention Directive mandated the incorporation of the blanket data retention rule that has not been amended after the annulment of the Data Retention Directive by the CJEU. Also, as seen above, internal legislation providing for higher protection of personal data was declared incompatible with EU law. With regard to immigration, national legislation was amended to increase the maximum length of detention of third country nationals who are subject to return procedures under the umbrella of the Return Directive.

In the context of the economic and financial crisis, the adoption of austerity measures to fulfil obligations of budget stability has led to curtailing social rights,[121] such as the right to healthcare. The reform of the healthcare system has been challenged before the CC and the decision is still pending.

On the whole, there are several fields in which EU integration has led to a reduction of the levels of protection that individuals once enjoyed. In some cases, the lowering of standards has clashed with the Constitution. Nonetheless, even if the lower protection does not impinge upon the Constitution, it is disturbing that the level of rights protection is eventually reduced as a consequence of obligations derived under EU law.

[118] See, among others, judgments CC No. 147/1995, of 16 October; 240/1999, of 20 December; 253/2004, of 22 December; 3/2007, of 15 January.

[119] Judgment CC No. 41/2006, of 13 February.

[120] See Sect. 3.5.

[121] González Pascual 2014, pp. 117–120.

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2.13.2–2.13.4 How could such an unwelcome result be avoided? Admittedly, EU integration might imply reducing the level of constitutional rights protection in some instances. The EU general interest or other competing rights might justify a restriction on the level of constitutional protection, but only when such an outcome is strictly necessary and cannot be avoided.

Within the domain of the EU, first of all, throughout the legislative process, the potential violation of the Charter or the need to give room to allow for better protection at the national level should be taken into consideration.[122] Once legislation has been adopted and a case reaches the CJEU, the Court should not disparage claims regarding constitutional protection for the sake of an absolute understanding of primacy and effectiveness. The CJEU might consider whether to embrace the constitutional understanding as the most adequate interpretation of the corresponding Charter right or accommodate diversity through the exercise of deference. The use of the comparative method by the CJEU in interpreting fundamental rights could be helpful for identifying common trends in the EU, as well as the adequate scope of deference.[123] In any event, and particularly if the outcome involves lowering the standards of rights protection, enhanced responsiveness to arguments grounded on the constitutional protection of fundamental rights would be advisable, given the pluralist nature of the EU and the pervasive contestation of its ultimate authority. For instance, in *Melloni*, one might agree that the countervailing interests and values, such as the need to effectively fight crime and protect victims' rights, in a context of mutual recognition, outweighed individual protection, as the person concerned had been informed and represented by lawyers of his choice. Nonetheless, a better articulation of the balancing of the conflicting rights and principles would have been welcomed, instead of an absolute understanding of primacy and effectiveness of EU law, since, in the end, the CJEU mandated the CC to lower the level of constitutional protection.[124]

In turn, a more proactive role for domestic courts, and particularly constitutional and supreme courts, in highlighting the standard of protection of constitutional rights through a robust use of the preliminary reference would facilitate the awareness of the impact of EU law on the constitutional system, and offer the CJEU the possibility to interpret the Charter accordingly or accommodate diverse interpretations. In the end, the building of a set of common rights can only successfully be achieved through the cooperation of domestic courts and the CJEU through a process of continuous dialogue, understood as the exchange of arguments in order to reach common understandings about the interpretation of fundamental rights.[125]

[122] De Witte 2013, pp. 1523–1538.

[123] Torres Pérez 2009, pp. 153–155.

[124] Torres Pérez 2014, p. 318.

[125] Torres Pérez 2009, pp. 179–184.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The Government is charged with the negotiation and ratification of international treaties. However, in some cases, the prior consent of Parliament is necessary. According to the Spanish constitutional framework, international treaties are classified into three types taking into account the degree of participation of Parliament in the ratification process. First, international treaties that transfer constitutional powers to international organisations are subject to the consent of Parliament through an organic law, which requires an absolute majority (Art. 93 of the Constitution). Secondly, legislative consent by simple majority is required in the case of international treaties on specific matters, such as treaties that involve fundamental rights or financial obligations for Spain (Art. 94(1) of the Constitution).[126] Finally, in all other instances, the Government shall simply inform Parliament of the conclusion of international treaties and agreements (Art. 94(2) of the Constitution).

Besides the participation of Parliament in the process of ratifying international treaties, the Spanish Constitution also attributes a role to the CC. Prior to ratification, the Government or Parliament may consult the CC and seek a decision stating whether there is a conflict between the Spanish Constitution and the treaty (Art. 95(2) of the Constitution). In the case of a declaration of incompatibility, the treaty may only be ratified if the Constitution is amended accordingly. The CC's intervention prior to ratification is not mandatory, since the CC only intervenes at the request of the Government or Parliament; however, if an action for *ex ante* review of an international treaty is lodged, the decision of the CC is binding.

These provisions do not establish any explicit limit to the delegation of constitutional powers or the values, principles or objectives that should be respected by international organisations of which Spain is a member. Neither of these provisions contains a reference to any specific international organisation. Only in the context of the Spanish membership in the European Union and the implications of EU law for national law has the CC stated its position in relation to the limits of delegation of constitutional powers to international organisations. The legal scholarship has also debated this issue in connection with the EU debate.[127]

[126] The treaties are the following: '(a) of political nature; (b) of a military nature; (c) affecting the territorial integrity of the State or the fundamental rights and duties established under Part 1; (d) implying financial liabilities for the Public Treasury; (e) involving amendment or repeal of some law or requiring legislative measures for their execution'.

[127] See Sect. 1.3.

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3.2 The Position of International Law in National Law

3.2.1–3.2.2 The Constitution establishes that international treaties shall be part of the internal legal system once officially published (Art. 96(1)). Thus, the Constitution encapsulates a sort of 'moderate monism', in the sense that only official publication is required for an international treaty to be binding domestically.

There is consensus about the position of international law in relation to domestic legislation (leaving aside the Constitution). Article 96(1) of the Constitution establishes that the provisions of an international treaty 'may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law'. Thus, it is understood that international law enjoys 'passive resistance' vis-à-vis domestic legislation in the sense that domestic legislation cannot modify international law. Consequently, Spanish judges are allowed to directly set aside domestic legislation in the case of incompatibility with international law. Yet, international treaties are not deemed to be hierarchically superior to legislative norms, since their interaction is established in terms of applicability rather than validity.

The position of international law with regard to the Constitution is still an open debate confronting constitutional and international law scholars. For constitutionalists, international law is subordinated to the Constitution[128] because: (i) Art. 95(1) of the Constitution requires the prior amendment of the Constitution in the case of ratifying a treaty that is incompatible with the Constitution; and (ii) the CC is able to declare an international treaty unconstitutional after its ratification.[129] For international lawyers and scholars, these reasons are inconclusive and they argue for the superiority of international law over the Constitution.[130]

Beyond this debate, the special status of international treaties on human rights ratified by Spain should be highlighted. According to Art. 10(2) of the Constitution, fundamental rights and freedoms recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and other international treaties and agreements protecting human rights. These treaties, therefore, are considered to be a constitutional canon of interpretation.

3.3 Democratic Control

3.3.1 The Constitution does not give a decisive role to Parliament in the ratification and oversight of international treaties. The Government is in charge of the negotiations at the international level, while Parliament shall consent prior to the ratification by means of a simple or qualified majority depending on the type and

[128] See the seminal work of Pérez Royo 1998, pp. 167–172.

[129] Article 27(2)(c), Organic Law 2/1979 of 3 October on the Spanish Constitutional Court.

[130] For instance, see Marín López 1999, pp. 65–67.

content of the treaty.[131] In certain cases, the role of Parliament is reduced to a minimum and it must only be informed of the ratification of the treaty.

In the case of treaties falling under Art. 93 of the Constitution, there are no specific rules that qualify the legislative process for organic laws. In the case of treaties falling under Art. 94(1) of the Constitution, the authorisation does not have a legislative nature and the process contains some specificities (Art. 74(2) of the Constitution): the legislative initiative can only originate in Congress and, in the event of a disagreement between Congress and the Senate, a Mixed Committee will be constituted; if the disagreement persists, Congress will decide by qualified majority. These specific rules bolster the role of the Senate in comparison with its role in the ordinary legislative process, although Congress retains the last word.

Despite these rules, the effective involvement of and control by Parliament in the ratification process is doubtful. The Government has the 'qualification power', i.e. determines the type of treaty (i.e. decides whether Arts. 93, 94(1) or 94(2) is applicable to a treaty, see above) and therefore also decides on the level of participation of Parliament. In this decision, the Government has to request the opinion of the Council of State – the supreme consultative body of the Government – but this opinion is not binding.[132] Parliament, however, has reassessed the qualification on several occasions.[133] The Government also decides on the provisional application of a treaty, with the possibility to delay the submission of the treaty to Parliament for consent.[134] Most importantly, experience shows that parliamentary debates are without substance, being, in the vast majority of cases, a mere formality.[135]

The subsequent control mechanisms of Parliament for scrutinising the application of a treaty or the activities of the international organisation do not improve this poor initial role of Parliament. The Constitution does not foresee any special mechanism and the relevant international treaty determines the role of Parliament. We are only aware of special mechanisms in relation to the role of national parliaments in the European Union (Protocol No. 1 to the TFEU).

3.3.2 In line with the limited oversight of Parliament, referendum is scarcely used in Spain in the ratification process or subsequent oversight of an international treaty. There is neither a specific provision establishing the obligation to hold a referendum nor the ban of this instrument for this purpose. As stated above, Art. 92 of the Constitution allows the Government to call a consultative referendum on 'political decisions of special importance'. This kind of referendum, which is not binding, has been used only twice, precisely regarding international treaties. These two experiences have shown that the referendums were used for strategic political decisions

[131] See Sect. 3.1.

[132] Article 5(1)(e), Law 50/1997 of 27 November on the Government and Art. 22(1), Organic Law 3/1980 of 22 April on the Council of State.

[133] Izquierdo Sans 2002, pp. 24–27.

[134] Ibid. p. 19.

[135] Ibid., pp. 29–30.

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rather than to enhance the democratic legitimacy of the ratification of a particular treaty.

Spain became a member of the North Atlantic Treaty Organization (NATO) on 30 May 1982, in the context of strong social and political contestation against it. In October 1982, the recently elected socialist Government had advocated for Spain's withdrawal from NATO. However, international commitments and alliances made the new Government change this initial position. In 1986, the Spanish Government decided to call a referendum to enable citizens to have a say on the continuity of the country's membership to NATO.[136] The Government mounted a political campaign in favour of remaining in NATO. The referendum was used on this occasion to legitimise a controversial change of the Government's position rather than to enhance democratic legitimacy.

The second and last referendum was held in 2005 by the Spanish Government prior to the ratification of the Treaty Establishing a Constitution for Europe, as mentioned before.[137] Again, the referendum was used strategically to achieve political purposes at EU level – to bolster the EU Constitution against more sceptical countries – rather than to exclusively enhance democracy in the national sphere where the positive outcome could be clearly anticipated before the referendum. The turnout was rather low (42.32% of the voters).

3.4 Judicial Review

3.4.1 The CC is in charge of reviewing the constitutionality of international treaties. According to Art. 95(2) of the Constitution, the CC can be consulted on whether an international treaty is compatible with the Constitution prior to its ratification (*ex ante* judicial review). In the case of no prior consultation, a ratified treaty can also be declared unconstitutional according to Art. 27(2) of Law 2/1979 of 3 October (*ex post* judicial review).

In practice, the CC has hardly ever reviewed the constitutionality of an international treaty. Only on two occasions – in 1992 and 2004 – was the CC consulted prior to ratification, first in relation to the Maastricht Treaty and secondly with regard to the Treaty Establishing a Constitution for Europe, which were discussed in Sects. 1.2.3 and 1.3.

The judicial review of international law is even more limited due to the fact that ordinary courts are not entitled to review international treaties. As mentioned above, a conflict between domestic legislation and a treaty should be resolved in favour of the treaty, which entails the disapplication of domestic legislation ('passive resistance' of treaties). In the case of the suspected incompatibility of a treaty with the Constitution, the judge should submit a question of constitutionality to the CC. In

[136] Royal Decree 214/1986 of 6 February.

[137] Royal Decree 5/2005 of 14 January.

any event, if the CC were to find that the Constitution and a treaty were incompatible, it would declare the respective international legal provision to be unconstitutional, but it would not have the power to annul it. Consequently, that provision could not be applied internally, and Spain might incur responsibility under public international law.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 The 1978 Spanish Constitution encapsulates economic, social and cultural rights, but provides a lower level of protection for them than in the case of civil and political rights (see Sect 2.1.1). Most of these rights are categorised as 'principles governing economic and social policy' (Title I, Chap. III).[138] Only some social rights, such as the right to education, are placed in the section providing maximum protection within the Constitution. This lower level of protection for the majority of social rights means that an individual complaint before the CC is not available and, most importantly, that the legislator enjoys more leeway when regulating economic, social and cultural rights. In short, constitutional constraints and barriers are weaker in this field.[139]

Despite the lower level of constitutional protection, Spain has developed a strong social welfare state, including a universal public healthcare system, a solid social security system (with unemployment benefits, public pensions and disability pensions), strong social services and, finally, a public educational system in all levels (primary, secondary and higher education). Globalisation and, in particular, the consequences of the global economic and financial crisis have had a negative impact on the Spanish social welfare state, which has been subject to strong pressure. Financial markets, international organisations, the EU and the IMF at the forefront have pressed Spain to adopt an agenda of structural reforms, i.e. a severe austerity reform programme.[140]

In April 2009, the European Commission initiated an excessive deficit procedure against Spain.[141] Moreover, Spain has been signalled as a country with

[138] *Inter alia*, within Chap. III, the Spanish Constitution recognises the right to social security (Art. 41), the right to healthcare (Art. 43), the right to environment (Art. 45) and the right to housing (Art. 47).

[139] See Art. 53(3) of the Constitution for the diminished protection of economic, social and cultural rights that are recognised in Chap. III. For a common understanding amongst the Spanish scholarship of social rights as non-enforceable rights, see Díaz Crego 2012, pp. 17–20.

[140] The Spanish Governments have taken measures in all fields, *inter alia*, the reduction of protection in the case of unemployment, the reform of public pensions and cutting funding to the public education and the healthcare systems. For the implications for the Spanish constitutional system, see González Pascual 2014, pp. 116–127.

[141] Council Decision 2009/417/EC of 27 April 2009 on existence of an excessive deficit in Spain. The Council's Recommendations 15764/09 ECOFIN 775 UEM 301; 12171/12 ECOFIN 669 UEM 252; 10560/1/13 ECOFIN 478 UEM 173 OC 361 to Spain with a view to bringing an end to the situation of an excessive government deficit, follow upon the procedure.

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macroeconomic imbalances by the Alert Mechanism Report (AMR).[142] Following this mechanism, Spain was subject to an in-depth review and, as a result, was requested to adopt reforms in the labour market and the social security scheme (with special attention to the pension system). Finally, despite the fact that Spain has not been subject to a formal bailout, the banking rescue programme for Spanish financial institutions in 2012 has implied, in practice, an international intervention in several Spanish financial institutions. The memorandum of understanding signed between Spain and the Troika (the European Commission, the European Central Bank and the IMF) has imposed obligations on financial institutions, but the State is the ultimate accountable party and has to accept the austerity reform programme as a condition for access to the financial assistance granted by the Troika. Precisely, based on the reports of the Troika and the financial assistance provided to the Spanish financial institutions, the Government has challenged several Autonomous Communities' laws protecting the right to housing in the CC, alleging that these laws can jeopardise financial stability;[143] these have been declared unconstitutional[144] or temporarily suspended by the CC.[145] In short, Spain has launched a massive austerity programme that has impacted all areas of the welfare state. *Inter alia*, health and education expenditures along with social assistance to dependents have been reduced, and the conditions for receipt of public pensions have been made more restrictive.[146]

The austerity reform programme has been widely contested politically by the leftist parties and socially by NGOs and other platforms. Yet, with some exceptions,[147] ordinary courts and the CC have not been able to confront the challenges to the social welfare state. So far, the CC has remained a passive spectator.

[142] Alert Mechanism Report 2014 COM (2013) 790 final of 13 November 2013 (Spain was signalled as a country with 'excessive imbalances', the worst classification) and Alert Mechanism Report 2015 COM (2014) 904 final of 28 November 2014 (the Commission reclassified Spain as a country with only 'imbalances', recognising the improved position of the country).

[143] Law 4/2013 of 1 October on Measures to Protect the Social Function of Housing of the Autonomous Community of Andalusia and Law 24/2013 of 2 July on Urgent Measures to Guarantee the Right to Housing of the Autonomous Community of Navarra. *Inter alia*, this legislation provides for the temporary suspension of evictions.

[144] In a recent judgment, the CC has declared unconstitutional some housing measures launched by the Andalusian Government through Decree-Law 6/2013 of 9 April. This Decree-Law included some measures that were subsequently incorporated in Law 4/2013 of 1 October, now temporarily suspended by the CC. The declared unconstitutionality is based on the use of the Decree-Law (this instrument cannot be used to regulate the right to property) and the lack of competence of the Autonomous Communities to expropriate inhabited houses in the context of an eviction procedure. Again, the CC has not approached the right to housing from a substantive point of view and has only faced it indirectly in light of a source of law issue or a conflict of competences between territorial entities. See Judgment CC No. 93/2015, of 14 May 2015.

[145] Order CC No. 69/2014, of 10 February and No. 115/2014, of 8 April.

[146] See González Pascual 2014, pp. 117–120.

[147] See Sect. 2.7.

Moreover, for instance, the CC struck down a law passed by the Autonomous Community of Andalusia to enhance the right to housing.[148]

Paradoxically, in certain cases, protection in the social welfare area has come from the CJEU, the ECtHR and the Committee on Economic, Social and Cultural Rights (CESCR). Facing the inaction of the CC, in the last years ordinary courts have turned towards the CJEU seeking collaboration to deal with some of the negative effects of the economic crisis.[149] For instance, the CJEU gave protection to Spanish citizens against evictions, declaring the Spanish mortgage law unfair for the consumer.[150] The Spanish legislation did not allow, in mortgage enforcement proceedings, for the debtor to claim the existence of unfair terms or for the competent court to stay this kind of proceeding to adopt interim measures.[151] Moreover, a debtor against whom mortgage enforcement proceedings were brought was precluded from lodging an appeal against any decision of the judge of first instance to dismiss his objection to enforcement.[152] The decisions of the CJEU in the *Aziz* and *Sánchez Morcillo* cases, declaring the Spanish legislation incompatible with EU law (based, *inter alia*, on incompatibility with Art. 47 of the Charter), have had a significant impact in the context of the economic crisis and have led to the amendment of Spanish mortgage law. On the other hand, the ECtHR is timidly providing protection also in this field through interim measures aimed at paralysing evictions.[153] Finally, in the first decision taken under the individual communication mechanism provided by the Optional Protocol, the CESCR concluded that Spain violated the right to housing (Art. 11 of the International Covenant on Economic, Social and Cultural rights, in conjunction with Art. 2.1) because its courts failed to take all reasonable measures to adequately notify Ms. I.D.G that the lending institution had filed a mortgage foreclosure against her.[154]

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[148] See supra n. 144.

[149] Gómez Pomar and Lyczkowska 2014, pp. 7–10.

[150] See Iglesias Sánchez 2014, pp. 955–974.

[151] Case C-415/11 *Aziz* [2013] ECLI:EU:C:2013:164.

[152] Article 695(4), of Law 1/2000 of 7 January on Civil Procedure; Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECLI:EU:C:2014:2099.

[153] Interim measures taken by the ECtHR in the *A.M.B. and others* case on 12 December 2012, the *Mohamed Raji and others* case on 31 January 2013 and in the *Salt* case on 15 October 2013. However, the ECtHR has not decided on the merits of either case. In *A.M.B. and others* the ECtHR lifted the interim measures and declared inadmissible the complaint because of the non-exhaustion of domestic remedies (case *A.M.B and others v. Spain*, no. 77842/12, decision of 28 January 2014). In relation to the *Mohamed Raji* case, the ECtHR struck the application from its list of cases (case *Mohamed Raji and others v. Spain*, no. 3637/13, decision of 16 December 2014) because the Madrid city council decided not to enforce the demolition and eviction proceedings. In the *Salt* case, on 6 November 2013, the ECtHR lifted the interim measures because the Spanish authorities gave guarantees of alternative housing for the families concerned.

[154] Decision CESCR on the individual communication No. 2/2014, of 17 June 2015 (reference E/C.12/55/D/2/2014).

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3.6 Constitutional Rights and Values in Selected Areas of Global Governance

Global governance has influenced and transformed certain values of the Spanish constitutional framework. The fight against terrorism – global and national – and the phenomenon of immigration are only some examples.

First, the transformations of Spanish criminal law on terrorism and organised crime should be highlighted. Beyond the EAW, these transformations have implied serious challenges to the rule of law and the principle of proportionality. These changes include the criminalisation of new conducts such as the extension of the concept of terrorist crime to mere collaboration with the aim to constitute a terrorist organisation (Art. 576(1) of the Criminal Code, approved by Organic Law 10/1995 of 23 November), the 'individual terrorism' conduct without connection to a criminal organisation (Art. 577 of the Criminal Code), or the mere defence of terrorism (Art. 578 of the Criminal Code). In connection to this, the close relationship of Spain with the United States in fighting terrorism has raised strong criticism in relation to the collaboration of Spain in the secret detention and unlawful inter-state transfers of suspected terrorists.[155]

Secondly, also in the context of the fight against terrorism, the law adopted in Spain to ban political parties (Organic Law 6/2002 of 27 June on Political Parties) is still contested. The right of association (Art. 22 of the Constitution) and the right to vote (Art. 23 of the Constitution) are at the forefront of the debate. The measures introduced by Organic Law 6/2002 were highly controversial, including, *inter alia*, the regulation of a specific procedure of illegalisation before a specialised section of the SC (Art. 11), the effects of the illegalisation decision for future associations (Art. 12), and the detailed clauses for illegalisation of a political party (Art. 9). This has led to the characterisation of Spain as a militant democracy. Yet in several judgments, the ECtHR has endorsed these measures.[156] Moreover, the so-called *Parot* doctrine adopted by the SC in 2006, aimed at extending the sentence of terrorists whose convictions are about to end, raised serious issues in relation to legal certainty, unexpected changes in the case law and the principle of non-imposition of heavier penalties than the ones that were applicable at the time that the criminal offence was committed. Eventually, this doctrine was declared incompatible with the ECHR by the Strasbourg Court.[157]

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[155] Marty, D. *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*. Report of the Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 12 June 2006.

[156] See for instance, case *Etxeberria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03, 35634/03, judgment of 6 November 2009.

[157] In 2006, the SC ruled that for crimes committed before the current Criminal Code came into effect in 1995, reductions would no longer apply to the accumulative maximum sentence of 30 years, but to the absolute total term of the sentence (judgment SC No. 197/2006, of 20 February). The CC ratified and declared constitutional this interpretation by the SC (judgment CC No. 114/2012, of 24 May). The ECtHR declared a violation of Arts. 5(1) and 7 of the ECHR (see *Del Río Prada v. Spain* [GC], no. 42750/09, judgment of 21 October 2013).

Finally, the global phenomenon of immigration, combined with the economic and financial crisis, has also produced tensions in relation to welfare rights, the right to a fair trial, the right not to be discriminated against and, above all, the more basic principle of human dignity. Several humanitarian crises on Spanish borders – the attempt by immigrants to surpass the fences of Ceuta and Melilla – have been a constant in the last years. The refortification of the fences, the treatment of the incoming immigrants by the police – reported deaths and mistreatments on the fences – and the deportations by public authorities are some of the challenges for the more basic human rights on Spanish soil. Along the same line of fighting illegal immigration, a 2003 reform established a mechanism for the automatic expulsion from Spanish territory of illegal immigrants sentenced to prison for less than six years.[158] The law does not provide for proportionality or a balancing test for taking into account all the personal and general interests in a particular case. The SC, however, reinterpreted this article in a constitutional spirit and introduced a balancing test.[159]

As it has been put, the Spanish constitutional system is 'under stress'.[160] European and global governance, and particularly the economic and financial crisis, have had a deep impact on basic constitutional values and principles such as the welfare state, the territorial distribution of power and the democratic legitimation of governmental powers. The consequences of this new scenario are hard to predict and might result in social contestation against the transformed constitutional framework. Indeed, there are already social and political signs in this direction, such as the emergence of new political parties and groups deeply opposed to the austerity measures. In any event, it seems necessary to recast the relationship between the Global-European spheres and the national constitutional order so as to reinforce basic principles such as democracy, the rule of law and a high level of protection of fundamental rights.

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[158] Article 89 of the Criminal Code, as amended by Organic Law 11/2003 of 29 September.

[159] See for all, judgment SC No. 588/2012, of 29 June.

[160] González Pascual 2014, pp. 116–127.

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Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution

Francisco Pereira Coutinho and Nuno Piçarra

Abstract The Portuguese Constitution of 1976 shares some of the main features of the constitutions adopted after the fall of an authoritarian regime, such as detailed rules and enforceability in court. The constitutional culture is mostly influenced by continental constitutional traditions, especially the French constitutional experience as regards the organisation of the state, and Germany in relation to the rule of law and fundamental rights. Rights from the first to the fourth generation are protected in some sixty articles, with detailed sub-clauses, and with a particularly strong social solidarity dimension and social rights. In the jurisprudence of the Constitutional Court, measures have often been annulled on the grounds of violation of the principles of equality, proportionality and the protection of legitimate expectations. This approach was enhanced in relation to the drastic austerity measures resulting from the European Union and IMF bailout programmes. The so-called austerity case law has been praised by some commentators, but criticised by others who have accused the Court of insularity, inconsistency and of engaging in judicial activism. Other areas where transnational law has presented challenges include retroactive effect of EU regulations, publication of IMF decisions and

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international extraditions. The European Arrest Warrant and Data Retention Directive did not raise constitutional issues. Amendments of the Constitution with a view to EU and international co-operation are extensive. These include removal of several programmatic provisions regarding the social orientation.

Keywords The Constitution of Portugal · Constitutional amendments regarding European and international integration · The Portuguese Constitutional Court Constitutional review statistics and grounds · Fundamental rights and the rule of law · European Union and IMF austerity programmes · The principles of legal certainty, legitimate expectations and non-retroactivity · Social rights and the social state · European Arrest Warrant · Data Retention Directive · Publication of IMF decisions

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Portuguese Constitution was, and to some extent still is, a by-product of the revolutionary years that followed the military coup that overthrew the authoritarian right-wing regime of the 'Estado Novo' (1926–1974). The 'Carnation Revolution' was made by middle-rank military officers but was quickly taken over by leftist political parties and movements. The military organised under a movement called '*Movimento das Forças Armadas – MFA*' ('Movement of the Armed Forces').

An assembly was democratically elected on 25 April 1975 to enact a new constitution, but during the following year its proceedings were heavily influenced by the military. Two pacts with the main political parties represented in the assembly were signed to assure that the 'spirit' of the revolution was not lost. The Constitution that entered into force on 25 April 1976 stated that the MFA exercised sovereign powers in order to safeguard the conquests of the revolution, and foresaw the creation of the 'Council of the Revolution' (*Conselho da Revolução*). The latter was composed of military officers and had the competence to review the constitutionality of laws.

The 1976 Portuguese Constitution shares some of the main features of the constitutions adopted after the fall of an authoritarian regime, such as detailed rules and enforceability in court. From the outset it was also very programmatic and ideological, as it was envisioned as a transitional tool for the creation of a socialist society through the collectivisation of the means of production.[1] Some of the most

[1] The Preamble of the Constitution still reads that one of the aims of the Constitution is to 'open up a path to a socialist society'.

ideological provisions were removed in 1982, and others became obsolete after the accession to the European Communities in 1986.

The extent of the revolutionary DNA that remains is still a topic of contention in Portugal. As we will see below, it was tested in the context of the constitutionality review of the austerity measures adopted after the 2011 international bailout.

Portuguese constitutional culture is mostly influenced by continental constitutional traditions. The French constitutional experience was preferentially chosen for the adoption of the main tenets of the political system and the organisation of the state. Germany's fundamental law was mirrored for the basic principles of the rule of law and the protection of fundamental rights.[2]

1.1.2 Article 1 of the Portuguese Constitution establishes that 'Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society'.[3] The next 295 articles establish the sovereignty and organisation of the state and, simultaneously, limit its powers through the protection of individual rights and liberties, the adoption of the rule of law and the separation of powers with due checks and balances. The Constitution also encapsulates the core values of the political community, which is to achieve an 'economic, social and cultural democracy' (Art. 2). To this end, the state is given a wide range of objectives in several programmatic provisions that recognise a vast array of social and cultural rights, such as the right to employment (Art. 58), social security (Art. 63), health (Art. 64), housing (Art. 65) and education (Art. 73). The Portuguese Constitution inaugurated a tradition of 'analytical constitutional texts' that was quickly followed in Spain (1978) and Brazil (1988), which are characterised by the thoroughness of the constitutional provisions and by the inclusion of novel subject matters in the Constitution.[4]

None of the main purposes of the Constitution could be said to have an edge over the others.

1.2 The Amendments of the Constitution in Relation to the European Union

1.2.1 The original version of the text of the 1976 Portuguese Constitution did not mention European integration. Although arguably the majority of the Portuguese political elites were then already pro-European, the correlation of forces was still dominated by Marxist political parties and the military. The latter was able to

[2] Piçarra 1994, p. 55.

[3] All translations of the current version of the Portuguese Constitution are taken from the website of the Portuguese Parliament (available at http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.) (Minor stylistic revisions have been made by the authors). Translations of earlier versions of the Constitution are the sole responsibility of the authors.

[4] Barroso 2006, p. 75.

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impose some ideas that were simply at odds with accession to a political project that pursued the creation of a single market based on liberal fundamental freedoms. The 'transition to socialism' was declared as an objective of the state (Art. 2). A mixed economic model was adopted, which included several provisions inspired by the socialist experiences of the former Eastern socialist bloc, such as the collectivisation of the sectors of production and wealth (e.g. Arts. 9(c) and 80) or the irreversibility of nationalisation carried out after the revolution, said to be 'a conquest of the working class' (Art. 83(2)).

An inconclusive doctrinal debate over the compatibility of the Constitution with the Treaties of Paris and Rome followed. Some argued for the introduction of structural amendments in the Constitution, especially in the economic chapter,[5] while others referred to a constitutional *praxis* that was already compatible with the European project.[6]

The first constitutional amendments were introduced in 1982 also with the purpose of preparing a path for accession to the European Communities. The subsequent six constitutional revision processes were also based, albeit in different degrees of intensity, on the necessity to keep pace with the European integration project. For the sake of simplicity, the constitutional amendments related to European integration are schematically described in Table 1.

1.2.2 Title II of Part IV of the Constitution establishes two amendment procedures: (i) the ordinary, initiated by Parliament at least five years after the publication of the last ordinary constitutional revision law (Art. 284(1)); (ii) the extraordinary, initiated at any moment by a four-fifths majority of the Members of Parliament in exercise of their office (Art. 284(2)). In both cases, constitutional amendments need the approval of a two-thirds majority of the Members of Parliament who cast a vote (Art. 286). Of the seven constitutional revisions, three were extraordinary and motivated by the necessity to introduce amendments related to the ratification of the Maastricht Treaty (1992), the ratification of the Statute of the International Criminal Court (2001) and a referendum on the European Constitutional Treaty (2005).

1.2.3 Since the accession, we can identify three sets of amendments aimed at answering constitutional questions related to the EU.

The first regarded the democratic legitimisation of Portugal's participation in the European integration process, namely through the adoption and continuous update of a provision that delegates the exercise of sovereign powers to the EU (Art. 7(6)) and through several amendments introduced to the legal framework for referendums to allow for a popular consultation on the text of the European treaties (Arts. 115(5) and 296).

The second set of amendments sought to tackle the problem of the so-called European democratic deficit. The intergovernmental nature of decision-making in the Council and the ever-increasing competences delegated to the EU challenged

[5] Fausto de Quadros 1978, p. 12; Pitta e Cunha 1979, p. 79.

[6] Rebelo de Sousa 1981, p. 149.

Table 1 EU related constitutional amendments

Year	Amendments	Purpose
1982	Abolition of the 'Council of the Revolution'	The Council was composed of military officers who were involved in the 1974 revolution. The wide scope of its competences breached democratic principles and could be considered as incompatible with accession to the European Communities[a]
1982	Article 8 (International Law): '3. The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is expressly laid down in the respective constituent treaties.'	Allowed the direct application of the secondary law of the European Communities in the domestic legal order[b]
1982	• Revocation of Art. 50 that stated that 'the collective appropriation of the primary means of production, economic development planning and the democratisation of the institutions are guarantees and conditions for the fulfilment of economic, social and cultural rights and duties' • In Art. 61(1) a reference to the possibility of free private initiative as 'an instrument of the collective progress' is included • Elimination in Art. 80 of the reference to the social and economic organisation of the state being based in the 'development of socialist relations'	These (and other) amendments reflected a deflection from the socialist economic model chosen in the original version of the Constitution. However, most of the structural provisions of that model remained unchanged, namely those related to nationalisation and the collectivisation of the agrarian sector[c]
1989	Article 7 (International relations): '5. Portugal is committed to reinforcing the European identity and to strengthening the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples.'	Proclaimed a firm commitment to European integration[d]
1989	The adverb 'expressly' is deleted from Art. 8(3)	Removed any doubts regarding the direct effect of European Communities' directives[e] In 1989, the Constitutional Court had discussed at length the scope of Art. 8(3) and declared that it only included regulations which, according to the express wording of Treaties, are the only directly applicable EU legal acts[f]
1989	Article 15 (Foreigners, stateless persons): '4. Under reciprocal terms, the law may accord foreigners who reside in Portugal the eligibility to vote for and stand for election as officeholders of local authority organs.'	Strengthened bonds with EU Member States' citizens (and other foreigners) who reside in Portugal[g]

(continued)

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Table 1 (continued)

Year	Amendments	Purpose
1989	• Article 85 (Reprivatisation of property nationalised after 25 April l974) (now with a different version in Art. 293): '1. The reprivatisation of the ownership of the means of production and other nationalised assets after 25 April 1974 can only be made through a framework-law approved by an absolute majority of the Deputies in full exercise of their office.' • Deletion of the reference to nationalisation as one of the objectives of the state (Art. 81(e)) • Amendments introduced in Art. 83 that allowed for the reprivatisation of nationalised companies • Deletion in Art. 288 of the reference to the collective appropriation of the means of production, as a matter with regard to which constitutional amendments are not possible	Following the path initiated in 1982, the economic framework of the Constitution was revised to remove ideological references to socialism and foster the creation of a mixed economy more open to private initiative[h] Of utmost importance for long-term incorporation in a unified European economic space was the revocation of the principle of the irreversibility of nationalisation[i]
1989	References to the European Parliament elections included in Arts. 118(5) (now 115(7)), 136 (b) (now 133(b)) and 136(c)	Technical amendments related to elections and referendum procedures.
1992	Article 7 (International relations): '6. Subject to reciprocity and to respect for the principle of subsidiarity, and with a view to the achievement of economic and social cohesion, Portugal may enter into agreements for the joint exercise of the powers needed to build the European Union.'	Conditioned the delegation of powers to European Union included in the Maastricht Treaty
1992	Article 15 (Foreigners, stateless persons, European citizens): '5. Under reciprocal terms, the law may also accord citizens of European Union Member States who reside in Portugal the eligibility to vote for and stand for election as Members of the European Parliament.'	Anticipated one of the legal outcomes of the European citizenship created by the Maastricht Treaty
1992	Article 105 (Bank of Portugal) (now 102 after further amendments introduced in 1997) 'The Bank of Portugal is the national central bank and performs its functions as laid down by law and in accordance with the international rules by which the Portuguese state is bound.'	Opened the path for the adoption of the European single currency (euro)[j]
1992	• Article 166(f) (now 163(f)) (Responsibilities in relation to other bodies): 'In relation to other bodies, the Assembly of the Republic is responsible for: As laid down by law, to monitor and consider Portugal's participation in the process of constructing the European Union.' • Article 200(1)(i) (now 197(1)(i)) • (Political responsibilities): 'The Council of Ministers shall be responsible for: submitting information concerning the process of constructing the European Union to the Assembly of the Republic.'	Mitigated the European democratic deficit by increasing Parliament's powers to monitor Governmental actions in the EU institutions

(continued)

Table 1 (continued)

Year	Amendments	Purpose
1997	Article 112(9) (now (8)) (Legislation): 'The transposition of European Union legal acts into the internal legal order shall take the form of a law, an executive law, or, in accordance with the provisions of paragraph (4), a regional legislative decree.'	Imposed the requirement of transposition of EU law through legislative acts
1997	Article 115(5) (Referendum): 'The provisions of the previous paragraph do not prejudice the submission to referendum of important issues concerning the national interest that must be the object of an international convention pursuant to Art. 161(i), except when they concern peace or the rectification of borders.'	Allowed referendums on questions related to European integration
1997	• Article 161 'The Assembly of the Republic is responsible for: … (n) to pronounce, as laid down by law, on matters awaiting decision by European Union organs that concern the sphere of its exclusive legislative competence.' • Article 164. 'The Assembly of the Republic has exclusive responsibility to legislate on the following matters: (p) The regime governing the appointment of members of European Union organs, with the exception of the Commission.'	Mitigated the European democratic deficit by providing Parliament with the competence to regulate the appointment of Portuguese nationals to the EU's bodies, as well as by increasing parliamentary influence in the European legislative procedure
1997	• Article 227 (Powers of the autonomous regions) '1. The autonomous regions are territorial bodies that are given the following powers: … (v) on their own initiative, or when consulted by entities that exercise sovereignty, to pronounce on issues that are within the latter's competences and concern the autonomous regions, as well as, in matters that concern their specific interests, on the definition of the Portuguese state's positions within the ambit of the process of constructing the European Union; (x) To participate, when matters that concern them are at stake, in the process of constructing the European Union by means of their representation in the respective regional institutions and in the delegations involved in European Union decision-making processes.'	Mitigated the European democratic deficit by giving a say to the Parliaments of the autonomous regions of Azores and Madeira in the definition of the position of the Portuguese state whenever an issue that concerns matters of their specific interest is being discussed in the EU

(continued)

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Table 1 (continued)

Year	Amendments	Purpose
2001	New version of Art. 7: '6. Subject to reciprocity and to the respect for the principle of subsidiarity, and with a view to the achievement of the economic and social cohesion of an area of freedom and security, Portugal may enter into agreements for the joint exercise of the powers needed to build the European Union.'	Conditioned the delegation of powers to the EU in the area of freedom, security and justice
2001	Article 33 (Deportation, extradition and right of asylum): '5. The provisions of the previous paragraphs do not prejudice the application of the norms governing judicial cooperation in the criminal field that are laid down within the scope of the European Union.'	Incorporated developments of European integration in the area of freedom, security and justice
2004	New version of Art. 7: '6. Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union.'	Conditioned the delegation of powers to the European Union in the area of common external relations, security and defence
2004	Article 8 (International law): '4. The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.'	Adopted a position on the supremacy of EU law vis-à-vis the Constitution
2004	• Article 112 (Legislation) '8. The transposition of European Union legal acts into the internal legal order shall take the form of a law, an executive law, or, in accordance with the provisions of paragraph (4), a regional legislative decree.' • Article 227 (Powers of the autonomous regions). '1. The autonomous regions are territorial bodies corporate and possess the following power: … (x) to participate, when matters that concern them are at stake, in the process of constructing the European Union by means of their representation in European regional institutions and	Allowed the autonomous regions of the Azores and Madeira to transpose EU legislation through regional legislative acts

(continued)

Table 1 (continued)

Year	Amendments	Purpose
	in the delegations involved in European Union decision-making processes, as well as to transpose Union legislation and other legal acts in accordance with Art. 112.'	
2005	Articles 295 (Referendum on European Treaties) 'The provisions of Art. 115(3) do not prejudice the possibility of calling and holding referenda on the approval of treaties concerning the construction and deepening of the European Union.'	Allowed referendums on the text of treaties related to the EU

Source Authors

[a]Vitorino 1984, p. 12.

[b]Miranda 1996, p. 47.

[c]Leitão Marques 1990, p. 3.

[d]Besselink et al. 2014, p. 246.

[e]Marques Guedes and Pereira Coutinho 2006, p. 92.

[f]Case 184/89, 1 February 1989. This and other constitutional judgments are available in Portuguese at the website of the Portuguese Constitutional Court (www.tribunalconstitucional.pt).

[g]Marques Guedes and Pereira Coutinho 2006, p. 92.

[h]Leitão Marques 1990, p. 19.

[i]EU law does not prohibit nationalisation. Article 345 TFEU states that the Treaties shall in no way 'prejudice the rules in Member States governing the system of property ownership'. However, State Aid Treaty provisions (Arts. 107 and 108) are applicable both to the acquisition and management of companies controlled by the state. In Portugal, during the revolutionary year of 1975, crucial economic sectors were nationalised without compensation (foreign capital was excluded), which included banking and insurance (with some exceptions), transport, shipyards, public utilities, media and the petrochemical, iron, steel, fertilizers and cement industries. Since many of the nationalised companies were holdings, the state also became the owner of hundreds of companies in a vast array of sectors, ranging from breweries, restaurants, hotels and even florists and barbershops! This widespread nationalisation was subsequently frozen by the irreversibility clause inserted in the 1976 Constitution (Art. 83 (1)). The combination of these two factors inevitably transformed Portugal during the 1980's into a country with one of the biggest and more comprehensive public sectors among OECD states (Baklanoff 1996, pp. 932–936). The accession to the European Communities in 1986 was perceived as a decisive momentum to liberalise the economy in order to prepare it for the end of the transitional period of incorporation of the *acquis communautaire* (1996) and the establishment of the single market in December 1992 (Braga de Macedo 1990, p. 3). An agreement was thus reached between the main political parties that allowed the unfreezing of the public sector through the repeal of the constitutional principle of the irreversibility of nationalisation in 1989.

[j]Bacelar Gouveia 2011, p. 518.

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the pre-eminence of the national Parliament as 'the house of Democracy'.[7] In 1992 and 1997 provisions were introduced to increase Parliament's powers to monitor and exercise control over Governmental intervention within the European institutions.

The third set of amendments aimed at preventing conflicts between the Portuguese and the European legal orders. Some amendments were rather surgical and did not raise significant legal debates. This was the case for the amendment included in 2001 to allow for the adoption of the European Arrest Warrant (EAW).[8] Moreover, no relevant discussions arose regarding the obligation to transpose directives through legislative acts adopted in 1997 and 2004. This amendment was introduced to remove any doubts about the legal notice of national acts of European origin. Other amendments were more contentious, such as the transformations introduced in Art. 8 in order to prevent conflicts between constitutional law and EU law. Although the Constitution already contained a provision on the domestic incorporation of international law, that provision was specifically revised before Portugal's accession to the European Communities so that it covered secondary law. It was further revised to resolve any doubts regarding the direct effect of directives in 1989 and on the *magna* question of the supremacy of EU law in 2004.

1.2.4 Most of the EU-related amendment proposals or constitutional reforms were enacted. Some, for example the amendment to the referendum procedure to allow for popular consultations on European treaties, were postponed for a while (see below Sect. 1.4.2), but materialised in the end. Recently, there was some discussion over the inclusion of the so-called deficit 'golden rule' adopted by the 'Fiscal Compact' in the Constitution, but no agreement was achieved between the main political parties to reach the necessary two-thirds majority to amend the Constitution (see below Sect. 2.7.1).

Notwithstanding the revision undertaken in 1989, several social and economic provisions of the Constitution are still regarded as in need of amendment to reflect the evolution of European integration. In this context, one constitutional scholar refers to an interpretative reorientation of the constitutional text in conformity with EU law in social and economic matters that could even lead to the 'marginalisation or ignorance of constitutional provisions contrary or barely compatible with certain imperatives that stem from EU law'.[9]

[7] Leading Portuguese scholars in constitutional law refer to these phenomena as a 'legislative evasion that benefits the government' (Miranda 2007, p. 181) and even a 'fraud' (Bacelar Gouveia 2011, p. 528).

[8] Piçarra 2006, pp. 238–239.

[9] Otero 2003, p. 549. Authors' translation of the original text.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Article 7(6) of the Constitution governs the delegation of powers to the European Union by stating:

> Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union.

This provision develops the general commitment, expressed in Art. 7(5), to the reinforcement of the European identity and the strengthening of 'European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples'.

Supremacy and direct effect are indirectly recognised in Art. 8(4) of the Constitution:

> The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.

1.3.2 The Portuguese Constitution follows a traditional notion of absolute sovereignty. Article 3(1) states that 'sovereignty is single and indivisible and lies with the people'. This explains the absence of a clause for the transfer of sovereign powers to the EU. The majority of Portuguese constitutional scholars consider Art. 7(6) as a mere delegation of powers through inter-governmental cooperation.[10] It is as if European integration could be subsumed as 'a mere participation in an inter-governmental process where the powers transferred by the States would be *a priori* clearly defined and subject to consensus decision-making'.[11] Remarkably, it was only on the eve of the ratification of the Maastricht Treaty, when the commitments assumed by the Portuguese state in the European integration process assumed a more pronounced political nature, that a provision regarding the exercise of competences by the EU was included in the Constitution. More recently, some authors have been advocating the need to recognise the EU's claim of being an independent constitutional authority that exercises sovereign powers transferred by the Member States.[12]

[10] Duarte 1994, p. 990.

[11] Poiares Maduro 2009, p. 549.

[12] Guerra Martins 2000, p. 71.

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1.3.3 The delegation of powers to the European Union is limited by satisfaction of the general conditions set forth in Art. 7(6) of the Constitution, which include reciprocity, and respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiary. There are no specific limits to the extent of delegation.

The amendments introduced over the years in Art. 7(6) were aimed at legitimising Portuguese participation in European integration in areas more akin to the exercise of the state's traditional sovereign competences.

1.3.4 Article 8(4) of the Constitution recognises that the legal authority of EU law in the Portuguese legal order must the established according to the parameters laid out by the EU legal order. This recognition is not unconditional, as it must comply with the fundamental principles of a democratic rule of law. In other words, the Portuguese Constitution recognises the primacy of EU law as long as both legal systems are compatible in systemic terms. This compatibility can be found in the mutual respect of the fundamental principles of a democratic rule of law. This means that the recognition of the supremacy of EU law in Art. 8(4) is not a constitutional capitulation, as it is limited by respect of the fundamental values of the Portuguese constitutional order. It is precisely this systemic identification between these two legal orders that will ultimately prevent the existence of any conflicts of normative authority.[13]

The Constitutional Court has declared that the legislative branch is bound to respect the obligations stemming from EU law,[14] but has never accepted the supremacy of EU law over the Constitution. However, it has always shown restraint in reviewing the constitutionality of EU law. The Court seems to follow the generalised perception within Portuguese legal doctrine that the core legal values of the Portuguese Constitution are shared by the EU legal order and, therefore, it is unlikely that an EU legal act will go against the Constitution. This reasoning was clear in a decision from 14 August 2014. The case concerned the review of austerity measures which the Government contended were implemented to comply with binding recommendations of the European Commission adopted in the context of an excessive deficit procedure initiated against Portugal in January 2010. The Constitutional Court declared that the applicable EU law only set objectives to be reached by the Member States, and added that:

> In a multilevel Constitutional system, in which several legal orders interact, internal legal norms cannot breach the Constitution (being that it is for the Constitutional Court, according to the Constitution, to administer justice in constitutional matters).
>
> EU law respects the national identity of the Member States, reflected in the fundamental political structures of each of them [Art. 4(2) TEU]. Moreover, in this case there is no disagreement between EU law and Portuguese constitutional law. The Constitutional

[13] Poiares Maduro and Pereira Coutinho 2007, p. 55.

[14] See Case 141/2015, 25 February 2015, para. 7.

principles of equality, proportionality and the protection of legitimate expectations that have been used by the Constitutional Court to assess the constitutionality of internal norms in matters related to those that are being reviewed are at the core of the rule of law and the common European legal traditions that also bind the EU.[15]

1.4 Democratic Control

1.4.1 Parliamentary control of Governmental participation in the EU's decision-making procedure was marginal until the approval of Law 43/2006 of 25 August 2006 regarding the intervention of the Portuguese Parliament (*Assembleia da República*) within the scope of the process of constructing the European Union. This law, with the amendments introduced in 2012 (Law 21/2012 of 17 May), transformed the Portuguese Parliament into by far the most active Parliament based on the number of opinions sent to the European Commission,[16] especially after the adoption of an 'enhanced scrutiny procedure' in 2010 by the European Affairs Committee (EAC) for what it regards as priority initiatives.[17] The assessment procedure for European legislative initiatives takes a maximum of eight weeks and is better described in the following diagram (Fig. 1).

The EAC receives draft legislative initiatives sent by the European institutions or by the Government. The latter is obliged to keep Parliament informed of any relevant European legislative initiatives and is bound to ask for an opinion whenever such initiatives fall within the scope of Parliament's reserved legislative competence (see Arts. 164 and 165 of the Constitution). The EAC then sends the draft legal acts to the parliamentary standing committees that are competent on the matter and, eventually, to the Legislative Assemblies of the Autonomous Regions, which have to be consulted if the subject matter of the draft legal act falls within their sphere of competence. After the reception of the report made by the parliamentary standing committee(s), the EAC approves a final written opinion. The written opinion, together with the report of the competent committee, is sent by the President of the Parliament to the European institutions and to the Government. If the draft legal act is deemed to breach the principle of subsidiarity or is considered to be politically relevant, the EAC will submit a draft resolution for the approval of the Plenary of Parliament. This procedure is applicable *mutatis mutandis* to the scrutiny of other European initiatives.

[15] Case 575/2014, 15 August 2014, para. 25. Authors' translation of the original text.

[16] See Annex 1 of the European Commission 2013 Annual Report on the relations between the European Commission and the National Parliaments, COM (2014) 507 Final, p. 10. http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/ar_2013_en.pdf.

[17] This procedure is explained in English at: http://www.en.parlamento.pt/EuropeanAffairs/EuropInitiativesScrutiny.html.

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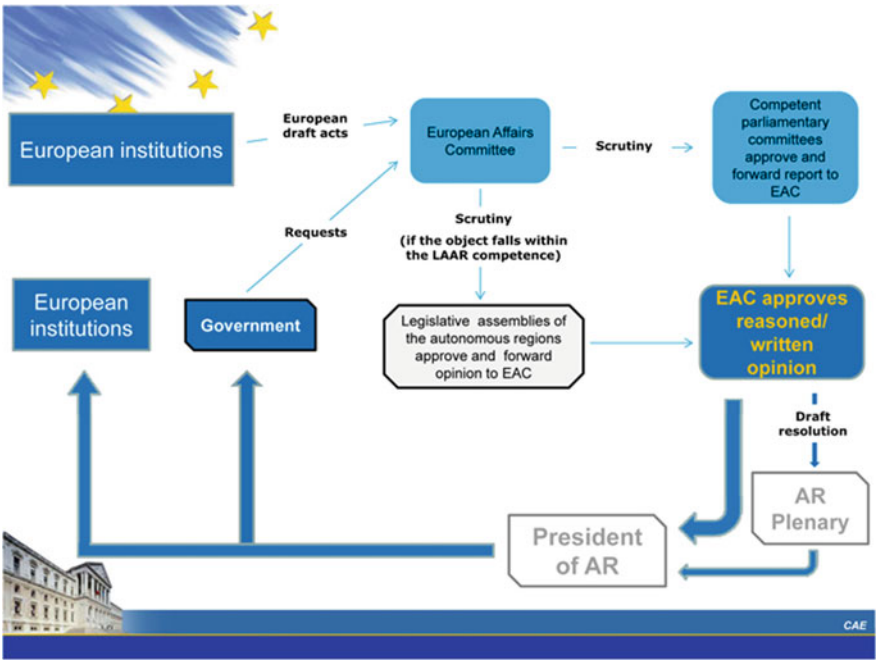

Fig. 1 European legislative initiatives assessment procedure (*Source* European Affairs Committee (http://www.en.parlamento.pt/). Reproduced with the authorisation of the Portuguese Parliament.) The abbreviations refer to the following: AR – Portuguese parliament; EAC – European Affairs Committee; LAAR – Legislative Assemblies of the Autonomous Regions.

Parliament has proven extremely effective in monitoring EU policy documents and proposals for action, but less so in detecting breaches of the principle of subsidiarity. In fact, the number of reasoned opinions on the application of the principle of subsidiarity (Protocol 2 to the EU Treaties) has averaged only one a year, which is below the average of other European parliaments.

1.4.2 Since accession, the idea of calling a referendum on European integration has been discussed but has never materialised. At the time of accession, the Constitution only foresaw local referendums. The 1989 amendments introduced national referendums, but did not allow the people to be called upon to decide on questions included in international treaties. After two failed attempts to amend the Constitution for this purpose in 1992 and in 1994, the possibility of a referendum on matters included in international treaties was introduced in 1997. However, the referendum could not be on the text of the treaty itself. For that reason, two proposals for a referendum on the Amsterdam Treaty (1997) and on the Constitutional Treaty (2004) were both rejected by the Constitutional Court, with

the argument that the questions drafted by Parliament were misleading.[18] To overcome this legal hurdle, in 2005 an extraordinary constitutional revision procedure was initiated to include the possibility of consulting the people directly on the text of a treaty aimed at deepening European integration (Art. 295).[19] Ironically, no vote was called on the Constitutional Treaty because other Member States in the meantime had abandoned its ratification, after popular rejections in France and in the Netherlands in the spring of 2005. Notwithstanding all the efforts to let the people have a direct say on Europe, political constraints determined that in 2008 a referendum was not called in the process of ratification of the Lisbon Treaty. More recently, on 12 June 2012, proposals for a referendum on the 'Fiscal Compact' treaty were also rejected by Parliament; it is likely that this proposal would have been rejected by the Constitutional Court, as the Constitution does not allow for referendums that concern budgetary or financial issues (Art. 115(4)(b)).

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Although the Portuguese constitutional amendment procedure is very rigid – it establishes several formal, material and temporal conditions – the Portuguese constitutional culture is very favourable to the introduction of constitutional amendments as soon as a question of importance for society emerges. This is probably connected to a contentious constitutional history and to the lack of a national consensus on the original text of the 1976 Constitution, which soon became disconnected from the mainstream political choice towards European integration. Amendments were introduced to legitimise this option and to prevent conflicts with EU law.

European integration is a common trend in Portuguese constitutional revision procedures. In 1982 amendments were introduced to pave the way for accession to the European Communities. In 1989, 1992, 2001 and 2004 a systemic revision of the Constitution was implemented in order to prevent the risk of collisions with the EU legal order. These revisions involved the suppression of national provisions that could breach EU law (1989, 1992 and 2004) and a limited recognition of the supremacy of EU law (2004). Finally, the constitutional revisions of 1997 and 2005 were justified by the will to legitimise European integration through a referendum (1997 and 2005) and by the need to include safeguards to guarantee the democratic control of the actions of the Government in the European institutions (1992, 1997 and 2004).

1.5.2 Not applicable (see Sect. 1.5.1).

1.5.3 Over the years, constitutional amendments have been introduced *ex ante* to reflect treaty developments in the EU. For this reason, some argue that Treaty

[18] Case 531/98, 29 July 1998 and Case 704/2004, 17 December 2004.

[19] Proposals with this content were rejected in the 2001 and 2004 revision procedures.

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ratification reflects the only real exercise of constitutional authority in Europe.[20] This position, which is a reminiscence of a classic voluntaristic public international law perspective according to which no effects could emerge from treaties except those expressly foreseen by states, stems from a conception of absolute sovereignty that is still enshrined in Art. 3(1), but contradicts the constitutionalisation process that is ongoing both in the international and European legal sphere. The introduction of Art. 8(4) may have been a turning point. This provision indirectly recognises the autonomy of the European legal order. It was within this novel legal framework that the Constitutional Court mentioned the existence of a 'multilevel constitutional system'[21] and referred to the principle of supremacy as imposing obligations that emerge directly from EU law, as well as from Art. 8(4) of the Constitution.[22] This recognition does not imply a constitutional surrender. The Constitution remains the basic law that defines and protects the core values of the political community and the basic rights and liberties of individuals. This implies that the Constitutional Court is not bound to recognise the supremacy of a supranational legal order in the unlikely event of a breach of those values, rights and liberties.

2 Constitutional Rights, the Rule of Law and EU

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The 1976 Constitution begins with a general introductory part, titled 'Fundamental Principles'. It includes the protection of human dignity and the rule of law and its corollaries or sub-principles: legal certainty, the protection of legitimate expectations and proportionality. Part I opens with a section dedicated to the general principles that belong to the regime governing fundamental rights: the principle of universality (Art. 12), the principle of equality (Art. 13), etc. This part of the Constitution includes an extensive and detailed (perhaps too detailed) catalogue of fundamental rights encompassing rights from the first to the fourth generation (Art. 24 to Art. 79). This catalogue distinguishes between (i) civil rights, freedoms and guarantees (safeguards), (ii) rights, freedoms and guarantees concerning political participation, (iii) workers' rights, freedoms and guarantees and (iv) economic, social and cultural rights. Amongst civil rights, freedoms and guarantees, Arts. 27 to 32 provide extensive and detailed provisions on deprivation of liberty, defence rights and guarantees in criminal proceedings, on the application of criminal law and on limits on sentences and security measures. Such an extensive

[20] Miranda 1996, p. 52.

[21] In Portuguese: '*sistema constitucional multinível*'. See Case 575/2014, 15 August 2014, para. 25.

[22] Case 141/2015, 25 February 2015, para. 7.

and detailed list of rights, freedoms and guarantees for the individual in the criminal justice system is unusual from a point of view of comparative constitutional law.

The dividing line between each of these sets of rights and freedoms is not always very clear, although it is possible to say that each of the sets delimits a field of human activity: personal life, political life and work life.[23]

The so-called 'rights, liberties and guarantees', be they civil, of political participation or, more specifically, of workers, are submitted to a common legal framework (which does not extend to economic, social and cultural rights). This framework is foreseen in Art. 18(1), which states that the 'Constitutional provisions with regard to rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies'.

On that constitutional basis, such rights, freedoms and guarantees, as well as the above-mentioned principles, are generally enforceable in courts, and their enforcement by ordinary courts may be submitted to a final review by the Constitutional Court (see above Sect. 1.1.2).

Furthermore, Art. 21 states that everyone has 'the right to resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression'.

2.1.2 The constitutional provisions stipulating the conditions under which restrictions can be imposed on rights are found in Art. 18(2) and (3). They provide:

> A statute may only restrict rights, freedoms and guarantees in cases expressly provided for in this Constitution, and such restrictions shall be limited to those needed to safeguard other rights and interests protected by this Constitution. … Statutes restricting rights, freedoms and guarantees shall possess an abstract and general nature and shall not have a retroactive effect or reduce the extent and the scope of the essential content of the provisions of this Constitution.

2.1.3 According to Art. 2 of the Constitution, the Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, on plural democratic expression and organisation, on respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers.

Jurisprudence and legal literature conceptualise the rule of law as a structuring constitutional principle encompassing a variety of sub-principles: not only legal certainty, proportionality, non-retroactivity and legitimate expectations, as already mentioned, but also the separation of powers (Art. 111(1)), the independence of judicial power (Art. 203) and access to law and effective judicial protection as established in the detailed Art. 20. The rule of law principle is normally justiciable through its sub-principles. The argument of the violation of, for instance, the

[23] Bacelar Gouveia 2015, p. 127.

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principle of proportionality, contained within the principle of the rule of law in Art. 2 of the Constitution, is frequently invoked by applicants and by ordinary courts exercising judicial review of constitutionality under Art. 204, and naturally by the Constitutional Court, as 'the court with specific responsibility for administering justice in matters of legal and constitutional nature', under Art. 221.

Access to courts and the right to judicial review are foreseen by Art. 20(1), according to which everyone shall be guaranteed access to the law and the courts in order to defend their rights and legitimate interests, and justice shall not be denied to anyone due to a lack of financial means. The same article also states that everyone has the right to secure a ruling in any lawsuit to which he or she is a party, within a reasonable period of time and by means of a fair process (para. 4).

The rule that only published law can be enforced, the rule that any imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute or of a governmental legislative act previously authorised by Parliament, and the rule according to which sanctions cannot be applied either retroactively or by analogy, are also considered as core elements of the rule of law principle (and incorporated e.g. in Art. 103(2) and (3) regarding the tax system).

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 Until the zenith of the financial crisis in Portugal in 2010, which culminated in an international bailout in the first semester of 2011, the balancing of constitutional fundamental rights with economic free movement rights did not raise noteworthy issues. Since then and especially within the framework of the privatisation of relevant public enterprises with their shares made available for acquisition by foreign economic entities, the balancing of the main constitutional goods at stake is becoming more controversial: on the one side, the freedom of establishment – inasmuch as it allows the possibility of transferring the head office of a privatised enterprise to another Member State; on the other side, the fundamental rights of workers, and namely their right to take collective action, which are possibly affected or limited by such transfer. In cases such as the privatisation of TAP Air Portugal (the national airline), these questions were openly discussed.

It has yet to be seen if the national courts will adjust their balancing towards generally favouring workers' rights over economic freedoms to match the approach of the Court of Justice (ECJ).

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 According to Art. 32(2) of the Constitution, '[e]very defendant shall be presumed innocent until a sentence has been pronounced, and shall be brought to trial as quickly as it is compatible with the safeguards of the defence'. We are not aware that such constitutional provision has been invoked in the Portuguese legal literature or in the case law in the context of the European Arrest Warrant (EAW) with a view to raising concerns about a hypothetical weakening or jeopardising effect of the EAW on the principle of the presumption of innocence.

Therefore, a conclusion that such principle can no longer be fully granted the same level of protection as prior to the entry into force of the EAW Framework Decision[24] (EAW FD) cannot be drawn. In the context of the Portuguese experience with the EAW, that conclusion seems indefensible. Furthermore, it presupposes an ideological conception, according to which beyond the framework of the national state the protection of fundamental rights and liberties is always weaker than inside, and therefore such shift represents a loss in terms of the rule of law.[25]

2.3.1.2 In the context of the execution of international conventions on extradition binding on the Portuguese state, national judges must be more 'pro-active' than in the framework of the EAW. As a matter of fact, in the context of extradition they have to observe constitutional provisions that are not applicable to the EAW by virtue of Art. 33(5) of the Constitution. According to the latter, the provisions of the previous paragraphs of Art. 35 (limiting extradition) shall not 'prejudice the application of such rules governing judicial cooperation in the criminal field as may be laid down under the aegis of the European Union', and namely the rules of transposition of the EAW FD.

It follows that cases of refusal of extradition are more frequent than cases of refusal of execution of an EAW. In the former, revision of evidence by the courts is not excluded when the person whose extradition is requested claims his or her innocence.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 Article 29(1) of the Constitution provides that '[n]o one shall be sentenced under the criminal law unless the action or omission in question is punishable under the terms of a pre-existing law, nor shall any person be the object of a security measure unless the prerequisites therefor are laid down by a pre-existing law'.

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[24] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[25] See Tomuschat 2005, p. 455 and also Piçarra 2005, pp. 91–93.

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The fact that the list in Art. 2(2) of the EAW FD includes merely 'types' and not well-defined offences does not jeopardise *eo ipso* the principle *nullum crimen.*[26] As a matter of fact, such types are not directly applicable, and the national criminal law cannot include 'types' but only precisely defined offences, according to the principle of legality, which is very strict in this context. As the ECJ stated in *Advocaten voor de Wereld*:

> … even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.
>
> Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties. [27]

The Portuguese act transposing the EAW FD (Law 65/2003 of 23 August) reproduces the list of the categories of offences set out in Art. 2(2) of the EAW FD, but the Criminal Code defines, in strict conformity with the legality principle, such offences and the penalties applicable.

In any case, it should not be forgotten that the offences included in the EAW FD list, due to their gravity, are inevitably foreseen by the criminal laws of the Member States, and some of them had already been harmonised at EU level before the entry into force of the EAW FD. Furthermore, this legislative harmonisation did not stop after the entry into force of the EAW FD, since its development is crucial in this area, as the TFEU itself recognises in Art. 82(1). According to this provision, 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in para. 2 and in Art. 83'. The latter coincide largely with the offences listed in Art. 2(2) of the EAW FD.

At the level of national case law, the Portuguese Supreme Court of Justice, in a judgment of 4 January 2007, held that the abolition of the double criminality test presupposes that the executing authority verify, in accordance with the principles of trust and mutual recognition, whether the acts underlying the EAW, as qualified by the issuing authority, integrate the 'material domains of criminality' defined in Art.

[26] According to Jegouzo 2005, p. 43, the EAW FD list is inspired by a more criminologist than legal approach and is very similar to the Europol Decision list.

[27] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, paras. 52–53. For a commentary on this decision, see Figueiredo Dias and Caeiro 2013, p. 26.

2(2) of the EAW FD or are rather 'manifestly beyond them'.[28] In the latter cases, where double criminality is effectively absent, it is generally assumed by the national courts that such a situation constitutes a ground for optional and not mandatory non-execution. This solution has given rise to criticism in the legal literature, which generally considers that non-execution is mandatory in such cases.[29]

In any case, a conclusion that the principle of *nullum crimen* can no longer be fully granted the same level of protection as prior to the entry into force of the EAW FD does not seem objectively permissible in this context. The observation made above (Sect. 2.3.1.1) is fully transposable to this context: such conclusion would be mainly ideological and not based on sound evidence.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 According to Art. 32(6) of the Constitution, '[t]he law shall define the cases in which, subject to the safeguarding of the rights of defence, the presence of the defendant or the accused at procedural acts, including trial hearings, may be dispensed with'. It follows that *in absentia* judgments, being exceptional, are not necessarily contrary to the Constitution and to the safeguards for the defence that criminal proceedings must ensure by virtue of Art. 32(1).

Furthermore, that constitutional provision is in accordance with the ECHR jurisprudence according to which the right of the accused to appear in person at the trial is not absolute, and under certain conditions the accused may, of his or her own free will, expressly or tacitly but unequivocally waive this right.

The cases of judgments *in absentia* foreseen by the EAW FD as amended by FD 2009/299/JHA of 26 February 2009, which do not allow the executing authority of a Member State to impose conditions on the execution of an EAW issued by another Member State, are cases of so-called false *in absentia* judgments where:

(i) the person was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision might be handed down if he or she did not appear for the trial;
(ii) the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision might be handed down if he or she did not appear for the trial;
(iii) being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the

[28] Supreme Court of Justice, 4 January 2007, case 06P4707. This and other judgments of the Portuguese higher courts are available in Portuguese at www.dgsi.pt.

[29] See for instance Caeiro and Fidalgo 2009, pp. 261–262. More recently, see Caeiro and Fidalgo 2015, pp. 186–191.

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state, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.

In these cases, the execution of an EAW by a national court does not raise any constitutional issues and does not prompt any revisiting of the established standards of protection.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Beyond standard consular assistance, the Portuguese state does not usually provide assistance to its extradited citizens or residents.

The introduction of a publicly funded state or non-governmental body to provide assistance to residents of Portugal who are involved in trials abroad could make sense, especially in cases where the state in which the trial is held is not governed by the rule of law, or where the death penalty is applicable. The criteria for the intervention of such a body should be very clear in order to limit it to cases where it would be indispensable. In principle, the intervention of such body would be excluded regarding trials in other EU Member States, considering the general safeguards of defence ensured in the framework of their criminal proceedings.

2.3.4.2 We were unable to gather data concerning the number of individuals extradited by Portugal who have subsequently been found innocent.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The move to mutual recognition is not incompatible with the requirements of the rule of law and the right to effective judicial protection, provided that the states among which mutual recognition is put in effect are themselves governed by the rule of law and guarantee the right to effective judicial protection, as are and do in principle the EU Member States.

Contrary to the idea that underlies this questionnaire, a supranational or transnational framework of judicial cooperation in criminal matters does not necessarily imply a loss or a *minus* in terms of the rule of law when compared with the national framework. In the legal framework of the EU, mutual recognition should even be taken as an opportunity to improve the rule of law in the Member States. For instance, if in a Member State there is a deficit in judicial protection, the fact that the Charter of Fundamental Rights of the European Union (Charter) and its Art. 47 ('Right to an effective remedy and to a fair trial'), which are fully justiciable, become applicable in the context of the issuing and execution of an EAW can contribute to improving such deficit at the national level.

Since a right of appeal is an essential element of the right to effective judicial protection (according to Art. 29(1) of the Constitution, the right to appeal is a necessary safeguard for the defence in criminal proceedings), it has to be put in 'practical accordance' (balanced) with the principle of mutual recognition. Although 'the full exercise of the right of defence against the accusation must take place in the courts of the issuing State, because the EAW is based on the principles of judicial cooperation between Member States, mutual recognition of their respective legal systems and trust between the said States',[30] if such defence really does not take place, it is the duty of the executing judge of the other Member State to guarantee that Art. 47 of the Charter is not violated in that case. The same is applicable *mutatis mutandis* to civil and commercial matters.

For all these reasons, the answer to the sacramental question whether a conclusion can be drawn that the principle of effective judicial protection and the rule of law can no longer fully be granted the same level of protection as prior to the introduction of the mutual recognition rule in criminal law and the abolition of the exequatur in civil and commercial matters, is negative.

2.3.5.2 It is a fact that the principle of mutual recognition was an ECJ creation in the framework of the freedom of movement of goods when it was not yet decided whether that freedom of the common market presupposed the general harmonisation of national legislation on the production and commercialisation of goods, or could coexist with different national legislation on those matters. In that context, the principle of mutual recognition rendered a considerable quantity of EU harmonising legislation unnecessary.

It was with the purpose of limiting the legislative competence of the EU that the principle of mutual recognition was extended to the fields of judicial cooperation in criminal and civil matters. However, the material differences between those areas and the internal market have as a consequence that the necessity of approximation of the laws of the Member States is much higher in the former areas than in the latter. While in the internal market mutual recognition can be seen as a real alternative to approximation of the legislation of the Member States, in the areas of judicial cooperation in criminal and civil matters, one of the indispensable conditions for the effectiveness of the principle of mutual recognition of judgments and judicial decisions is that such judgments and decisions are based on harmonised legislation reflecting the same fundamental substantive and procedural principles.[31]

In conclusion, in the areas of judicial cooperation in criminal and civil matters mutual recognition and legislative harmonisation are more closely associated than in other areas. These are the main aspects of the national debate.

[30] Supreme Court of Justice, case 08P1891, 29 May 2008.

[31] Along the same line of thought, see Vitorino and Vasconcelos 2012, p. 542. These authors also observe laconically that the abolition of double criminality 'which is the very essence of mutual trust … may foster a repressive "European criminal space"' (p. 540).

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2.3.5.3 For all the above mentioned reasons, a supposed change in the role of the Member States' courts, from providing judicial protection against unwarranted national measures to becoming actors of loyal co-operation, efficiency and trust as 'EU law courts of ordinary jurisdiction' is, in our view, somewhat of a false dilemma. Mutual recognition does not suppress the fundamental role of every court to protect against illegal measures.

The EAW FD is sufficiently clear on this point. According to its recital 12, nothing in the EAW FD

> may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

Furthermore, according to Art. 1(3), '[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 of the Treaty on European Union'. An evolutionary approach to this provision obliges the interpreter to add the following normative segment: 'and as enshrined in the Charter of Fundamental Rights of the European Union'.[32]

2.3.5.4 Extradition requests for trivial offences should not happen, simply because the relevant conventions generally exclude 'trivial offences' from their scope. The required courts must deny requests for extradition that are not based on the applicable convention, as duly interpreted.

In the context of the EAW, the FD is clear. According to Art. 2(1), '[a] European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'. Such acts are not, in principle, 'trivial offences'.

In our view, recommendations that undermine the essential logic of the EAW should not be supported. On the other hand, concerning the classic institute of extradition, several forms of judicial and political review are foreseen by the applicable conventions aimed at ensuring that there is sufficient evidence that the offence is sufficiently serious and that there is a sufficient link between the offence and the country to which the individual is extradited.

There is no point to call for amendments in the extradition legal framework when the reasonable solutions already flow from this framework.

[32] Therefore, it is simply false to affirm that nowhere in the EAW FD is non-execution of an EAW on the grounds of disrespect for human rights foreseen.

2.4 The EU Data Retention Directive

2.4.1 The Portuguese Constitution protects the privacy of personal life in Art. 26(1), according to which

> [e]veryone shall possess the right to a personal identity, to the development of their personality, to civil capacity, to citizenship, to a good name and reputation, to their likeness, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination.

According to Art. 35(4), '[t]hird-party access to personal data shall be prohibited, save in exceptional cases provided for by the law'. Article 34(1) proclaims that '[p]ersonal homes and the secrecy of correspondence and other means of private communication shall be inviolable', and Art. 32(8) forbids evidence obtained by improper tampering with personal telecommunications. Limits to the privacy of electronic communications may be allowed in criminal cases (Art. 34(4)). Any restriction has to be established by law, which has to be necessary, abstract, general and cannot have retroactive effect or reduce the extent or the scope of the essential content of the constitutional right to privacy (Art. 18(2) and (3)).

Law 32/2008 of 17 July that transposed the EU Data Retention Directive 2006/24[33] is in force. It was never contested prior to the annulment of the directive, and it is unlikely to be challenged based on the rules regarding safeguards for access to and time limits for data retained. Data are preserved for one year and can only be accessed with the permission of a judge (Arts. 6 and 7 of Law 32/2008). This explains why Portugal has only had a few hundred requests for access to data retained compared to millions in the United Kingdom.[34]

Prior to the decision of the ECJ that invalidated the EU Data Retention Directive 2006/24, it was unclear whether the rule on blanket data protection was compatible with the Constitution. In 2010, a decision of the Portuguese Supreme Court of Justice adopted a strong stance against 'fundamental readings' of the right to

[33] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[34] DG Home Affairs, European Commission, Statistics on Requests for data under the Data Retention Directive (October 2013). http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/docs/statistics_on_requests_for_data_under_the_data_retention_directive_en.pdf.

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privacy that could jeopardise the safety of the community.[35] After the *Digital Rights* decision,[36] this position is no longer sustainable.

Law 32/2008 still implements EU law, even if it was originally enacted to transpose an EU legal act that has in the meantime been invalidated.[37] It thus falls within the scope of the Charter (Art. 51). As 'EU law courts of ordinary jurisdiction', Portuguese courts are thus under the obligation to apply the principle of supremacy and trump its application.

Moreover, the Constitutional Court, if called to decide on the constitutionality of Law 32/2008 of 17 July, would be likely to declare the unconstitutionality of the latter, with the argument that automatic blanket retention of data for one year is a mechanism of 'mass surveillance' that involves a disproportionate restriction on the right to privacy (Art. 26(1) of the Constitution), since it allows for the retention of data of citizens who are not involved in any criminal activity (Art. 34(4) of the Constitution). Such a decision would follow its case law that recognises the existence of a 'multilevel' system of protection of fundamental rights,[38] but it could have the effect of reopening criminal cases that have been decided based on access to data retained under Law 32/2008.

2.5 Unpublished or Secret Legislation

2.5.1 We are unaware of any cases concerning the constitutionality of unpublished or secret measures. Article 119(2) of the Constitution establishes that unpublished

[35] The Portuguese Supreme Court of Justice, in case 886/07.8PSLSB, 3 March 2010, held that Art. 34(4) of the Constitution incorporates other interests and values that also have to be protected. The Court declared that a 'fundamentalist reading of personal rights could leave the community unarmed vis-à-vis the demands of the fight against ever more organised and efficient criminals'. (Translation by the authors).

[36] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[37] See Art. 15(1) of Directive 2002/58/EC Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (E-privacy Directive), [2002] OJ L 201/37, which states that Member States may restrict the rights relating to the confidentiality of communications, location and other traffic data and caller identification 'when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. state security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Art. 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Art. 6(1) and (2) of the TEU'.

[38] On this topic, see Guerra Martins and Prata Roque 2014.

legal acts 'do not have legal force'. This means that they are valid but cannot produce any effects on individuals.[39]

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 Until the recent economic and financial crisis, issues regarding constitutional standards of protection of property rights, legal certainty, legitimate expectations, non-retroactivity and proportionality had arisen rarely in practice in relation to EU measures on market regulation (some cases regarding constitutional non-retroactivity of tax law in the case of an EU legislative corrigendum are summarised below 2.8.1).

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Capital calls that could be requested from Portugal under the Treaty Establishing the European Stability Mechanism (ESM Treaty) amount to a maximum of 17,564,400,000 EUR,[40] or approximately 10% of the annual GDP (at market prices) and 9% of the annual state budget (2013).[41] Notwithstanding these impressive figures, in the parliamentary commission reports we found no reference to specific constitutional problems related to this financial commitment of the Portuguese state under the ESM Treaty.[42]

Constitutional arguments were discussed during the ratification of the Fiscal Compact Treaty.[43] There were some discussions on the inclusion in the

[39] See Lopes Luís 2013, p. 311.

[40] Opinion of 10 April 2012 of the Commission on European Issues of the Portuguese Parliament, Resolution Proposal 28/XII, *Diário da Assembleia da República* 2012 II (159: 86, footnote 4).

[41] Data from the European Central Bank. http://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=119.ESA.A.PT.N.0000.B1QG00.1000.TTTT.V.U.A and http://www.pordata.pt/Portugal/Despesas+do+Estado+orcamento+final-.

[42] See Opinion of 10 April 2012 of the Commission on European Issues, Resolution Proposal 28/XII, *Diário da Assembleia da República* 2012 II (159: 85–88) and Opinion of 28 March 2012 of the Commission on Budgetary Issues, Resolution Proposal 28/XII, *Diário da Assembleia da República* 2012 II (159: 88–91).

[43] The Portuguese constitutional scholar Jorge Miranda declared to the press that this Treaty should have been reviewed by the Constitutional Court prior to its ratification. See Valente, L. (2014, November 4) *Assessor do PR defende revisão constitucional para incluir 'estado de necessidade financeira'* (Advisor of the President of the Republic advocates a constitutional revision process to recognize a 'financial state of emergency'). O Observador. http://observador.pt/2014/11/04/assessor-do-pr-defende-revisao-constitucional-para-incluir-estado-de-necessidade-financeira/.

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Constitution of annual limits to the public deficit and debt. Parliament decided to include such limits, but only in the 'budget framework law' (Law 91/2001 of August 20), which is an act that has a parametric nature in relation to ordinary laws (Art. 112(3)). Some concerns were also articulated regarding the powers at the disposal of the European Commission to determine substantive public policies in Member States that are experiencing budgetary and debt problems. A Member of Parliament declared that these powers breached the principle of national sovereignty, the principle of popular sovereignty, the principle of democracy and the principle of budgetary sovereignty.[44]

2.7.2 With a crumbling banking sector and a chronic public debt, there is a wide agreement in Portugal in favour of Eurobonds and of a stronger Banking Union as quickly as possible. No relevant discussions have arisen with regard to potential constitutional problems related to exposure to other countries' debt or banking failures.

2.7.3 The Portuguese Constitutional Court emerged during the financial crisis as a key protagonist in the political system when it had to address the compatibility with the Constitution of legislative acts that established increases in taxes and reductions of expenditures that included drastic cuts in the wages of public servants and in several social benefits, including pensions.

Austerity measures were enacted between mid-2010 and May 2011 to avoid an international bailout, between May 2011 and May 2014 to reflect the requirements of the Financial Assistance Programme set forth in several memoranda of understanding imposed by the European Commission, the European Central Bank and the International Monetary Fund (the so-called Troika), and have been enacted since May 2014 to comply with the Commission's recommendations adopted in the context of an excessive deficit procedure initiated against Portugal in January 2010.[45] Table 2 portrays all of the high profile decisions taken by the Constitutional Court during this period.

The Portuguese Constitutional Court cannot be identified as a sort of 'Don Quixote' fighting the windmills of austerity. Such an image would be completely at odds with the fact that from the outset of the crisis, the Court made every effort to

[44] Opinion of Member of Parliament João Galamba, Opinion of 4 April 2012, Commission on Budgetary Issues, Resolution Proposal 30/XII, *Diário da Assembleia da República* 2012 II (159: 98).

[45] Contrarily to what happened in Ireland and Spain, a failure of the Portuguese banking system was not the key factor leading to the international bailout, although a bank recapitalisation fund was contemplated in the bailout agreement. In fact, the Portuguese banks did not use all the money that was reserved to them under that programme. At the heart of the problem was a mounting public external debt. The latter was created by unsustainable public deficits and chronic profligacy, coupled with a large stock of private debt. The increase in public external debt led in turn to large deficits in the current account. The deteriorating macroeconomic situation of Portugal and the repeated warnings by rating agencies, followed by an effective decrease in the credit rating of the country, concerned private and institutional investors, thereby putting pressure on the public debt bonds, which caused an increase in yields to a point where Portugal was virtually kept out of the capital markets.

Table 2 'Austerity case law' of the Portuguese Constitutional Court

Case	Date	Ruling
399/2010	27.10.2010	Accepted inauthentic retroactivity of personal income tax increases (7-3[2])[a]
396/2011	21.9.2011	Accepted transitory cuts of public servants' wages included in the Budget Act for 2011 (9-3)
353/2012	5.7.2012	• Rejected the suspension of two months of salary/allowances for public servants and pensioners ('holiday and Christmas allowances') included in the Budget Act of 2012 based on violation of the principle of equality (Art. 13 of the Constitution)[b] (10-3); • Limited the effects of the declaration of unconstitutionality and allowed cuts to continue until the end of the tax year (10-3)
187/2013	5.4.2013	• Rejected the suspension of one month's salary/allowance for public servants and pensioners ('holiday allowance') included in the Budget Act for 2013 based on violation of the principle of equality (Art. 13 of the Constitution) (7-5[1]); • Rejected cuts in unemployment and health benefits because they were not progressive and, therefore, breached the principle of proportionality enshrined in the principle of the rule of law (Art. 2 of the Constitution) and the constitutional safeguard to a 'decent human existence' (11-2); • Accepted transitory cuts in public servants' wages (10-3), cuts in overtime work (13-0), temporary cuts in pensions (7-5[1]), a reduction of tax brackets (10-0[3]), the adoption of a solidarity tax (10-0[3]), the elimination of several health, education and house deductions from personal income tax (10-0[3]) and the adoption of a tax surcharge (13-0)
474/2013	29.8.2013	• Rejected the adoption of new grounds for the dismissal of public servants under contract, as this breached the constitutional protection of job security and the prohibition of dismissal without fair cause (Art. 53 of the Constitution), as well as failed the proportionality test for a restriction of a fundamental right (Arts. 18 (2) of the Constitution) (6-1); • Rejected the adoption of new grounds of dismissal for public servants under nomination, since this breached their legitimate expectations protected by the principle of the rule of law (Art. 2 of the Constitution) (7-0)
602/2013	20.9.2013	• Rejected changes in the conditions of dismissal of private sector workers grounded on the extinction of the work post (10-3) and on worker inadequacy for the work post (13-0) because they breached the constitutional protection of job security and the prohibition of dismissal without fair cause (Art. 53 of the Constitution); • Rejected the nullity of collective agreements and work contracts that foresaw compensatory rest for supplementary work (7-6) and established the reduction of increases in holidays to a maximum of three days (9-4) because they breached the right to enter into collective agreements (Art. 53 (3) and (4) of the Constitution) and failed the proportionality test for a restriction of a fundamental right (Art. 18 (2) of the Constitution); • Upheld other measures, such as the introduction of individual (13-0) and collective 'bank hours' (7-6), the elimination of compensatory rest and the reduction of payment for extraordinary work (13-0), the elimination of several bank holidays (13-0), the revocation of holidays increased based on the worker's assiduity (13-0), the elimination of a requisite for dismissal based on worker inadequacy for the work post (13-0), new grounds for dismissal based on worker inadequacy for the work post (8-5), the nullity of collective agreements that foresaw higher compensation for the dismissal of workers (9-4) and a two-year suspension of retributions granted for supplementary work and for work on holidays (or the equivalent compensatory rest) included in collective agreements and work contracts (11-2);

(continued)

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Table 2 (continued)

Case	Date	Ruling
		• Rejected a permanent reduction of retributions granted for supplementary work and work on holidays (or the equivalent compensatory rest) included in collective agreements and work contracts because it breached the right to enter into collective agreements (Art. 53 (3) and (4) of the Constitution) and failed the proportionality test for a restriction of a fundamental right (Art. 18 (2) of the Constitution) (8-5)
794/2013	21.11.2013	Upheld the constitutionality of rules that increased the daily work of public servants from 7 to 8 hours and from 35 to 40 hours a week (7-0[6]).
862/2013	19.12.2013	Rejected permanent cuts in the pensions of former public servants since this breached the principle of the protection of legitimate expectations (13-0)
413/2014	30.5.2014	• Rejected cuts in public servants' wages included in the Budget Act for 2014 based on violation of the principle of equality (Art. 13 of the Constitution) (8-3 [2]); limited the effects of the declaration of unconstitutionality by safeguarding cuts made until the date of the decision of the Court (9-4); • Rejected cuts included in the Budget Act for 2014 to unemployment and sickness benefits based on violation of the principle of proportionality enshrined in the principle of the rule of law (Art. 2 of the Constitution) (8-5); • Rejected cuts in survival pensions included in the Budget Act for 2014 based on violation of the principle of equality (Art. 13 of the Constitution) (7-6); • Upheld the suspension of the payment of pension supplements in public sector companies that had negative liquid results during three consecutive years (7-6)
572/2014	30.7.2014	• Accepted the applicability of pension cuts in 2014 (7-6); • Upheld the increase of contributions to the health public insurance system included in the Budget Act for 2014 (12-1);
574/2014	14.9.2014	• Accepted cuts in public servants' wages during 2014 and 2015 in the percentages set in the Budget Act for 2011 (10-2[1]); • Rejected cuts in public servants' wages planned for 2016, 2017 and 2018 based on violation of the principle of equality (Art. 13 of the Constitution) (8-5)
575/2014	14.9.2014	Rejected cuts in pensions to be applied from 2015 onwards based on violation of the principle of the protection of the legitimate expectations of pensioners protected by the principle of the rule of law (Art. 2 of the Constitution) (10-3)
141/2015	25.2.2015	Rejected the conditioning of the grant of a social benefit on a one-year minimum legal residence in the Portuguese territory because it breached the principle of equality (Art. 13 of the Constitution) (10-2)

Source Authors

[a]Judges who concurred (in this case seven) and dissented (in this case three). In square brackets, judges who dissented partially (in this case two). According to Article 222 of the Constitution, the Constitutional Court has thirteen judges. Some of the decisions were decided with a lower number of judges.

[b]These measures were unsuccessfully challenged before the ECtHR in *Da Conceição Mateus v. Portugal*, nos. 62235/12 and 57725/12, 8 October 2013 and the ECJ in Case C-128/12 *Sindicato dos Bancários do Norte and Others v. BPN* [2013] ECLI:EU:C:2013:149, in Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial* [2014] ECLI:EU:C:2014:2036; and in Case C-566/13 *Jorge Ítalo Assis dos Santos v. Banco de Portugal* [2014] ECLI:EU:C:2014:209 (removed from the register by an order of the President of the Court of 25 March 2014).

internalise the European and international obligations of the Portuguese state.[46] In case 396/2011, the Court declared that the austerity measures were important to enforce the Growth and Stability Pact obligations, in case 353/2012 the Court recognised (wrongly) that the memoranda signed by the Portuguese Government with international and European institutions were legally binding to the extent that they were based on international law and EU law instruments, and in case 602/2013 the Court went through a detailed examination of how the provisions under review were a result of a direct transposition of the memoranda into national law. More recently, in case 575/2014, although any declaration on the legal nature of the European Commission's recommendations adopted in the context of the excessive deficit procedure was avoided, the Court considered that the objective set forth in the recommendations was binding (see above Sect. 1.3.4).

The Constitutional Court has always made the caveat that the austerity measures adopted during the international bailout to comply with the conditionality programmes imposed by the Troika were approved within the limits of the discretion given by international and European Union law. In other words, they were a direct result of a political option and, therefore, had to be reviewed according to the usual constitutional standards of adjudication. In this context, the Court rejected the adoption of a 'crisis law' criterion that would imply accepting the argument of the financial emergency of the state as a justification for austerity measures.[47] Instead it went through a case-by-case analysis of each measure, which determined the acceptance of some (mostly transitory) and the rejection of others because they breached the principle of equality, failed the proportionality test or did not meet legitimate expectations. This case law, which in several decisions was adopted with a slim majority inside the Court, was praised by some authors[48] but contested by others who accused the Court of inconsistency and of engaging in judicial activism.[49]

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 We found three cases since 2001 in which a preliminary ruling regarding the validity of an EU law act was requested by an applicant in a Portuguese court, but only in one was a preliminary reference sent to Luxembourg.

[46] Joerges 2014, p. 44, identifies a 'signal' of judicial opposition against the European crisis management in the Portuguese Constitutional Court case law, although he recognises that it is a rather weak signal since the implementation of austerity measures was objected to on the basis of violation of the principles of proportionality and equality.

[47] Urbano 2014, pp. 14–15.

[48] The most notable example being Reis Novais 2014a.

[49] See the contributions included in Almeida Ribeiro and Pereira Coutinho 2014.

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The first two were identical and concerned a corrigendum to Council Regulation (EC) 1771/2003 of 7 October 2003 regarding quotas for certain fishery products.[50] The corrigendum was published on 31 March 2004 and clarified that the quotas were applicable from the date of the entry into force of the regulation (13 October 2003) and not from the beginning of 2003, as it was stated in the original version of the regulation. The applicant in the national proceedings argued that the corrigendum had a retroactive effect and thus materially should be considered as an amendment and not a correction to the regulation. The corrigendum was thus deemed invalid by the national court, as it had not followed the EU legislative procedure, namely voting by qualified majority in the Council, and could not be considered as an EU legal act, since it was not foreseen in Art. 288 TFEU.[51]

The Portuguese administrative court of appeal refused to apply the corrigendum based on a violation of the constitutional principle of the non-retroactivity of tax law (Art. 103(3) of the Constitution). These are, as far as we know, the first decisions on the unconstitutionality of an EU law act adopted in the Portuguese legal order. According to the Court:

> the (EU) law provisions in question breach … the constitutional principle of non-retroactivity of tax law … Art. 204 of the Constitution grants a national judge the competence to judicially raise and declare the unconstitutionality and, therefore, the internal inapplicability of the (EU) law provision.[52]

These decisions are also noteworthy because the Portuguese court went on to declare in an *obiter dictum* that the corrigendum was invalid but a preliminary reference was not mandatory: according to the '*acte clair* doctrine' set forth in *Cilfit*, the grounds of invalidity argued by the applicant were said to be in these cases 'completely clear'.[53]

In the third case, the respondent in the national proceedings invoked several infringements of Art. 107 TFEU to argue for the invalidity of the Commission Decision 2011/346/EU of 20 July 2010 on the State aid C 33/09, which was implemented by Portugal in the form of a state guarantee to a bank. This claim was dismissed by the ECJ.[54]

2.8.2 A systematic contrast in the standard of judicial review applied by the EU courts and by the Portuguese courts has not been generally perceptible until now. However, we should be aware of the possibility of a more serious and systematic

[50] Corrigendum to Council Regulation (EC) No 1771/2003 of 7 October 2003 amending Regulation (EC) No 2803/2000 as regards the opening and increase of autonomous Community tariff quotas for certain fishery products, [2004] OJ L 258/69.

[51] Administrative Appeal Court (South), 22 May 2007, case 01685/07, and 8 July 2008, case 2296/08.

[52] Translation by the authors.

[53] See, however, Case C-461/03 *Gaston Schul* [2005] ECR I-10513, para. 23, where the ECJ declared that the interpretation adopted in the *Cilfit* judgment refers to questions of interpretation and thus cannot be extended to questions relating to the validity of EU acts.

[54] See Case C-667/13 *Banco Privado Português and Massa Insolvente do Banco Privado Português* [2014] ECLI:EU:C:2015:151, para. 17.

contrast between the case law of the ECJ and that of the European Court of Human Rights (ECtHR), with unavoidable repercussions on the scrutiny powers of the national courts. The most recent example is the judgment of the ECtHR, *Tarakhel v. Switzerland*,[55] of 4 November 2014, concerning the enforcement of the Dublin III regulation, which contrasts, to some extent, with the judgment of the ECJ in *N.S. and Others*.[56,57]

For its part, Opinion 2/13 of 18 December 2014 of the ECJ,[58] having seriously obstructed the accession of the EU to the ECHR, does not contribute to the solution of this problem. As it is well known, EU Member States are all Contracting Parties to the ECHR and in that quality they are bound by the latter, even when they enforce EU law. Furthermore, according to Art. 2 of Protocol No 8 relating to Art. 6(2) of the TEU on the accession of the Union to the ECHR, the agreement relating to this accession 'shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto'.

It is to be seen if the above-mentioned divergences are sufficient to make a case for a stricter standard of judicial review of EU measures.

2.8.3 The Constitutional Court and the two Portuguese Supreme Courts (Supreme Court of Justice and Supreme Administrative Court) take in general a more deferential than vigorous approach to the review of constitutionality and of legality, oriented by a conception of self-restraint imposed by the principle of the separation of powers. The idea is that such courts do not want to become alternative legislators or administrators when exercising their judicial review.

This does not mean that a considerable number of legislative and executive acts are not annulled not only on grounds of lack of competence or infringement of formal or procedural requirements,[59] but also due to infringement of substantive constitutional law (fundamental rights and principles). Some of the judgments referred to above in Sect. 2.7.3 (Table 2) are good examples of annulment judgments of the Constitutional Court on grounds of the violation of the fundamental principles of equality, proportionality and the protection of legitimate expectations, as concretised by a previous, consolidated jurisprudence, which did not change substantially in those judgments (notwithstanding some occasional and limited adaptations). They also show that it is not correct to affirm in general terms that the Constitutional Court became significantly more vigorous in its approach during the economic and financial crisis and that it built upon the principles and tests developed before the crisis. It was rather the legislator, urged by the Memorandum of Understanding signed with the Troika, that revealed a controversial political will to

[55] *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

[56] Joined cases C-411/10 and 493/11 *N.S. and Others* [2011] ECR I-13905.

[57] Maiani 2015.

[58] Opinion 2/13 *Opinion pursuant to Art. 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

[59] When the courts annul a measure on grounds of lack of competence or of an infringement of formal or procedural requirements, they normally do not review the measure on the grounds of an infringement of substantial law, even if such infringement is invoked by the parties.

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go even 'beyond the (bailout) agreement'.[60] This voluntary stance led to the adoption of a considerable number of austerity measures, including of budgetary nature (e.g. cuts in public servants' wages, suspension of two months' salary for public servants and pensioners, cuts in unemployment and health benefits) in contradiction with the above-mentioned constitutional principles, in their previously stabilised interpretation, on an unprecedented scale.

2.8.4 On several occasions the Constitutional Court and the two Supreme Courts have reviewed national measures implementing EU legislation through the application of internal constitutional and legal standards. Concerning EU measures, such courts have so far not expressly adopted a position similar to the German Constitutional Court's *Solange II*[61] judgment. However, Art. 7(6) of the Constitution – in so far as it subjects 'the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union' to 'respect for the fundamental principles of a democratic state based on the rule of law' – creates a basis for a claim by the Constitutional Court of the competence to review, as a last resort, EU measures on grounds of inconsistency with one of those fundamental principles, in the not very likely case of failure to safeguard such principles at the EU level.

2.8.5 Article 2 TEU, in so far as it enumerates the list of common fundamental values and principles binding on the EU and also the Member States, allows, in principle, the Member States to fill any potential gap in judicial review. However, if the contrast between the case law of the ECJ and the case law of the ECtHR becomes aggravated, the national courts cannot continue to refrain from scrutinising acts of EU law from the perspective of their compatibility with the ECHR. As a matter of fact, Member States fully maintain their quality of Contracting Parties in that Convention in the sense that their obligations are not reduced or suspended because of EU membership. Moreover, with or without accession to the ECHR by the EU, the fundamental rights guaranteed by the ECHR are general principles of EU law. From this point of view, the use by national courts of the standard of human rights protection under the ECHR to scrutinise EU measures and not the standard used by the EU itself would not be problematic vis-à-vis the principle of sincere cooperation enshrined in Art. 4(3) TEU, even if through this kind of scrutiny the primacy, unity and effectiveness of EU law could eventually be compromised (see below Sect. 2.11.1).

Furthermore, in circumstances of a growing contrast between the case law of the ECJ and of the ECtHR, the latter might be led to re-examine its *Bosphorus*[62] judgment.

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[60] Pedro Passos Coelho – the Portuguese Prime Minister from 2011–2015 – in an interview to Reuters given after he had won the parliamentary elections held in May 2011. http://uk.reuters.com/article/2011/06/06/uk-portugal-election-idUKTRE7532MA20110606.

[61] 19 BVerfGE 73, 339 [1986] (Solange II).

[62] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

2.8.6 The broader issue of equal treatment of individuals falling within the scope of EU law and those falling within the scope of domestic protection of constitutional rights is a permanent question which did not have to wait for the *Advocaten voor the Wereld* case to arise. This issue is very present for instance in respect to reverse discrimination or discrimination against a Member State's own nationals who have not exercised their rights of free movement.

In our view, this ECJ judgment demonstrates sufficiently that the risk of discrimination within the scope of the EAW FD in what concerns the *nulla poena sine lege* principle is very low. In any case, the courts of the Member States in question have an important role to play in preventing such discrimination (see above Sect. 2.3.2).

2.9 Other Constitutional Rights and Principles

2.9.1 Article 165 of the Constitution describes the list of matters of exclusive legislative competence of the Portuguese Parliament. However, from Art. 165(1)(c) and (d) we can conclude that, subject to previous authorisation by Parliament,[63] the Government may legislate, through an executive law (*Decreto-Lei*), on the definition of crimes, sentences, security measures, criminal procedure, disciplinary infractions and administrative offences. This dichotomy between 'exclusive responsibility of Parliament to legislate' (*reserva absoluta de competência legislativa*) and 'partially exclusive responsibility of Parliament to legislate' (*reserva relativa de competência legislativa*) applies generally and was established in the Constitution before the accession of Portugal to the EU. These provisions must be read in conjunction with Art. 112(8) of the Constitution according to which 'the transposition of European Union legislation and other legal acts into the internal legal system shall take the form of a law (*lei*), an executive law (*decreto-lei)*, or … a regional legislative decree' (see above Table 1, 1997).

2.10 Common Constitutional Traditions

2.10.1 Article 2 TEU in conjunction with the ECHR encompasses the so-called Europe-wide common constitutional traditions. Principles like *nullum crimen, nulla poena sine lege*, the right to judicial protection, the right to a fair trial, etc., should be regarded as corollaries of the principle of the rule of law and, to that extent, also as common constitutional traditions.

[63] According to Art. 165(2), every act of the Portuguese Parliament granting authorisation to the Government to legislate 'shall define the object, purpose, extent and duration of such authorisation, which may be extended'.

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Some of these common traditions coexist with idiosyncratic elements resulting from a national constitutional identity or simply from the national history, as is the case, for instance, with the requirements for the protection of the dignity of the human person consecrated in the *Bonner Grundgesetz*. This was already recognised by the ECJ in the *Omega* judgment.[64]

2.10.2 It should not be forgotten that the concept of 'common constitutional traditions' was adopted by the ECJ at a moment when the then European Communities were not bound by a catalogue of fundamental rights of their own. Since nowadays the EU is bound by Art. 2 and Art. 6 TEU and by the Charter of Fundamental Rights, which are largely based on the common constitutional traditions of the Member States, the latter tend to be absorbed by the former. Therefore, we do not see much merit in the proposition that national courts refer to national constitutions before questioning the ECJ in the framework of the preliminary ruling procedure, except in cases in which the fundamental right or principle invoked has an idiosyncratic element which is deemed to be essential to the constitutional identity of the Member State in question.

In any case, the Charter, for its part, foresees in broader terms in Art. 52(4) that in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, these rights shall be interpreted in harmony with those traditions. This provision is obviously mandatory for the ECJ.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 According to Art. 52(3) of the Charter, in so far as the Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision does not prevent EU law from providing more extensive protection. It also does not preclude the existence of cases in which the standard is increased to match that provided under national constitutions. This is expressly allowed by Art. 53 of the Charter, although such authorisation cannot be interpreted as absolute or unlimited.[65]

As the ECJ stated in the *Melloni* judgment, the application of national standards of protection of fundamental rights is allowed at the stage of implementing EU law, provided that the level of protection granted by the Charter, as interpreted by the said Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[66] This judgment confirms that Art. 53, *in fine*, must be balanced with

[64] Case C-36/02 *Omega* [2004] ECR I-09609.

[65] See Canotilho 2013.

[66] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para. 60.

the fundamental principles of the EU legal order, namely those enumerated by the ECJ in *Melloni*.[67] However, this is not incompatible with a presumption (*juris tantum*) in favour of a 'more extensive protection' allowed, but not imposed, by Art. 53 of the Charter.

In any case, it should not be forgotten that the highest protection ensured by EU law may be the protection established by the Charter, by the ECHR or by national constitutions, as there may be 'differences between the legally relevant levels of protection that derive both from the texts and from their interpretation/practical application, done by the different judicial organs of the different levels of the system'.[68] In that context, it becomes clear that the ECHR, as interpreted by the ECtHR, does not necessarily provide a 'minimum floor' of protection of fundamental rights and that the Charter and national constitutions do not always provide a higher level of protection. If a right recognised by the ECHR, as interpreted by the ECtHR, which corresponds to a right guaranteed by the Charter, provides more extensive protection than the latter, the national courts, when they are implementing Union law, must enforce the right as interpreted by the ECHR. As a matter of fact, Art. 52(3) of the Charter does not prevent courts from providing more extensive protection than the ECHR, but prohibits such courts from providing less protection than the latter.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 At the time of the national transposition of the EAW FD and of the Data Retention Directive there was a mild debate in the national Parliament concerning the conformity of the transposition acts with the fundamental rights granted by the Portuguese Constitution. In both cases, a parliamentary majority considered that these legislative acts were not incompatible with the Constitution.

2.12.2 The fact that a national Constitutional Court is confronted with 'important constitutional issues' 'at the stage of implementing EU law' obviously does not preclude the exercise of judicial review of the national measures at stake, eventually in dialogue with the ECJ. If the measures are of EU origin, their validity must be challenged before the ECJ through a request for a preliminary ruling. In parallel with this multilevel judicial review, the democratic debate about national measures implementing the contested EU law may proceed at national level.

2.12.3 If the cases in which important constitutional issues have been identified by a number of constitutional courts concern EU measures directly, those constitutional courts must request the ECJ to give a preliminary ruling on their validity and seize

[67] See Wathelet 2014, p. 444.

[68] In that sense, see Silveira, Froufe and Canotilho, p. 742.

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the opportunity to explain in detail why they think such EU measures should be invalidated. If the cases in which such important constitutional issues concern national measures implementing EU law, the constitutional courts are usually competent to review such national measures.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 We share concerns on the reduction in the standard of protection and in the rule of law in some domains where rights arise directly from EU law, such as in immigration and asylum (see above Sect. 2.8.2). However, we do not consider it accurate to declare that an overall reduction in the standard of protection of national constitutional rights in the context of or due to EU law has occurred.

That is in principle not the case with regard to the so-called 'personal rights, freedoms and guarantees' enumerated in Arts. 24 to 47 of the Constitution, nor with regard to the 'rights, freedoms and guarantees' concerning participation in politics established in Arts. 48 to 52 (see above Sect. 2.1.1). The same cannot be said about the 'workers' rights, freedoms and guarantees' (Arts. 53 to 57) and the 'economic, social and cultural rights' (Arts. 58 to 79). The 2011 Memorandum of Understanding signed with the Commission – which may be considered binding EU law[69] – had indeed as its object or effect a reduction in the standard of protection of some of such rights, freedoms and guarantees (see infra Sect. 3.5.1).

In any case, it should not be forgotten, on the one hand, that some of the national legislative and executive measures implementing the Memorandum were rejected by the Constitutional Court, such as, for instance, a legislative act foreseeing the dismissal of workers without fair cause, in flagrant contradiction with Art. 53 (which expressly prohibits such dismissal to protect job security; see above Table 2). On the other hand, it should be borne in mind that the implementation and enforcement of economic, social and cultural rights is made under the so-called 'reserve of the possible', i.e. under the constraints of the financial and material resources of the state

[69] According to Pereira Coutinho 2013a, p. 166, the Memorandum (and its subsequent supplements) is an atypical act of EU law that specifies measures that condition the release of instalments of a bailout authorised and structured by Council Implementing Decisions (e.g. 334/2011, of 17 of May) adopted under the scope of a regulation (407/2010, of 11 of May) that created an emergency mechanism for the financial rescue of eurozone Member States (the European Financial Stabilization Mechanism). Its binding nature for the Portuguese state is especially connected to compliance with budgetary consolidation obligations stemming from Art. 126 TFEU on the excessive deficit procedure. A Council recommendation (566/2012, of 2 of October) mentions the need to fulfil measures foreseen in the memorandum in order to put an end to the situation of excessive deficit (Recital 18). The breach of these measures may determine, as a last resort, the imposition of sanctions foreseen in Art. 126 (11) TFEU. On the binding legal nature of the Memorandum see also Kilpatrick 2014, pp. 411–412.

or under a 'certain empirical situation'.[70] Furthermore, the constitutional case law concerning such rights, freedoms and guarantees has always been cautious, contained and 'condescending regarding the margins of political option of the legislator'.[71] Neither does such case law interpret the Constitution as establishing a general principle of prohibition of 'social retrocession' i.e. of reversibility of the economic, social and cultural rights, freedoms and guarantees, except when the object or the effect of the measure is to jeopardise the essential core of a minimal existence which is inherent to the respect for the dignity of the human person.[72]

2.13.2 Some specific reductions are not inevitable, as the case law of the ECtHR has already demonstrated. We see merit in the following paths for upholding and enhancing the protection of constitutional rights: (i) EU accession to the ECHR, although the latter, as interpreted by the ECtHR, does not necessarily provide just a minimum level of protection (see above Sect. 2.11.1); (ii) a more proactive role for the national constitutional courts and/or supreme courts in highlighting the issues surrounding the standard of protection of constitutional rights in European judicial dialogues; (iii) a more proactive role for other national institutions, such as national parliaments and ombudsmen in stressing constitutional issues in European governance.

2.13.3 To date the Portuguese Constitutional Court has not raised any constitutional issues in preliminary ruling requests to the ECJ.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Article 7 of the Constitution sets the basic guidelines for Portugal's international relations by establishing the principles and objectives that ought to be upheld by the state when participating in international co-operation:

> (1) In its international relations Portugal shall be governed by the principles of national independence, respect for human rights, the rights of peoples, equality between states, the peaceful settlement of international conflicts, non-interference in the internal affairs of other states and cooperation with all other peoples with a view to the emancipation and progress of mankind;
>
> (2) Portugal shall advocate the abolition of imperialism, colonialism and all other forms of aggression, dominion and exploitation in the relations between peoples, as well as simultaneous and controlled general disarmament, the dissolution of the political-military blocs and the setting up of a collective security system, all with a view to the creation of an international order with the ability to ensure peace and justice in the relations between peoples;

[70] See recently Rosado Pacheco 2015, p. 276.

[71] Alexandrino 2011, p. 187 and also Mac Crorie 2014, p. 117.

[72] See Mac Crorie 2014, pp. 118–121 and Botelho 2015, p. 253.

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> (iii) Portugal shall recognise peoples' rights to self-determination and independence and to development, as well as the right to insurrection against all forms of oppression.

Conditions on the delegation of powers to international organisations are only expressly foreseen regarding agreements concerning the deepening of the European Union (Art. 7(6)).

Finally, constitutional compatibility with the Statute of the International Criminal Court is ensured by Art. 7(7):

> With a view to achieving an international justice that promotes respect for the rights of both individual human persons and peoples, and subject to the provisions governing complementarity and the other terms laid down in the Rome Statute, Portugal may accept the jurisdiction of the International Criminal Court.

3.1.2 In 1997, some minor stylistic changes were introduced in Arts. 7(1) to (3). In 2001, an extraordinary amendment procedure was initiated with the purpose of harmonising the Constitution with the Statute of the International Criminal Court. The latter included several provisions that were constitutionally problematic, namely the possibility under the Statute to sentence someone to life in prison and the irrelevance of constitutional immunities. Portuguese scholars suggested two options to constitutionally accommodate the Statute: either through amendments to the provisions that collided with the Statute or through the adoption of a single provision that accepted the jurisdiction of the International Criminal Court.[73] This last option is now included in Art. 7(7).[74]

3.1.3 Portuguese legal doctrine and courts do not highlight any necessity to update Art. 7 in order to reflect new trends in international law or in global governance, namely regarding the transfer of powers to the transnational level or the need to uphold constitutional values in international cooperation more effectively.

3.1.4 See above Sect. 1.5.3 in Part 1.

3.2 The Position of International Law in National Law

3.2.1 Article 8(2) of the Constitution foresees the conditions for the application of treaty law in the domestic legal order:

> The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.

[73] On this debate, see Moreira 2004.

[74] Bacelar Gouveia 2001, pp. 639–640, considers that this solution does not solve conflicts with specific constitutional provisions. The same author goes even further by stating that Art. 7(7) is an 'unconstitutional constitutional' amendment. See Bacelar Gouveia 1998, p. 1484.

This provision adopts a monistic system where the internal application of international conventions is conditioned on their ratification (treaties) or approbation (agreements), publication in the official journal and entry into force in the international legal order.

The Constitution is silent about the position of international law within the hierarchy of the domestic sources of law. The majority of legal doctrine, which is closely followed by the courts, considers international law to rank superior to ordinary law but inferior to constitutional law (see below Sect. 3.4.1).

3.2.2 Portuguese international law scholars still teach the classic distinction between monism and dualism.[75] However, since nowadays there is wide support for monism with the supremacy of international law,[76] the distinction is usually used to describe the choice of methodology for incorporating international law into the domestic legal realm. This, in turn, is mostly irrelevant for the international legal order given the developments in the legal regime of the responsibility of states for internationally wrongful acts.[77]

Legal integration with EU law renewed the debate. In the *Internationale Handelsgesellschaft* case, the ECJ declared the supremacy of EU law over national constitutional law.[78] The Luxembourg court envisions a 'European monism' in which it always has the final say on the resolution of conflicts between EU law and national law.[79] This perspective has been rejected by some national constitutional courts, which have not waived the so-called *Kompetenz-Kompetenz* to review the constitutionality of EU law.[80] These positions have been challenged in the last two decades by a pluralist (for some dualist) perspective on legal integration. This is based on the idea that the EU and national legal orders have different 'rules of recognition' (in the Hartian sense)[81] but this does not necessarily entail a conflict of applicable norms if the courts in both legal orders respect common principles and rules of what has been described as 'contrapunctual law'.[82]

The contemporary relevance of the monism/dualism debate became clear in the *Kadi* decisions of the ECJ. This case presented concurring monist (General Court) and dualist (Court of Justice) perspectives on the relations between EU law and

[75] Amongst others, Duarte 2014, pp. 269–280.

[76] Based in Art. 27 of the 1969 Vienna Convention on the Law of Treaties, according to which a state 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

[77] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), Chap. IV. E. 1. http://www.refworld.org/docid/3ddb8f804.html.

[78] Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 01125.

[79] Kumm 1999, p. 354.

[80] The most famous case being the *Maastricht* decision of the German Constitutional Court [2 BvR 2134/92 e 2 BvR 2159/92, *Entscheidungen des Bundesverfassungsgerichts* (1993) 89:155].

[81] MacCormick 1993, pp. 8–9.

[82] Poiares Maduro 2003.

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international law.[83] Both reveal that one of the effects of globalisation is the increasing incapacity of a simple monist answer based on the supremacy of international law to offer solutions to every systemic conflict between legal orders in an increasing fragmented transnational legal environment.

3.3 Democratic Control

3.3.1 The Portuguese Parliament adopts international treaties and international agreements that address matters included in its exclusive competence, or which the Government deems fit to submit for its consideration (Art. 161(i)). The negotiation of international treaties and agreements is a competence reserved solely for the Government (Art. 197(b)). The Parliament Rules of Procedure (Law 1/2007 of 20 of August) does not foresee a specific procedure dedicated to monitoring international organisations beyond the initial process of ratification. An ordinary examination may, in any event, be made either in a parliamentary commission or in the plenary of Parliament.

We are not aware of any study on the extent of parliamentary debates on substantive matters arising from international obligations.

3.3.2 Notwithstanding the fact that the Constitutional revision of 1997 introduced the possibility, no referendums have ever been held in relation to international organisations or treaties.

3.4 Judicial Review

3.4.1 The majority of Portuguese doctrine and courts consider that the Portuguese Constitution has supremacy over treaty law and acts of international organisations.[84] Article 204 of the Constitution states that in matters that are brought to trial, the courts shall not apply rules that breach the provisions of the Constitution. However, the principle of *pacta sunt servanda* obliges courts to forestall normative conflicts as much as possible by interpreting constitutional norms in conformity with international law.[85] If such an interpretation is not possible, the court is bound to not apply the international law provision that breaches the Constitution.[86] In this case, an appeal must be lodged to the Constitutional Court by the Public

[83] Case T-85/09 *Kadi v. Commission* [2010] ECR II-05177; C-584/10 P *Commission and Others v. Kadi*, [2013] ECLI:EU:C:2013:518.

[84] This reasoning does not apply to general international law, namely *ius cogens* norms, which are considered to have a supraconstitutional character. See Bacelar Gouveia 2013, pp. 418–423.

[85] Duarte 2014, p. 307.

[86] See, for instance, Supreme Court Decision 27 November 2007, case 07B4055.

Prosecutor's Office (Art. 280(1)(a)). If the constitutionality of international law is raised during judicial proceedings but is dismissed by the court, a constitutional review by the Constitutional Court may be initiated upon the request of one of the parties to the case (Art. 280(1)(b)). A declaration of unconstitutionality of a binding international treaty by the Constitutional Court does not necessarily entail a violation of the *pacta sunt servanda* principle. Article 277(2) of the Constitution safeguards the application of international law provisions:

> On condition that the rules laid down by properly ratified international treaties are applied in the legal system of the other party thereto, the unconstitutionality in form or substance of such rules shall not prevent their application in the Portuguese legal system, save if such unconstitutionality results from the breach of a fundamental provision of this Constitution.

The majority of Portuguese legal doctrine and jurisprudence argue that the hierarchical position of international treaties in the Portuguese legal order is superior to that of ordinary national law (i.e. all other legal acts of the Portuguese legal order except the Constitution).[87] One of the arguments invoked to support this position is the obligation to respect the *pacta sunt servanda* rule and its corresponding duty to implement international obligations domestically in good faith, which could be easily breached if it were possible for courts to trump international treaty law that contradicted ordinary laws based on the application of the *lex posterior derogat priori* principle.[88] Another argument derives from Art. 70(i) of the Law of the Constitutional Court that states that an appeal may be lodged with the Constitutional Court against ordinary court decisions that reject 'the application of a rule appearing in a legislative act on the grounds that it contradicts an international convention'.[89] The review is, however, restricted to 'questions of a juridic-constitutional and juridic-international nature implied in the decision submitted for appeal' (Art. 71(2) of the Statute of the Constitutional Court) and, therefore, does not include assessment of conflicts between domestic law and treaty law.[90]

3.5 The Social Welfare Dimension of the Constitution

3.5.1 The Portuguese Constitution protects a wide range of social rights, such as the right to social security (Art. 63), healthcare (Art. 64) and appropriate housing (Art. 65). Between 2011 and 2014, the adoption of an International Monetary Fund-inspired programme led to a 'dramatic' erosion of these rights,[91] namely

[87] See, for instance, Supreme Administrative Court, case 0308/07, 28 November 2007, or Supreme Administrative Court, case 68/09, 25 March 2009.

[88] Bacelar Gouveia 2013, pp. 424–426.

[89] Official translation taken from the website of the Portuguese Constitutional Court with minor stylistic changes introduced by the authors.

[90] Constitutional Court, case 290/2002, 3 July.

[91] This adjective was used in this context by Nogueira de Brito 2014, p. 69. See also Canotilho 2015.

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through the adoption of drastic cuts in several social allowances and in expenditure in the education and health sectors. The Constitutional Court rejected several elements of the programme (see above Table 2). However, the Court also reversed a long-standing opinion of the majority of Portuguese constitutional law scholarship regarding the welfare state, according to which it would be unconstitutional to lower current pensions and other social benefits, such as illness and unemployment allowances (See above Sect. 2.13.1).[92]

3.5.2 Portugal had to apply an austerity programme designed by the International Monetary Fund with the assistance of the European Central Bank and the European Commission. The opacity of the International Monetary Fund *modus operandi* seems to have contaminated the EU institutions. For instance, the memorandum of understanding signed between the Commission and the Portuguese state in May 2011 was not published in any official journal – Portuguese (*Diário da República*) or European (Official Journal of the European Union) – and was not even translated into Portuguese.[93] Moreover, during the three-year Troika programme there was always some degree of uncertainty regarding whether the measures proposed by the Government were part of the conditionality agreed with the international institutions.[94]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 The Constitutional Court decision of 5 July 2012 is an example of a high profile case where constitutional rights and the rule of law may have been affected by security concerns associated with global governance trends.[95]

The Constitutional Court declared that a judicial decision that revoked authorisation for the extradition of an Indian national to India based on the International Convention for the Suppression of Terrorist Bombing[96] on the grounds of violation of the principle of speciality, is just one of the elements to be taken into consideration

[92] On this topic, see Loureiro 2014, pp. 196–197. This jurisprudence was criticised by Novais 2014b.

[93] Since the memoranda are mentioned in the Council implementation decisions as documents that establish conditions for the delivery of financial assistance to Member States, the absence of publication and translation is a clear violation of the principle of transparency (Art. 1 TEU) as well as of the principle of the linguistic diversity of the European Union enshrined in Art. 6(3) TEU. On this topic, see Pereira Coutinho 2013a, pp. 166–167 and Kilpatrick 2015, pp. 342–344.

[94] See the discussion on the introduction of the '*Taxa Social Única*' ('Common Social Tax') in Pereira Coutinho 2013a, p. 160, footnote 37.

[95] Case 360/2012, 5 July. For a commentary on this decision, see Pereira Coutinho 2013b.

[96] International Convention for the Suppression of Terrorist Bombing, of 25 November 1997, *UN Doc A/52/49* 1998, entered into force 23 May 2001.

by the Portuguese Ministry for Foreign Affairs in its political relations with the Indian State.

The Indian national based his claim on Art. 16(2) of Law 144/99, which provides a person who is subject to extradition the right to invoke a violation of the principle of speciality in court. Unfortunately, the Constitutional Court decision of 5 July 2012 determines that such a right does not have an effective legal remedy. If the decision of the Portuguese courts on the violation of the principle of speciality is just one element to be taken into consideration in the diplomatic relations between Portugal and India, then there is a risk that the executive branch could simply disregard the decision, for example for plausible *Realpolitik* considerations.

The Portuguese Supreme Court of Justice had earlier taken a different path on the same case. In 11 January 2012, the Court confirmed the revocation of the extradition authorisation and demanded that the executive branch ask for the surrender of the Indian national.[97] The Court declared that the Portuguese state, as a sovereign state, could not be immune from a judicial decision of its highest court, and, therefore, had to act in conformity with that decision. In this case there was simply no leeway for the Government to decide the best course of political or diplomatic actions to adopt towards India. In fact, any other interpretation would withdraw any *effect utile* from Art. 16(2) of Law 144/99 and ignore the human rights dimension of the principle of speciality.

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[97] Case 111/11.7 YFLSB.

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The Constitution of Greece: EU Membership Perspectives

Xenophon Contiades, Charalambos Papacharalambous and Christos Papastylianos

Abstract The Constitution of Greece, adopted in 1975 after the collapse of the military dictatorship, was drafted with provisions providing the constitutional grounds for European integration. Subsequently, two EU related amendments were introduced and, additionally, constitutional interpretation is used to overcome further conflicts. The Constitution is described in the report as detailed and comprehensive, with a legal character and strong normative force. It includes a detailed list of rights, including social rights. The Constitution refers to the concept of 'welfare state rule of law'. By way of an exception to constitutional systems of this type, Greece does not have a constitutional court, but instead a decentralised system of review of constitutionality. Adhering to the French '*État de droit*' and the German '*Rechtsstaat*' traditions, the rule of law works in conjunction with specific constitutional provisions. In particular, *nulla poena sine lege* is a cornerstone

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principle of constitutionality and the rule of law, and has prompted extensive scholarly concerns in relation to the European Arrest Warrant system. More widely known are the constitutional and fundamental rights issues raised in the context of the EU and IMF austerity and conditionality programmes, marking, according to the report, a darker side of sovereignty loss. The report summarises a broader concern in Greek academic commentary that constitutional rights and values have been given marginal protection, as the national constitution is no longer the guarantor of popular sovereignty rooted in a political decision made by the people, but rather has become a guarantor of the state's compliance with EMU obligations.

Keywords The Constitution of Greece · Constitutional amendments regarding European and international co-operation · Decentralised constitutional review 'Welfare state rule of law' · The French '*État de droit*' and German '*Rechtsstaat*' traditions · European Arrest Warrant · *nulla poena sine lege* and defence rights in extradition cases · Fundamental rights · EU and IMF austerity and conditionality programmes · Social rights · Trade union rights and the economic emergency regime · Data Retention Directive · Limitation of rights and public interest Change away from popular sovereignty based on the Constitution

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The current constitution of Greece was promulgated in 1975 after the collapse of a seven-year military dictatorship. The constituent power exercised by the Parliament elected in 1974 was described as delegated power to convey the image of constitutional continuity. Indeed, the 1975 Constitution, which has been revised three times (1986, 2001, 2008) has its roots in the Constitution of 1864, the most long-lived Constitution in Greek constitutional history, which contributed greatly to the establishment of the rule of law and parliamentarism. The 1864 Constitution had been enacted after a revolution against the monarch and was influenced by the 1831 Constitution of Belgium and the 1849 Constitution of Denmark. The election of a new king by the Constituent Assembly and the enactment of a liberal constitution marked the passage from constitutional monarchy to parliamentary democracy.

The Constitution of Greece is written and difficult to amend.[1] Detailed, analytical and comprehensive, the Constitution has legal character and strong normative force. Due to the existence of a system of diffused constitutional review, all courts have competence to review the constitutionality of laws. In other words, Greece does not have a constitutional court, but instead a tradition of diffused review. The current Constitution thus enshrines a decentralised system of judicial

[1] Spyropoulos and Fortsakis 2009.

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review of the constitutionality of laws (Art. 93(4)). However, constitutional review is to a great extent concentrated through jurisdictional mechanisms of appellate review by the three supreme courts, i.e. *Areios Pagos* (Supreme Civil and Criminal Court), the Council of State (Supreme Administrative Court), and the Court of Audit. Article 100(5) of the Constitution regulates constitutional review as follows:

> When a section of the Supreme Administrative Court or chamber of the Supreme Civil and Criminal Court or of the Court of Audit judges a provision of a statute to be contrary to the Constitution, it is bound to refer the question to the respective plenum, unless this has been judged by a previous decision of the plenum or of the Special Highest Court of this article. The plenum shall be assembled into judicial formation and shall decide definitively, as specified by law. This regulation shall also apply accordingly to the elaboration of regulatory decrees by the Supreme Administrative Court.

Thus, the Greek Constitution belongs to the type of constitutions that have legal character, contain detailed norms and are enforceable in courts.

1.1.2 The Constitution sets out the form of government, establishes the separation of powers and provides for checks and balances. Furthermore, it includes a detailed list of fundamental rights enshrining civil, political and socio-economic rights. It is noteworthy that all former Greek constitutions have also included catalogues of rights, gradually incorporating the three generations of rights. Since the adoption of the Constitution of 1864, the principle of popular sovereignty has been enshrined in constitutional texts. According to Art. 1 of the current Constitution, '[s]overeignty lies with the people; all powers derive from the people and exist for the people and the Nation'.

The Constitution of Greece sets out the basic rules of the game, organising and allocating powers and providing for the detailed protection of fundamental rights. It has therefore been central to the legal and political life of Greece, generating a strong culture of constitutionalism; constitutional narratives are dominant in the Greek political discourse.

1.2 Amendment of the Constitution in Relation to the European Union

1.2.1, 1.2.3 The application for accession to the EU was submitted on the day the Constitution of 1975 was enacted. Specific provisions were included in the constitutional text in order to provide the constitutional grounds for the accession. Thus, accession to the EU did not take place under an aged constitution, rather the Constitution itself was drafted in such way as to include provisions facilitating this goal. The advice of legal scholars in favour of this choice proved invaluable for a smooth accession procedure.

Articles 28(2) and (3) of the Constitution[2] set out the substantive and procedural requirements allowing the accession as follows:

> Article 28(2) Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.
>
> Article 28(3) Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.

In 2001 an interpretative clause was added, according to which: 'Article 28 constitutes the foundation for the participation of the Country in the European integration process'. Still, the wording of the above provisions was rather ambiguous and left room for different interpretations. Thus, Greek scholars disagreed on whether the accession of Greece to the EU should be understood as vesting powers in agencies of international organisations, which would require the three-fifths majority of the total number of Members of Parliament (MPs), or it constituted a limitation on the exercise of state sovereignty, which could be made through the enactment of legislation voted by the absolute majority of the total number of MPs. The dominant view was that both paras. (2) and (3) of Art. 28 in combination provided the constitutional grounds for the accession. Thus, a combination of the stricter substantive conditions provided for by para. (3) and the stringent procedural requirements set by para. 2 was applicable. What the Parliament actually did was to vote the law ratifying the accession of Greece to the EU with a three-fifths majority, leaving open the relevant interpretative issues. The same procedure was followed for the ratification of the treaties of Maastricht, Amsterdam, Nice and Lisbon, leaving the interpretational ambiguity unresolved. However, all ratifications took place smoothly since the two major political parties of the pre-financial crisis period were pro-European.[3]

1.2.2, 1.2.4 So far, constitutional amendment procedures have not been used to address the application of EU law. Although the relationship between EU law and the Greek Constitution from the aspect of the hierarchy of legal rules has been the subject of debate, with the doctrine of primacy of EU law having gained ground during recent years, in practice the issue has not yet created serious problems. So far, the incompatibility of constitutional norms with EU law has emerged as a problem with regard to two provisions. The first is Art. 14(9) of the Constitution, which provides that the capacity of owner, partner, major shareholder or managing

[2] The official translation, which is used here and subsequently in the report, is available at http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

[3] For details and references to further literature, see Contiades and Fotiadou 2014.

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director of a media enterprise is incompatible with the capacity of owner, partner, major shareholder or managing director of an enterprise that undertakes to perform works or to supply goods or services to the public sector, with the prohibition extended to all types of intermediary persons. The Greek Council of State[4] referred questions to the European Court of Justice (CJEU) regarding the compatibility of the 'major shareholder' provision with EU law. The CJEU in its judgment of 16 December 2008[5] concluded that an incompatibility existed. The contested provision has not been enforced since, and its revision is pending because, due to procedural hurdles set by the amending formula, no constitutional revision to allow such amendment has as yet taken place.

The second provision of the Constitution that creates tension with EU law is Art. 16(5), according to which 'education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons'. Incompatibility with EU rules on the recognition of professional rights with regard to graduates of private colleges, as well as with EU rules on freedom to offer and receive services, has often triggered discussion about amending this constitutional provision. Nonetheless, agreement among the political parties to do so has been hard to achieve.

As mentioned, such tensions with EU law are difficult to promptly address through formal amendment, since the amending formula is very stringent, rendering the Greek Constitution difficult to change. In particular, formal amendment rules consist of a combination of procedural and material limits. Procedural limits set out in Arts. 110(2)–(6) are very strict, providing for a two-phase process, with intervening general elections. In the first phase, the need for a constitutional revision is ascertained by a resolution of Parliament, adopted on the proposal of at least fifty Members of Parliament either by a three-fifths majority or by an absolute majority of the total number of its members in two ballots, held at least one month apart. This resolution specifically determines the provisions that are to be revised. In the second phase, the next Parliament proceeds with the amendment of the provisions that are to be revised. It is noteworthy that the timing of the intervening elections is not influenced by the initiation of the amending process. If a proposal for amendment of the Constitution receives an absolute majority of the votes of the total number of members but not the three-fifths majority, the next Parliament shall proceed with the revision of the proposed provisions by a three-fifths majority of the total number of its members, and vice versa. Constitutional revision is concluded with the publication of the revised provisions in the government gazette within ten days after their adoption by order of the Speaker of Parliament. Rigidity is enhanced by a mandatory time lapse between revisions: revision of the Constitution is not permitted before a lapse of five years from the completion of a previous revision.[6] Material limits are provided for by Art. 110(1), which

[4] Decision 3760/2006 of the Greek Council of State.

[5] Case C-213/07 *Michaniki* [2008] ECR I-09999.

[6] Contiades and Fotiadou 2014, p. 712.

entrenches the provisions defining the form of government and also Art. 2(1) (respect of human dignity), Arts. 4(1), (4) and (7) (equality before the law, eligibility of Greek citizens for public service, and prohibition of titles of nobility or distinction), Arts. 5(1) (right to free development of personality) and (3) (personal liberty), Art. 13(1) (freedom of religious conscience) and Art. 26 (separation of powers).

The stringency of the amending formula works within a predominant culture of political distrust between the political parties. Thus, the constitutional culture enhances the rigidity level.[7] Within this context, the sort of constitutional maintenance culture required to 'fix' incompatibilities of specific constitutional provisions with EU law does not exist. Consequently, in the course of the three revisions of the 1975 Constitution, EU law exerted implicit influence in shaping the content of specific provisions. For example, EU law influenced the design of constitutional provisions such as Art. 116(2), according to which the adoption of positive measures for promoting equality between men and women does not constitute discrimination on grounds of sex. According to this provision, the state shall take measures for the elimination of actual inequality, in particular to the detriment of women. Another provision shaped in light of EU law is Art. 4(4), providing that only Greek citizens shall be eligible for public service. This provision was subject to interpretation imposed by EU law, opening the Greek public service to EU citizens, while Art. 102(2), according to which the authorities of local government agencies which enjoy administrative and financial independence are elected by universal and secret ballot, was influenced by EU law introducing interpretations that allow EU citizens to vote in municipal elections.[8] Thus, these examples show that informal amendment was the route chosen and that formal amendment is neither a necessary nor suitable tool to address incompatibilities between the Constitution and EU law.

Consequently, the strictly and directly EU-related formal amendments are two interrelated interpretative clauses. The first is the above-mentioned clause added to address the debate regarding the foundation for participation in the European integration process. The clause adopts the view, which prevailed during the discussions in Parliament as part of the revision process, that different possibilities exist, which may accordingly trigger the application of different paragraphs of Art. 28. This interpretative clause was complemented in 2001 by the interpretative clause of Art. 80 of the Constitution, providing in para. 2 that the minting or issuing of currency shall be regulated by law. According to this interpretative clause, '[p]aragraph 2 does not impede the participation of Greece in the process of the Economic and Monetary Union, in the wider framework of European integration, according to the provisions of article 2'.

[7] Contiades and Fotiadou 2012, p. 450.

[8] Contiades and Tassopoulos 2012, p. 166.

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1.3 Conceptualizing Sovereignty and the Limits to the Transfer of Powers

1.3.1, 1.3.4 For many years the supremacy of EU law appeared to puzzle constitutional scholars and judges alike.[9] Reluctant to clearly recognise the supremacy of legal norms over the Constitution, theory and jurisprudence found refuge in the concept that such rules have a different scope and cannot be in conflict. In extreme cases of tension, interpretative choices that harmonise the crucial constitutional provision with EU law should prevail.[10] This hesitation to address the issue gradually gave way. In Decision 161/2010, the Grand Chamber of the Council of State stated that when reviewing a law, the courts must first consider whether the law is contrary to the Constitution. Only if the answer to that question is negative should the courts consider whether the law is contrary to EU law. If the contested provision is found to be in violation of the Constitution, it is rendered inapplicable, and thus there is no reason to review it further. The Court stressed that this way of reviewing national laws is not contrary to the principle of the primacy and direct effect of EU law, but appropriate, since in order to assess the compatibility of a national law with EU law (and perhaps ask the European Court of Justice for a preliminary ruling), the exclusively competent national judge should firstly adjudicate on all the issues of interpretation and applicability of national law. It is noteworthy that 13 members of the Court dissented, stating that the Court in the specific case should first have adjudicated on the compatibility of the specific law with EU legislation, since the specific piece of legislation was enacted in order to comply with rulings of the European Court of Justice. The dissenting opinion also stressed that in accordance with the principles of primacy and direct effect of EU law, the Court should interpret the relevant constitutional provisions in line with EU law, so as to minimise the possibility of conflict between the Constitution and EU legislation.[11]

As a whole, although sovereignty narratives have not changed, in practice the Constitution operates in harmony with EU law, the supreme courts refer questions to the Court of Justice of the EU, and EU-friendly interpretation of legislation is common practice.

It is noteworthy that the crisis-related EU treaties were ratified via the normal law-making procedure provided for in Arts. 70–77 of the Constitution. In other words, Art. 28(1) of the Constitution, which dictates that international conventions are ratified by law, was applied instead of the special procedures set up by Art. 28(2) for vesting constitutional powers in agencies or international organisations. Statute 4063/2012 contained, among other rules, the ratification of the Treaty

[9] Chryssogonos 2003, pp. 210–213.

[10] See Decision 247/1997 of the Council of State recognising the supremacy of EU law, and contrarily Decision 2809/1997 not recognising supremacy of EU law over the national Constitution.

[11] See Association of European Administrative Judges, Greek Report, 2013.

Establishing the European Stability Mechanism (ESM Treaty), the amendment of Art. 136 TFEU and the ratification of the Fiscal Compact. The balance of political powers in Parliament allowed for this to happen quite smoothly, although concerns about the informal amendment of the Constitution effected by these treaties were expressed by parties of the opposition. So far, the dilemma about the constitutionalisation of the balanced budget rule implementing the Fiscal Compact has not been addressed due to the stringency of the amending formula. Nonetheless, when a constitutional revision process is initiated, the issue will inevitably emerge.

For more recent discussion on sovereignty in the context of the judicial adjudication of the financial crisis, see Sect. 1.5.

1.4 Democratic Control

1.4.1 The Standing Orders of Parliament[12] (Standing Orders) provide for the rules governing the relation of the Greek Parliament with the EU decision-making process. According to Art. 70(8) of the Constitution, 'the Standing Orders of Parliament shall specify the manner in which the Parliament is informed by the Government on issues being the object of regulation in the framework of the European Union, and debates on these'. This amendment, explicitly mentioning the EU, was added in the 2001 constitutional revision.

Article 32 of the Standing Orders sets out the rules on the Committee of European Affairs, providing that the Speaker of the Parliament shall, at the onset of every parliamentary term, establish by his/her decision a special standing Committee of European Affairs. The Committee is composed by 30 MPs and one of the Parliament's Deputy Speakers, acting as the Committee's president. In the sittings of the Committee, Greek members of the European Parliament can participate with a right to speak. The Speaker of the Parliament may refer to the Committee any issue that he/she deems as relevant or any issue submitted to him/her by the standing or special committees of the Parliament or by MPs and Members of the European Parliament. The competences of the Committee mainly include the following: (a) institutional issues of the EU, (b) issues of co-operation between the Hellenic Parliament and other national Parliaments of the EU, of the European Parliament and of the Conference of Community and European Affairs Committees of Parliaments of the EU (COSAC), (c) issues of European policy and (d) acts of EU bodies with a regulative content. The Committee can express its consultative opinion on the aforementioned issues through the submission of a respective report to the Parliament and the Government.

With regard to opinions on the regulatory acts of the European Parliament, Art. 41B of the Standing Orders provides that the Government shall forward the draft legislative acts of the EU to the Speaker of the Parliament immediately after they

[12] http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/Kanonismos-tis-Voulis/.

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are communicated to the Council of Ministers. The Speaker of Parliament refers the documents to the competent standing committee or/and to the Committee on European Affairs. The Speaker of Parliament or the Committee by its own decision may invite the competent Minister to provide information to the Committee if it is so requested by one third of its members. The competent committee delivers its opinion, which is forwarded to the competent Minister and, if this is provided by EU legislation, to the Union's competent bodies. By a decision of the Speaker of Parliament or if this is requested by the competent Committee, the issue on which an opinion is delivered is entered in the Plenum's parliamentary control order of the day. In recent years, the Hellenic Parliament Committee on European Affairs has adopted several opinions on EU legislative acts, which it has then submitted to the European Commission, and has taken part in consultation procedures with regard to green papers.

1.4.2 Since constitutional referendums are not provided for and referendums have not been employed in practice during the last 40 years, democratic control is exercised by the Parliament.

However, it is noteworthy that in the midst of the financial crisis that struck Greece in 2010, the idea of holding a referendum was brought forth by the then Prime Minister George Papandreou. His Government was constantly under stress caused by general strikes and violent clashes between police and protestors, and narrowly won a vote of confidence in June 2011 while Parliament approved a five-year austerity package. On 26–27 October, a second bailout loan, which reduced Greece's debt by 50%, was agreed by EU leaders, the IMF and banks. As the adoption of new harsh measures was due, Papandreou decided to hold a referendum to request the opinion of the people on the conditions of the new agreement. Under immense pressure exerted by both the French and German leaders, by his own party, and by the opposition parties as well, Papandreou called off the referendum on 3 November. As a vote of confidence was pending in Parliament and Papandreou was faced with the imminent danger of losing it, a constitutional absurdum occurred: the Prime Minister won the vote of confidence under the unprecedented condition that he would subsequently resign so that a coalition Government would be formed. One week later, on 11 November, an interim coalition Government was indeed formed with the participation of PASOK, New Democracy and a far right wing party, the Popular Orthodox Rally (LAOS). The new Prime Minister, Loukas Papademos, was a highly regarded technocrat, a former Vice-President of the European Central Bank, while the Government's main task was to lead the country up to new elections. Thus, the referendum proposal actually led to the collapse of the Papandreou Government.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The limited scope of EU-related formal amendments is explicable by a combination of factors. The Constitution of Greece is recent and modern, its very

drafting was done with the aim of EU membership and thus it included the appropriate accession mechanisms. The detailed and extensive protection of fundamental rights is in line with the EU culture of rights protection, which is also reflected in the addition of modern aspects of rights protection, such as the protection of genetic identity and the protection against biomedical interventions (Art. 5(5)), the right to information (Art. 5A(1)), the right to participate in the information society (Art. 5A(2)) and the protection of the person against the electronic processing of personal data (Art. 9A). Although the amending formula and the constitutional culture create a context of augmented constitutional rigidity, alternative routes for relieving possible tensions exist. Issues such as the ban of non-state university-level education, even if the political context fails to produce the level of consent required for a formal revision, can be resolved by way of judicial interpretation.

Furthermore, there has always been strong support for EU membership among the public in Greece, with Euroscepticism being expressed mostly by smaller political parties.

1.5.3 Sovereignty issues with regard to the EU integration process had been merely the subject of discussion among scholars, at least until the financial crisis broke out. The bailout agreements, however, marked a darker side of sovereignty loss. Delayed dismay at this loss apparent in the political discourse and in constitutional challenges against the bailout agreements suggest that an abrupt realisation of waning sovereignty in the age of globalisation occurred as a result of the financial crisis.[13] Its concrete expression was the challenge against Law 3845/2010 incorporating the Memorandum of Understanding (MoU) between Greece and its international lenders brought before the Greek Council of State, in which it was argued that this law, despite the fact that it made concessions of sovereignty and transferred state competences to international organisations (i.e. the Troika), was not adopted with the necessary enhanced majority of three-fifths of votes, as provided by Art. 28 of the Constitution. It is clear that despite the participation of the International Monetary Fund (IMF), which did however complicate matters legally, the bailout scheme was important if Greece was to remain in the eurozone. The Court resolved the issue by rejecting the very applicability of Art. 28 of the Constitution, characterising the Memorandum not as an international treaty but a political programme.[14] Although the Court thus did not invoke sovereignty issues to resolve the case, narratives of lost sovereignty are part of the influence of the financial crisis on the Constitution. Constitutional normativity has often been challenged because of the impact of austerity measures on the application of fundamental rights and because of deviations from normal law-making processes and the enhanced role of the executive in law-making.

Nonetheless, the Constitution is far from becoming obsolete. As regards the EU, it creates no problems with regard to the integration process, while it has an

[13] Contiades and Fotiadou 2013, pp. 9–59.

[14] Contiades and Tassopoulos 2013, pp. 195–218.

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immense role in adjudication and politics. Still, the financial crisis has put a severe strain on the Constitution and exerted a continuous influence on it, as it has on most constitutions in the legal orders that have been struck by the financial crisis. It is arguable that the amending formula itself could be considered as an area in demand of reconsideration. Over-stringency has proved to be an obstacle to constitutional updating as well as to allowing the people to be more involved in the amending process.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1–2.1.2 Part II of the Greek Constitution protects individual and social rights, while political rights are also enshrined in other constitutional provisions. Ever since the creation of the Greek state, fundamental rights have been constitutionally protected. All Greek Constitutions have included catalogues of rights that have gradually acquired their present status. This gradual evolution has been marked by the continuous enhancement of rights protection. The current Constitution of 1975 has a comprehensive and very detailed list of rights, which was further enhanced in the 2001 constitutional revision that was also marked by the constitutionalisation of interpretative principles.

As part of the 2001 revision, the proportionality doctrine and the horizontal application of rights were explicitly included in the Constitution (Art. 25(1)), which also guarantees the rule of law and the welfare state. The provision also provides that restrictions to rights may be imposed by the Constitution or by statute. In accordance with the wording of Art. 25(1):

> [t]he rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.

It is noteworthy that proportionality had already been extensively elaborated in the case law as a normative principle delineating the permissibility of restrictions imposed on constitutional rights. Interpretatively derived from the rule of law principle in a landmark case of the Council of State in 1984,[15] the proportionality doctrine is constantly employed by the Greek courts. The constitutionalisation of the principle encourages the judge to employ all tiers of the test rigorously. Under

[15] Decision 2112/1984 of the Council of State.

the rule of law umbrella, the principles of legal certainty and legitimate expectation have been judicially elaborated.

Greek courts in exercising judicial review of the constitutionality of laws often address constitutional rights protection issues. The absence of a constitutional court often works against a unified, coherent jurisprudence. Nonetheless, a large part of Greek constitutional jurisprudence deals with the delineation of the protective scope of rights and the permissibility of restrictions.

2.1.3 The rule of law principle was explicitly enshrined in 2001, although it had been part of the Greek constitutional culture ever since the birth of the Greek state, with a landmark point in its evolution being the Constitution of 1864. The above-mentioned concept of the 'welfare state rule of law'[16] is considered to be one of the fundamental principles of the state, along with the principle of democracy and the separation of powers doctrine. The Greek constitutional literature had interpretatively derived the principle from a combination of a long list of constitutional provisions. Jurisprudential references to the doctrine had also found multiple constitutional grounds for its elaboration. The welfare state dimension operates under the rule of law rationale, while welfare state redistribution complements the constitutional protection of social rights. Adhering to the French '*État de droit*' and the German '*Rechtsstaat*' traditions, the Greek conceptualisation of the rule of law works in conjunction with other specific constitutional provisions.

Article 42 of the Constitution dictates that statutes passed by the Parliament shall be promulgated and published by the President of the Republic. Statutes obtain formal legal effect with their publication in the government gazette, and substantive legal effect ten days after publication; i.e. legal validity begins with publication and legal enforceability ten days later. Statutes may also contain provisions that set a different starting point for legal bindingness. Retroactivity is possible if explicitly provided for under the condition that this is not prohibited by the Constitution. Retroactive force is not constitutionally permissible in the following provisions: Art. 7(1), according to which no crime exists and no punishment can be inflicted unless specified by law in force prior to the perpetration of the act, while criminal liability also cannot be retroactively increased; Art. 77(2), according to which pseudo-interpretative statutes may not be used to produce retroactivity;[17] and Art. 78(2), according to which taxes or other financial charges may not be imposed by a retroactive statute effective prior to the fiscal year preceding their imposition.[18] In other words, the rule of law is substantiated through specific constitutional provisions that pre-existed the explicit enshrinement of this principle, providing the grounds for its interpretative conceptualisation, while these provisions are currently read in conjunction with the doctrine.

[16] The terminology used in the official translation of the Constitution, see supra n. 2.

[17] 'A statute which is not truly interpretative shall enter into force only as of its publication.'

[18] Contiades and Fotiadou 2014, p. 714.

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2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 According to the CJEU's jurisprudence, conflicts that may arise between fundamental rights and fundamental freedoms enshrined in the Treaties are resolved when the Court, following a balancing procedure, rules whether or not a fundamental right can prevail over fundamental freedoms. In the light of the CJEU's jurisprudence, fundamental freedoms can justify a restriction of rights, which are not considered as absolute.[19] The evaluation of whether a right is considered absolute or not is based, among other criteria, on the European Convention on Human Rights (ECHR). Consequently, in relation to all the rights which, according to the ECHR, can be subject to limitations justified by objectives of public interest, fundamental freedoms are considered by the jurisprudence of the CJEU as a 'form' of public interest, the protection of which potentially requires the restriction of rights.[20] The CJEU's jurisprudence is not clear about whether rights generally prevail over freedoms. In every case the balancing procedure is based on the principle of proportionality. Consequently, the limitation of a freedom is considered legitimate if it takes place within the framework of the exercise of a fundamental right, and is considered to be appropriate, necessary and proportional *stricto sensu* for the achievement of the objectives of the right at issue. On the other hand, the limitation of a right is appropriate, necessary and proportional *stricto sensu*, if it serves the achievement of a given end which is protected by the freedom at issue. Nevertheless, the most crucial issue is that according to the CJEU's jurisprudence, fundamental freedoms must be balanced against fundamental rights even in those circumstances in which the exercise of rights concerns activities that fall outside the scope of the EU's competence, given that the CJEU has ruled that the exercise of rights cannot jeopardise the achievement of goals protected by fundamental freedoms.[21] Within the balancing context, fundamental rights do not prevail over economic freedoms. As a commentator on case C-112/00[22] has observed, 'the language of *prima facie* breach of economic rights, suggests that it remains something, which is at the heart wrong, but tolerated'.[23]

With regard to the question of constitutional issues in Greece due to the jurisprudence of the CJEU on the balancing of fundamental rights with economic freedoms, we can observe that the jurisprudence of the Council of State has been influenced by the CJEU's approach concerning the primacy of fundamental

[19] See Case C-112/00 *Schmidberger* (2003) ECR I-05659.

[20] Ibid., para. 79. The CJEU makes a direct reference to the text of Arts. 10 and 11 of the ECHR and their limitations due to objectives in the public interest.

[21] Case C-438/05 *International Transport Workers Federation* (*Viking*) [2008] ECR I-10779, para. 40 and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, para. 87. On this issue see Amtenbrink 2012, pp. 35–64, especially pp. 60–62.

[22] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[23] Brown 2003, p. 1508.

freedoms of EU law over national constitutions, which may act as trumps over the enforcement of certain constitutional provisions. However, the Council of State has not developed a sound constitutional policy regarding the relation between the Greek Constitution and EU law (see below Sects. 2.7–2.8).

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1–2.3.1.2 This presumption applies in Greece; Greece has incorporated the ECHR as well the International Covenant on Civil and Political Rights (ICCPR), among other conventions, into its legal order. Both academic commentary and the courts hold that the presumption is not violated through the execution of a European Arrest Warrant (EAW).

According to the national provisions concerning arrest, an arrest warrant is in conformity with the law if there is probable cause indicating guilt, and the proceedings are controlled by the judiciary (Arts. 5(3) and 6(1) of the Constitution; Art. 276 et seq. of the Code of Criminal Procedure (CCP)). Although these are provisions of domestic law, they apply to the EAW along the same lines, since it is considered as a procedural means in the common EU space, where mutual trust and especially the principle of mutual recognition have to prevail. Therefore, the Supreme Court (*Areios Pagos*, hereinafter AP) has no competence to control the substance of the case; it can only control the legality of the EAW.[24] However, part of the academic commentary holds that control must always be carried out in cases where procedural requirements for the execution of the EAW are not met. This is the case especially when the issuing state has no jurisdiction over the alleged deed.[25]

One aspect of the presumption of innocence that could be regarded as having been violated is the '*pro mitiore*' principle, which means that if several reasoned scientific views exist, the one that best safeguards the rights of the accused ought to be preferred. Such a violation occurs when national 'indictment' (i.e. charging the person sought, which in Greece is a ground not to execute an EAW according to the law (Arts. 12(1a') and (b') of Law No. 3251/2004), is interpreted narrowly by the courts and thus its scope is not exhausted to allow the person to be treated in more favourable terms. This narrow interpretation runs contrary to the very meaning of the legislative ground for non-execution, as long as the latter aims at avoiding

[24] Kedikoglou 2014, pp. 29–30, 71; Mouzakis 2009, pp. 572 et seq.; Mouzakis 2012, p. 67. From the case law see e.g. AP 1836/2007, Poiniki Dikaiosini 2008, p. 535 (summary); 1811/2009, Poiniki Dikaiosini 2010, pp. 37 et seq.

[25] Kedikoglou 2014, pp. 71–72.

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double jeopardy and thus should be interpreted generously to benefit the person sought. Since, according to the commentary, a preliminary investigation, possible henceforth in Greece for almost all crimes and obligatory now for felonies (Laws Nos. 3904/2010 and 4055/2012, accordingly amending Art. 43 CCP,) blocks the execution of an EAW as an indictment does, the execution of an EAW should be denied also in the case of such an investigation. Contrary, however, to the viewpoint in the above commentary, the Supreme Court considers preliminary investigation as separate from indictment (which as such may or may not follow, according to the evidence obtained after the investigation has ended). Here one could consider the Court's approach to identifying indictment in the wider sense of the EAW Framework Decision[26] (EAWFD) with the formal and narrow meaning that this term has in domestic law to be erroneous. The case seems ripe for a request for a preliminary ruling from the CJEU.[27] However, the Supreme Court has recently held that indictment, even if thus narrowly conceived, may exclude the execution of an EAW even when it temporally follows the issuing of the latter; the only condition is that indictment take place during the hearings on the EAW at the Appeals Judicial Council or the Supreme Court and not later.[28] However, pending indictments may adversely impact the proper application of the EAWFD, given that the optional refusal of execution has been reshaped as obligatory with regard to nationals under Arts. 11(h') and 12(a') of Law No. 3251/2004, which provides for a possibility of abuse since consciously unfounded complaints may be submitted with the aim of paralysing the execution of an EAW through a subsequent indictment. This reshaping into an obligatory ground deprives the judge of the discretionary power that he/she otherwise had to declare such submissions abusive and allow execution. The Greek legislator has thus distorted the EAWFD in a 'nationalist' manner.[29]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle *of nullum crimen, nulla poena sine lege* is recognised in Greece as a cornerstone of criminal law and, as discussed in Sect. 2.1.3 above, as part of the rule of law (Arts. 2(1), 6(1) and especially Art. 7(1) of the Constitution

[26] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[27] Kedikoglou 2014, pp. 129–134. As to commentary, see also Anagnostopoulos 2005, pp. 855–856; Fytrakis 2006, pp. 219; Kalfelis 2006, pp. 203; Mouzakis 2012, pp. 59-60. Cf. the opposite stance of the judiciary in AP 591/2005, Poinika Chronika 2005, pp. 840 et seq.; AP 2149/2005, Poiniki Dikaiosini 2006, pp. 169 et seq.; AP 1773/2007, Poinika Chronika 2008, pp. 556 et seq., as well as of Karaflos 2013, p. 98.

[28] Kedikoglou 2014, pp. 136–137. Cf. AP 678/2012, Poinika Chronika 2013, pp. 440–441; AP 558/2007, Poinika Chronika 2007, pp. 597 et seq.; AP 2135/2005, Poinika Chronika 2006, pp. 597 et seq.

[29] Togias 2013, pp. 1156–1157.

and Arts. 1 and 2 of the Criminal Code (CC)). Article 2(1) of the Constitution provides that '[t]he primary obligation of the State is to respect and protect human dignity'. Art. 6(1) provides that '[w]ith the exemption of *in flagranti* crimes, nobody shall be arrested or imprisoned without a reasoned warrant, which must be presented at the time of arrest or detention'. Article 7(1) provides:

> No crime is constituted and no criminal sanction shall be imposed without a law valid before the commission of the deed and defining its component elements. A criminal sanction that is harsher than the one provided for at the time of commission of the deed, shall never be imposed.

Therefore, the legal commentary has strongly contested the EAW from the point of view of respect of the principle of *nulla poena sine lege*, especially as regards the erosion of the dual criminality principle. The points stressed in the theory are the following: it is absurd for the executing state to extradite a person for an act which the state itself does not consider as punishable; the very fundamentals of extradition are thus dismantled; the guarantees of the person sought and laid down in the above-mentioned constitutional provisions are undermined; sovereignty is negated; without dual criminality, criminalisation overwhelms the EU legal space.[30] It seems clear that despite the symbolic maintenance of the principle of dual criminality, it has in fact been totally eroded, especially if the 32 'crime types' in Art. 2(2) of the EAWFD (Art. 10(2) of Law No. 3251/2004) are taken into consideration, whereby dual criminality is already *ex lege* excluded. The principle functions only marginally, e.g. when an execution is refused due to defects in the legality principle traced *in concreto* when, for instance, the crime for which a person is sought is not provided for as such in Greece and simultaneously is not included in the 32 'crime types'.[31] The removal of double criminality has been considered problematic in Greece in particular with regard to the following crimes and offences in the list, which are not considered as crimes or offences in Greece. First, Greece may face problems as to the forms of certain crimes: e.g. in Greece, 'homicide' does not include participation in suicide or acts of euthanasia, both specifically provided for

[30] Kedikoglou 2014, pp. 56–57, 68; Kaiafa-Gbandi 2004, pp. 1297–1301, noting '… for the person sought the offering of procedural guarantees for the materialization of extradition cannot counter the eventual dismantlement of basic obstacles blocking it, since, as it is obvious, there is no comparison between the possibility of non-extradition and the extradition under procedural safeguards' (at p. 1297); Fytrakis 2006, pp. 214–215, noting: '… narrowing the requirement of dual criminality constitutes a dangerous diversion from the fundamental principles of criminal law, as they are laid down in our Constitution' (at 215)'; Kalfelis 2006, p. 201; Vasilakakis 2006, p. 207, noting: '… the deletion of dual criminality produces an over-incrimination at a European level, since the probability of being confronted with a EAW grows … under conditions of intense international mobility like nowadays the possibility grows that somebody may behave legally according to the law of his/her nationality or usual residence, in conformity with which he/she coordinates his/her behavior, but illegally according to another country's law, which he/she may ignore'.

[31] See in this regard Togias 2013, pp. 1154–1156, referring in this regard e.g. to AP 116/2011, as well as Decision 8/2011 of the Piraeus Appeals Judicial Council and Decisions 38/2012 and 89/2012 of the Athens Appeals Judicial Council.

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in Greece separately from the former; however these may be part of 'homicide' in some other Member States. Problems may also arise with regard to the question whether crimes procedurally related to those in the EAW are to be considered as included in the list. Secondly, issues around dual criminality may arise with regard to crimes concerning tax evasion, customs fees or currency (Art. 10(1a'), last sentence of Law No. 3251/2004, incorporating Art. 4 of the EAWFD), whereby Greece is obliged to extradite persons even to countries that do not accept this EAWFD clause, like some Scandinavian and Baltic countries or the Netherlands. Furthermore, Greece in its domestic law has also widened the list of offences provided for in the EAWFD by providing also for 'violations of sexual freedom' in general, 'corruption' and preparatory acts of currency-related crimes.[32] Finally, the case law of the Supreme Court does not consider it to be a violation of the *nulla poena* principle if the EAW provisions also apply to alleged deeds committed before the entry into force of Law No. 3251/2004, provided that the EAW request has been received after this temporal point; the reasoning is that in procedural law matters, unlike in substantive law, the *nulla poena* principle is not binding, allowing thus for retroactivity.[33]

Counterarguments to the above critical points could be that the above-mentioned constitutional provisions concern only indictments made by the Greek state, whereas in the case of the EAW, Greece is only assisting another EU Member State legally and, moreover, the crimes included in the 32 'crime types' will mainly be committed abroad (however, in this case the problem remains with regard to crimes that are not punishable in Greece and have been allegedly committed by nationals).[34] There is thus a clear setback for the constitutional guarantees for arrested persons, which has been considered as a necessary 'sacrifice' for the good functioning of co-operation inside the EU legal space.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 According to Greek law (Art. 13(1) of Law No. 3251/2004, incorporating Art. 5 EAWFD), the execution of an EAW for the execution of a penal sanction based on a court judgment issued *in absentia* is not automatic; it may be made dependent on a declaration from the part of the issuing state, satisfying the executing state, that procedural possibilities exist for a new trial in the issuing state in the presence of the person sought. This declaration should originate only from a court, not from any other, administrative authority. A practical difficulty as to the handling of such cases is the multiplicity of the Member States' legislation on

[32] Kedikoglou 2014, pp. 59–67, and pp. 72–75.

[33] See Art. 39 of Law No 3251/2004 and Mouzakis 2012, p. 65, respectively. In favour of the judiciary's stance also Karaflos 2013, p. 99. For a comprehensive critique of the viewpoint that favours retroactivity in criminal procedure, see passim Fytrakis 1998.

[34] Kedikoglou 2014, p. 69.

summonses and subpoenas, which makes the respective control of whether the foreign law has been respected rather complicated for the executing state.[35] When the person sought for extradition is a national, Art. 11(f') of Law No. 3251/2004 also applies: the Greek state may insist on execution in Greece as a condition for execution of the EAW. It may then also refuse execution due to the fact that the *in absentia* judgment, if issued without compliance with the proper procedure on summonses and subpoenas, violates the principle of fair trial (scil. Art. 6(1) ECHR) and therefore execution of the sanction cannot be allowed by the Greek state (this rule applies both to nationals as well as non-nationals).[36] The 'collateral damage' of such potential refusals is of course the loss of a new trial of the person sought, i.e. the loss of the chance of an acquittal or a diminution of the sanction, and the risk of the judgment becoming final, if Greece, instead of taking refuge in Art. 6(1) ECHR, chooses to execute the sanction.[37] A solution in such cases could be that the Greek courts would adjudicate in conformity with the *I.B.* judgment of the CJEU. In that case, the CJEU would approach EAW requests for extradition for the execution of sanctions as requests for initiating criminal proceedings, provided that there exists in the issuing state an exceptional appeal for a new trial (in the form of a *'revisio propter nova'* or something analogous to it); meanwhile the execution of the existing judgment would be left pending.[38]

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The absence of the protection guaranteed by domestic legislation is a real challenge for the person sought, as well as for the family. In Greek legislation there are no special measures provided for assisting these persons in such cases. The Ombudsman cannot be involved, since this institution mediates between public administration services and citizens; cases having to do with the judiciary, like EAW cases, are excluded. As to legal aid, Law No. 3226/2004 provides that every EU resident of low income may become a beneficiary. Low income means an income less than two-thirds of the annual family income as stipulated by the conditions of the General National Collective Labour Agreement. Such aid must be applied for. The aid also covers appeals, provided that they are not blatantly unfounded (Arts. 1, 2 and 7(4) of Law No. 3226/2004).

One can consider perhaps the provisions of the Law incorporating the EAWFD in Greece concerning residents and inhabitants (Arts. 12(1e'), 13(3) of Law No. 3251/2004) as a kind of pre-emption and thus 'circumvention' of the challenges mentioned above. According to these provisions, Greece may refuse to execute an

[35] Kedikoglou 2014, p. 162.

[36] Kedikoglou 2014, pp. 162–163.

[37] Mouzakis 2012, p. 60.

[38] See Case C-306/09 *I.B.* [2010] I-10341, paras. 56–57; cf. on this also Mouzakis 2012, pp. 60–61.

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EAW if execution of the sanction in Greece (provided that such execution is possible according to domestic law) is guaranteed, if the person sought is resident in Greece, which is judged depending on the ad hoc personal, economic and social relations the person has to the country, indicating a link or connection of a more or less stable character. A certain period of stay is not a prerequisite, nor is it required that the person originate from an EU country, nor that he/she have no criminal record. Provided that the same conditions are fulfilled, custody of the arrested person may be replaced by non-custodial restrictive terms (Arts. 16(1)–(3) of Law No. 3251/2004). Exceptionally, when the person sought is a citizen of the issuing state, the link to the latter will probably prevail as to the execution of the EAW, but there is still a margin of appreciation for the Greek courts when the rights and freedoms of the person sought might be put at risk.[39]

The aim of the provisions is the successful rehabilitation of the person sought into the social circumstances with which he/she is familiar. This aim is also in harmony with Art. 8 ECHR, a provision the EAWFD also aims at enhancing.[40] Despite the conformity of the statute and the case law with the ruling in the *Szymon Kozłowski* case,[41] the differentiation of the treatment of nationals where refusal is obligatory (cf. Art. 11(f') of Law No. 3251/200[42]), is not in full compliance with the EU scope of protection for aliens, in so far as e.g. the court judgment may depend on administrative prerequisites like the possession of a valid residence permit. The CJEU preliminary ruling which was expected after the French request submitted in *Joao Pedro Lopes Da Silva Jorge* concluded that a Member State's legislation restricting the power not to execute an EAW to cases where the requested persons are its nationals runs contrary to the principle of non-discrimination.[43] A final complication that negatively impacts the situation of the sought person is the incorrect stance of the prevailing opinion in the Supreme Court's jurisprudence concerning the costs of the proceedings. Such costs, according to the Supreme Court's opinion, shall be borne by the person sought according to the respective domestic legislation, when he/she is extradited after his/her appeal has been rejected; however, Art. 37 of Law No. 3251/2004 provides otherwise, putting such charges at the expense of the executing state. This provision, especially as regards dealing with the costs of EAW proceedings on the basis of the territory on which they have arisen, has to apply in lieu of the general

[39] Kedikoglou 2014, pp. 91–94. See from the respective case law AP 854/2012, Poinika Chronika 2013, p. 116; AP 437/2012, Poinika Chronika 2013, pp. 113–115.

[40] See e.g. AP 1676/2010, Poinika Chronika 2011: 670–672.

[41] Case C-66/08 *Kozłowski* [2008] ECR I-06041.

[42] Whereby it remains contentious whether the court judgment of the issuing state should be 'irrevocable' (and not merely 'final' without suspension of the sanction's execution); fair trial considerations promote the affirmative answer, whereas the letter of the law allows for a negative one: cf. Karaflos 2013, p. 95.

[43] See Case C-66/08 *Kozłowski* [2008] ECR I-06041and Case C-42/11 *Joao Pedro Lopes Da Silva Jorge* [2012] ECLI:EU:C:2012:517. See also: Mouzakis 2012, pp. 57–59.

provisions of the Greek CCP.[44] It would seem recommendable to establish institutions and procedures aimed at appropriate assistance for persons extradited and for their relatives, and it is obvious that Greece is far behind in doing so. One possible solution could be an NGO-based model of assistance.

2.3.4.2 As to statistics regarding extraditions, throughout the years 2005 to 2009, Greece executed 82 EAWs. Between 38–49% of persons sought did not consent to their extradition; the average time needed for the extradition of persons not having consented to extradition was 48 days.[45] To date, 10 Greek citizens have been extradited to be indicted abroad and serve the sentence in Greece; in four cases concerning alien residents, no return has been decided due to the fact that they were citizens of the issuing state; in one case return was impossible because the Greek authorities did not apply for it; in five cases the aliens were deemed non-residents and the EAW was executed unconditionally.[46]

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.4 Given the strong adherence in the EAW system to the institution of mutual recognition, judicial review tends admittedly to become rather weak (and more so if the issuing state's authority is a non-judicial one). Since, however, fundamental liberties and rights are at stake in criminal law matters, the standpoint that seeks legitimacy for such weakness through the argument that criminal court decisions have to be assimilated to freely circulating consumer goods, cannot be regarded as acceptable. This is so because orders pertaining to deprivation of freedom, as inherently resistant to any kind of commodification, cannot be normatively equated with rules applicable to consumer goods. In this regard even the exequatur in civil and commercial matters is of dubious legitimacy, especially when the sanctions are so severe that they must be equated to quasi criminal sanctions; the same holds even more true when genuine criminal sanctions are to be imposed. Therefore, we will subsequently highlight six points which provide some additional safeguards in the Greek legal order.

First, one substitute for the lacking judicial review may be found in refusal of execution when the alleged deed does not fall under the jurisdiction of the issuing state, and Greece has no such jurisdiction either. However, this would run contrary to the interpretation of the EAWFD by the Greek courts; according to the judicial interpretation, the courts may not control the substance of the case underlying an EAW which Greece has been requested to execute.[47]

[44] Mouzakis 2012, p. 64.

[45] Togias 2013, p. 1154.

[46] Kedikoglou 2014, pp. 101–102.

[47] Kedikoglou 2014, pp. 71–72 and 150–152. See also under Sects. 2.3.1.1–2.3.1.2 above.

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Secondly, by way of an analogous substitute, one may consider refusal of execution when a national is sought for execution of a sanction where either the act is not punishable in Greece or simply the sanction is not provided for as such in Greece (e.g. a certain type of internment in a workhouse conceived of as a form of security in the issuing state, but not existing in Greece as such).[48]

Thirdly, along the same lines, one could request a more generous use of the human rights clause and thus the refusal to execute an EAW on the grounds of a potential violation of Art. 6 of the EU Treaty (Art. 1(3) of the EAW FD; Art. 1(2a') of the implementing Law No. 3251/2004). The standpoint of the Greek Supreme Court, which holds that these rights or the fairness of the procedure are not at stake when deciding on the execution of an EAW and that these become relevant only after execution,[49] is very narrow. In opposition to this, commentary is strongly in favour of taking principles laid down in instruments like the ECHR or the case law of the European Court of Human Rights (ECtHR) like the judgment in the *Soering*[50] case into consideration. In such a framework, detention conditions that violate Art. 3 ECHR could provide grounds to refuse execution.[51]

Fourthly, it was noted that an appeal against a decision to execute an EAW taken by the President of the Appeal Court is not permitted when the person sought has consented to the extradition. Whilst this is in accordance with the speedy nature of the procedure and the freedom of choice of the consenting person and thus complies with Art. 20(1) of the Constitution ('right to be heard'), Art. 6 of the ECHR, Art. 2 (1) of Protocol No. 7 to the ECHR and the ICCPR, the non-permissibility of a refusal to execute such decision, at least in exceptional cases, seems less justified. It is obvious that a decision is not to be executed in the case of invalid consent (e.g. the person sought consents without having a lawyer and without being e.g. informed about the real consequences of consent to waiving the specificity rule (Art. 34 (2) e'-f') of Law No. 3251/2004), despite the fact that this case is not expressly regulated in the law.[52]

Fifthly, when an appeal is submitted (when the person sought has not consented to the extradition) but the appellant is absent when the court convenes, the Supreme Court will reject the appeal on the formal ground that it is 'unsupported' through the appellant's presence; such presence is indeed required according to Art. 501(1) CCP. This standpoint has, however, been strongly and persuasively contradicted by the minority opinion in Supreme Court Judgment No. 651/2011,[53] rejecting the

[48] Kedikoglou 2014, pp. 87–90. If an alien is sought who is resident in Greece and who is a citizen of the issuing state, the link to the issuing state may lead Greece not to refuse to execute the EAW; see also above Sect. 2.3.4.1.

[49] See for instance AP 1303/2011, Poinika Chronika 2012: 494. See also Mouzakis 2012, p. 67.

[50] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

[51] Togias 2013, p. 1161 and footnote 52. As to the impact of international human rights and protective legal means on the EAW, see also Vasilakakis 2006, p. 208. Critically to the conception of the notion of the EAW as an overreacting 'combat norm', see also Papacharalambous 2002.

[52] Mouzakis 2012, pp. 63–64.

[53] AP 651/2011, Poinika Chronika 2012, p. 347.

application of this article. The argument is that the article in question has to do with genuine decisions taken after real trials and not with rulings issued by judicial units acting as mere councils (as in EAW cases), whereby publicity and orality are not followed as in trials. It is further pointed out in the minority opinion that rejection of the appeal significantly deteriorates the procedural status of the person sought also for another reason: it is not permissible to claim that the procedure is invalid, as normally possible for an appellant according to domestic law when the non-appearance of the appellant was due to 'force majeure' (Art. 341 CCP), because of the specific and accelerated procedure of the EAW.[54] Moreover, and according to the same minority opinion, even the appellant's declaration that he/she 'will not appear' before the Supreme Court cannot always be interpreted as a waiver of the initially launched appeal. Such waivers must be made explicitly; tacit waivers are not recognised by the respective provisions of Art. 474(1) and 475(1) CCP. Finally, the presence of the appellant in and of itself adds nothing to the judicial procedure regarding the EAW: it is not matters of evidence but only complex juridical issues that are at stake at this stage. For all these reasons, the rejection of the appeal on formal grounds falls short of the requisite level of due protection of procedural rights.[55]

Finally, a clear case of disproportionate deterioration of the procedural status of the person sought is the formalistic reference in Art. 22(1) of Law No. 3251/2004 to Art. 451(1) CCP as regards the procedure of appealing against the initial decision to execute an EAW. The latter provision requires the person sought to submit an appeal exclusively with the Appeal Court's secretary within 24 hours after the issuing of the initial decision. Thus, the appeal becomes nearly impossible for a person in custody, since he/she is not permitted to address the director of the penal institution for that purpose, as it is provided for in principle according to Art. 474(1) CCP.[56] Additionally, this option is misleading: Art. 451 CCP presupposes that the appellant is not in custody. Finally, the disproportionate outcome of this option is evident from the fact that addressing the prison's director is, according to the jurisprudence of the Supreme Court, allowed if the detainee intends to waive the right to appeal.[57]

[54] Mouzakis 2012, pp. 62–63; Togias 2013, pp. 1162–1163.

[55] Mouzakis 2012, p. 63; Baltas 2014, p. 287. Contra AP 241/2013, Poinika Chronika 2014, pp. 286–287.

[56] Togias 2013, p. 1162, where, as to the rejection of the appeal as inadmissible, the author refers e.g. to AP 478/2011, Nomiko Vima 2011, p. 1005; see also AP 117/2013, Poinika Chronika 2014, p. 285. Regarding the narrow time limit of 24 hours for the appeal, see also the critique in Vasilakakis 2006, p. 208.

[57] Voulgaris 2014, p. 286. See also against the AP jurisprudence on this, Fytrakis 2006, pp. 219–220.

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2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

Amongst other challenges to constitutional rights in the context of EU criminal law, six issues will be briefly mentioned here.

First, the territoriality and the notion of the identity of the 'same act' ('*idem*') present significant problems as to a stable and foreseeable application of the EAW. According to Art. 11(g)i)' of Law No. 3251/2004, Greece shall refuse execution if the act has been committed, even partly, on Greek soil; the optional ground of refusal has also here been recast as an obligatory one. This has been relevant to crimes committed through the Internet, trans-border crimes like cigarette smuggling and other forms of smuggling or drug trafficking, and they have been dealt with in a contradictory manner by the Greek courts. In some cases these have been considered as having been committed (partly) on Greek soil (which leads to a refusal of execution), whilst in others as not influencing the jurisdiction of the issuing state (which leads to execution of the EAW). Whereas the former interpretive option is in concordance with the spirit of the CJEU ruling in *Gaetano Mantello*, which also refers to Art. 54 of the Schengen Treaty and promotes the *idem factum* in lieu of the *idem crimen* approach,[58] the academic commentary has seen in the latter option a risk of enhancing what is already an overly extensive tendency to affirm execution of an EAW.[59] In the case of concurrence of more than one crime (and the same holds true for so-called 'continuous crimes', i.e. repetitious conduct of more or less the same kind, like more acts of theft, robbery or embezzlement), the point of departure remains their autonomy. Therefore, the Greek judicial authority shall require the urgent delivery of information from the issuing state as to whether the person sought had, even partly, committed separate act(s) of the 'crime chain' on Greek soil (according to Arts. 5 and 16 CC and Art. 19(2) of Law No. 3251/2004), in which case execution must be denied.[60] Inherent in all the above constellations is the risk that the 'wholeness' of the criminal event is not taken under proper consideration as long as it is 'chopped' into pieces, whereby the complexity of the facts, the involvement of more persons and the differences in the procedural laws among the Member States may cause delays and undeserved harm for the accused. A reform at EU level seems unavoidable.[61]

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[58] Cf. Case C-261/09 *Mantello* [2010] ECR I-11477, paras. 38–41.

[59] See also Togias 2013, pp. 1157–1161; Mouzakis 2012, pp. 65–67; AP 108/2013, Poinika Chronika 2013, pp. 468–469. These authors refer, respectively, to AP 1557/2012, AP 200/2011, AP 2006/2010 and the opposite (refusing the commission on Greek soil) AP 1074/2012, AP 678/2012, AP 994/2010, AP 810/2010. See also on territoriality AP 200/2011, Poiniki Dikaiosini 2011, pp. 579–581 and the respective remarks of Vrioni 2011, p. 582. In favour of the '*idem factum*' conception as to the identity of the act, see AP 1/2011, Poinika Chronika 2011, pp. 501–504, with approving remarks of Anagnostopoulos 2011, pp. 504–505; see also Karaflos 2013, pp. 91–92.

[60] Vrioni 2011, p. 583.

[61] This is correctly pointed out by Karaflos 2013, p. 97.

A second area of concern is whether an initial refusal of execution results in blocking the affirmation of a repeated EAW for the same person and deed. Since a clear provision is lacking in the Law, Art. 454 CCP applies *per analogiam*: in contrast to the final (i.e. irrevocable) judgment as to the substance of the case on which the EAW is based,[62] there is no *res judicata* in extradition cases, because the substance is never examined at this stage. Thus, the affirmation of a repeated EAW remains possible, provided that it contains new facts.[63]

The third point to note is that the requirement of specificity, i.e. the prohibition of being prosecuted or sentenced for an offence other than that for which surrender occurs, is dangerously undermined in Greece. Article 34 paras. (2)–(4) of Law No. 3251/2004 provide for exemptions from this principle, among which is the consent of the executing state after an application from the Appeals Court Prosecutor in this regard.[64]

The fourth point concerns the finding in Supreme Court Judgment No. 1/2011 that where a sentence has in fact been served, this is no longer a prerequisite for denying the execution of the EAW; the Supreme Court interprets Art. 50 of the EU Charter of Fundamental Rights (with regard to the *ne bis in idem* principle) as so indicating. However the issue cannot be considered as definitely settled.[65]

Another point that has arisen is that minors under 13 are not criminally responsible in Greece. EAWs regarding such persons cannot be executed in Greece.[66]

Last but not least, it is very important that EAWs are not unconditionally executed when human rights and discrimination issues arise in cases where the person sought may be further extradited via the issuing state to a third state of ambiguous democratic legitimacy. In Decision No. 1303/2011, the Supreme Court approved Germany's EAW request concerning a suspect for supporting DHKP-C (the acronym for '*Devrimci Halk Kurtuluş Partisi-Cephesi*', meaning 'Revolutionary People's Liberation Party/Front') in Turkey under the condition of no further extradition to third countries (according to Art. 36(2) of Law. No 3251/2004). The minority of the judges in this decision proceeded to an interpretation that was more generous and distinctly protective of human rights; the minority judges called for a rejection of the request on the grounds of a lack of clarity of the accusations and because of the fact that they saw the acts ascribed to the suspect as intrinsically legitimate.[67]

[62] Whether the judgment is final on the substance is determined according to the legislation of the Member State in which the case has been tried and not according to the legislation of the executing state: Karaflos 2013, p. 92.

[63] Togias 2013, pp. 1163–1164.

[64] Karaflos 2013, p. 99.

[65] Cf. respectively Karaflos 2013, p. 100.

[66] Karaflos 2013, p. 93.

[67] See the majority and the courageous minority in this decision in AP 1303/2011, Poinika Chronika 2012, pp. 494–495 and 495–496, accordingly.

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2.4 The EU Data Retention Directive

2.4.1 According to the Greek Constitution, home, private and family life are inviolable; home searches are subject to law and carried out in the presence of representatives of the judiciary (Art. 9(1)). Violations of this right are punishable as crimes of breaches of peace of home and abuse of power, and the perpetrator shall also pay damages to the victim (Art. 9(2)). Further, every person is protected from the collection, elaboration and use, especially through electronic means, of his/her personal data; an Independent Authority is established for this purpose (Art. 9(a)). Finally, correspondence is inviolable except in cases where national security and the fight against especially serious crime so warrant, and an Independent Authority is also established for this purpose (Arts. 19(1) and (2)). Evidence obtained through violations of all of these three articles is not admissible in court.

EU Directive 2006/24[68] has been incorporated into the Greek legal order through Law No. 3917/2011. The Law provides for some guarantees for the preservation of the rule of law: a) access to data is dependent upon the rules and restrictions laid down in Law No. 2225/1994 concerning the interception of communications (Art. 4); (b) the procedure is supervised by independent authorities like the one protecting personal data (Art. 9); (c) illegal access, elaboration and dissemination of retained data is punishable as a felony with long-term imprisonment (especially when the constitutional order is endangered) or with imprisonment of 2 to 5 years as a misdemeanour when the crime is committed through negligence (Art. 11); (d) data produced in public places may be retained only when serious crimes (treason; public order offences; violent crimes; drug trafficking, crimes against property) or vehicular circulation are concerned (Art. 14).

There have been no judicial challenges with regard to the implementation of the Directive in Greece. However, even with the above safeguards, the Law cannot stand up against the critique already exerted against the Directive itself. The proportionality principle is in particular blatantly violated, in a framework of a general inconsistency of the Directive with Art. 8(2) ECHR: principles like fair warning, foreseeability and the necessity of the measures in a democratic society are not satisfied. The Directive proves unclear, allows retention for disproportionately long periods of time, contains no sufficient procedural safeguards and infringes upon the very meaning of the right to privacy, establishing an Orwellian EU 'Super-Panopticon' undermining freedoms and pluralism as fundamental EU values. Thus, the Directive seems totally unconstitutional, empirically unverified as to its necessity and counter-productive. This is evidenced by the annulment or bypassing of the implementing laws of the Directive in Bulgaria, the Czech

[68] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

Republic, Cyprus, Germany and Romania[69] and of course by the respective decision of the CJEU in the jointly judged cases *Digital Rights Ireland* and *Seitlinger and Others*.[70] Nevertheless, Law No. 3917/2011 still remains in force.

2.5 Unpublished or Secret Legislation

2.5.1 This issue has not arisen in Greece. As was noted in Sect. 2.1.3, the requirement of publication of laws is regarded as part of the concept of a rule-of-law-based state. Article 42 of the Constitution provides that statutes passed by the Parliament are promulgated and published by the President of the Republic. Statutes obtain formal legal effect with their publication in the government gazette, and substantive legal effect ten days after publication; i.e. legal validity begins with publication and legal enforceability ten days later.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 The constitutional rules on legal certainty and non-retroactivity are addressed in Sect. 2.1; see also Sect. 2.8 on judicial review.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule of Law Based State

2.7.1–2.7.3 As noted in academic commentary, especially in a recent Policy Paper of the Robert Schuman Centre of the European University Institute, the establishment of the European Stability Mechanism (ESM) transforms the nature of the EU. The EU is no longer considered a community whose members enjoy only benefits; it is also a community that shares risks.[71] Although the ESM is not formally an institution of the EU, scholars have underlined that we cannot overlook that its function concerns managing financial risks relating to EU members; therefore the

[69] Lachana 2013, pp. 1143–1153 and generally. With regards to Bulgaria, cf. the Decision of the Supreme Administrative Court of 11.12.2008, http://secile.eu/wp-content/uploads/2013/11/Data-Retention-Directive-in-Europe-A-Case-Study.pdf, under Sect. 5.2.

[70] Joined cases C–293/12 and C–594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[71] Poiares Maduro et al. 2012, p. 8.

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ESM must not function in a way that is incompatible with the principles of transparency and accountability, which are fundamental for the operation of the EU.[72] However, in the decision-making process within the context of the ESM, the dominant role belongs to a body composed by the Ministers of Finance of the countries participating in the ESM. The choice of means for a country's rescue belongs exclusively to this body, and their decisions do not require any justification in the form of presenting the ground on which they are based, a requirement that exists for all EU institutions, in accordance with Art. 296 TFEU. This absence of justification is even more significant if we consider that the operation of the ESM is not accompanied by the usual accountability mechanisms for EU bodies, i.e. access to documents and the obligation to report to the European Parliament.[73]

Scholars have additionally identified two other changes brought by the ESM to the institutional architecture of the EU: (a) it alters the balance in favour of transnational over supranational elements of governance and (b) it breaks the unity of the EU legal order, as the legal regime of the ESM is in the form of an international treaty ratified by some members of the eurozone.[74] The first change is particularly important, if we consider that within the ESM, some countries play the role of the lender and others the role of the debtor, and therefore the power relations between them are unbalanced. This development weakens the economic sovereignty of some members, since the loss of their ability to make decisions on specific issues is not accompanied by the creation of decision-making mechanisms at the EU level that would enjoy democratic legitimacy.[75] Regarding the second change, it should be mentioned that this undermines the institutional unity of the EU, as the ESM introduces mechanisms that are not governed exclusively by EU law, allowing deviations in the decision-making process from the guarantees given by the institutional architecture of the EU.[76]

As Chiti and Teixeira have observed, whereas the establishment of the ESM and the amendment of certain provisions of the TFEU lead to constraints of national sovereignty over budgetary matters, this does not involve the reinforcement of all EU institutions, especially those which contribute to the transparency and accountability of the decision making process.[77] Thus, the current structure of the decision-making process of the ESM may contribute to the widening of the EU's democratic deficit and, consequently, also to the democratic deficit in the Members States. Furthermore, scholars have identified that the Memoranda of Understanding

[72] Ibid., pp. 8–10.

[73] Ibid., p. 10.

[74] Chiti and Teixeira 2013, pp. 673–708, especially p. 685.

[75] Ibid., pp. 705–706.

[76] A side effect of the non-inclusion of these mechanisms in the EU legal order is that national courts invoking such specificity may refuse to refer cases to the CJEU for a preliminary ruling, as did the Council of State in Decision 1117/2014 (para. 29), arguing that measures taken in the implementation of these mechanisms are not taken under EU law and therefore there is no need to refer a case for a preliminary ruling.

[77] Chiti and Teixeira 2013, p. 689.

(MoUs) signed by Greece and other countries make it clear that such instruments constitute a binding framework that Member States which receive financial assistance must respect in order to continue obtaining financial assistance.[78] As Kenneth Armstrong has observed:

> The degree and manner of the constraint on the policy autonomy of the states is significant. The regular mechanisms of accountability and governance are formally not suspended, yet they are in reality restricted for the states which are subject to the discipline imposed via MoU and controls exercised in the context of the adjustment programmes.[79]

Moreover, no legal evaluation of the international bailout agreements can escape considerations about state sovereignty. However, the Greek Council of State evaded the question as to whether the MoU implied a transfer of sovereignty by characterising the MoU as a political programme and not a legally binding document, since the MoU, unlike in other countries, had the support of the Parliament. In all of the relevant cases,[80] the Council of State has held that the measures taken by the Greek Government (salary cuts and cuts to bonds issued by the State of Greece) in order to comply with the loan agreements are compatible with the Geek Constitution (see below Sect. 2.8).

It is evident from the above-mentioned analysis that only issues within the field of Question 2.7.3 have arisen in Greece, since the Questions in Sects. 2.7.1 and 2.7.2 concern creditors and not debtors, such as Greece.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

It should be noted that Greek courts, from 1984 onwards, recognise the principle of proportionality as a general principle of law, which should rule limitations of rights. Since the 2001 constitutional revision, this principle is enshrined in the Greek Constitution (Art. 25(1)d)). However, as has been pointed out, during the financial crisis, the Council of State has significantly eased or relaxed its control as to the second stage of this principle, in which the necessity of the measure is examined, and has tended to accept the legislature's choices as to the necessity of the measures. At the same time, invoking the principle allows the judge to place some limits on the legislator as to the interference with rights that will be deemed to be compatible with the Constitution.[81]

As regards the principle of legal certainty, it should be noted that recognition of this principle in the jurisprudence of the Greek courts has not led the Greek courts,

[78] See Fabrini 2014, p. 73.

[79] Armstrong 2013, as cited by Fabrini 2014, p. 15.

[80] Judgment 668/2012 considering the implementation of the First MoU and Judgments 1117/2014 and 2307/2014 considering the implementation of the Second MoU.

[81] See Contiades and Fotiadou 2013, p. 33.

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in the past, to recognise a form of social acquis as regards the level of benefits associated with social rights.[82] The settled case law of the Greek courts is that the legislature has wide discretion in determining the amount of benefits of this type, and thus the level of benefits cannot be taken for granted. Therefore, the recent case law on the cuts in social benefits does not constitute a change of paradigm within the context of Greek jurisprudence. According to the principle of legal certainty as conceived in the Greek legal order, this principle does not guarantee a specific amount of benefits. Moreover, in accordance with the case law of the Greek courts, this principle does not apply to the expectations of bondholders. According to a recent decision of the Council of State, the application of the principle of legal certainty in relations between bondholders and the issuer of the bonds presupposes that the solvency of the state remains unchanged over time, which, according to the Court, is contrary to reality. Therefore, a 'haircut' of bonds is not contrary to the principle *pacta sunt servanda*, since in cases of changed circumstances, the guiding principle is *rebus sic stantibus.*[83]

As for the rule of law, it should be noted that even if we consider that the review of constitutionality of laws is one of the key aspects of this concept, the Greek courts have traditionally been very discreet in relation to the economic choices of the legislature, recognising the primacy of the latter on these issues over time.[84] We should note that the underlying reasoning of the jurisprudence of the ECtHR concerning the review of financial measures is similar, since it recognises a wide margin of appreciation in favour of the legislator.[85] Thus, the recent case law of the Greek courts in relation to the countermeasures of the economic crisis is not a deviation from the established case law.[86] The maximum that the judge can review is whether the legislature has provided sufficient evidence to support its choices.

The judicial review of the measures undertaken by Greece in the implementation of the MoUs does not exceed the limits of the judicial review exercised by the Greek courts in cases in which the crucial legal issue is the compatibility of a rule of EU law with the Greek Constitution. The Greek courts systematically avoid examining the cases at issue from the viewpoint of the protection of the constitutional identity of a Member State or a breach of competence by an EU institution, unlike is the case with the jurisprudence of other supreme courts. In the cases concerning the MoUs, the Council of State has followed this strategy and limited its judicial review of the measures only from the viewpoint of their compatibility with the Greek Constitution and the ECHR, ruling that they are compatible. Furthermore, the Council of State has avoided making a preliminary reference to the CJEU on the issue of whether EU law applied at that time (before the reform of the Treaties), conferred competence on the EU to adopt Council Decision

[82] See Contiades 1999, p. 199.

[83] Judgment 1117/2014, para. 16.

[84] See Kaithatzis 2010.

[85] See *Koufaki Ioanna and ADEDY v. Greece*, no. 57665 & 57657/2012, 7 May 2013.

[86] Judgments 668/2012, 1972/2012, 38/2013.

2010/320/EU, which constitutes the legal basis of the MoUs. This was despite the fact that a relevant preliminary reference question should have been raised, according to the criteria applied by the CJEU concerning the submission of preliminary references. At the same time, the Council of State has avoided making a preliminary reference with regard to the compatibility of specific measures laid down by the above-mentioned Council Decision, (e.g. wage cuts in the public sector) with specific provisions of the EU Charter of Fundamental Rights, for instance Arts. 20, 21(1) and 31(1). In general, as has been pointed out in Greek public law theory, the jurisprudence of the supreme courts tends to play down the importance of EU rules, which could contribute to the interpretation of the rules of the internal legal order, and has not yet developed a consistent constitutional policy regarding the relationship between the national constitution and EU law.[87]

We should also note that there has been a clear shift in the jurisprudence of the Council of State, which is based on an extension of the concept of public interest that now includes financial and service targets in order to avoid fiscal 'derailment' of the country. However, this is a choice made by the judges which is limited to the formative dimension of interpretation of legal provisions, without reaching the point of creating new rules of law by the court, in order to deal with situations that have not been foreseen by the legislator. It is significant that in a Council of State Decision[88] only a minority of three judges held that in cases involving the relationship of rights and the financial crisis, the constitutional provision (Art. 48 of the Constitution) which provides for the partial and temporary suspension of the Constitution due to national security reasons should be applied proportionately, even if the Constitution does not explicitly provide for the implementation of this provision in such a case. As far as the specific questions in Sect. 2.8 are concerned, we can make the observations below.

2.8.1 There is no statistical data concerning preliminary rulings addressed to the CJEU by the Greek Courts. It is commonly accepted that the Greek supreme courts were for a long time reluctant to submit preliminary rulings, which has changed over the last ten years, but is still not a well-established practice, as the recent case law concerning the loan agreements shows.

2.8.2–2.8.5 There is also no statistical data concerning the annulment of domestic acts on the grounds of their incompatibility with the Greek Constitution. In general, we can claim that the Council of State, at least after 1975, has been very active on rights protection, especially the protection of rights concerning individual autonomy, human dignity and the environment. The previous analysis also proves that the review of measures that implement EU law by the Greek courts does not demonstrate a sound doctrinal approach similar to that of the German Constitutional Court or the ECtHR. It is also obvious that such a lack of constitutional policy with regard to the relation between EU law and the Greek Constitution results in a gap in

[87] See Yiannakopoulos 2013, pp. 374–375.

[88] See Dissenting Opinion of three judges of the Council of State to Judgment 693/2011.

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judicial review. The range of strategies followed by the Council of State, according to scholarly commentary,[89] varies from setting aside the Constitution in favour of EU law to setting aside EU law in favour of the Constitution. Both strategies lack consistency, since they do not provide us with sound criteria that are used constantly. Yet we should not come to the conclusion that setting aside EU law in favour of the Greek Constitution results in a more protective approach for the rights' holders, as the recent case law on austerity measures indicates.

2.8.6 As far as the question of reverse discrimination due to the implementation of EU law is concerned, the answer is that we can distinguish two distinct periods in the jurisprudence of the Greek courts. Since 2009, the relevant jurisprudence has changed and reverse discrimination due the implementation of EU law is considered to be unacceptable. The main doctrinal arguments which have led to this shift are founded on the equality principle provided by the Greek Constitution (Art. 4). However, this shift in the jurisprudence does not imply an automatic implementation of EU law with regard to Greek citizens. It only implies that the judge is obliged to examine whether or not the differential treatment between EU and Greek citizens can be justified according to the equality principle.[90]

2.9 Other Constitutional Rights and Principles

2.9.1 One of the consequences of the economic crisis is the further retreat of the justiciability of social rights, since their operation is completely dependent on available funding sources. Moreover, the case law of the Greek courts does not deny the normative content of social rights, but merely disputes the possibility to found claims for steady and fixed benefits on them.[91] Economic crisis further weakens this dimension of rights, so that they alone cannot provide sufficient basis for reviewing the constitutionality of measures taken, without recourse to constitutional provisions which can give rise to justiciable claims, such as the right to property.[92]

Another development in the protection of rights during the financial crisis concerns the transformation of the concept of public interest in the case law. According to recent jurisprudence, the measures taken are not merely intended to satisfy a simple public interest but a serious financial interest, which has two sides. On the one hand, its satisfaction is considered as a prerequisite for the state's ability to serve its basic functions under the Constitution. On the other hand, it is connected to the satisfaction of a fundamental interest of the EU, of which Greece is a member.

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[89] Yiannakopoulos 2013, pp. 424–464.

[90] Ibid., pp. 342–348.

[91] See Ntouchanis 2007.

[92] Contiades and Fotiadou 2013, p. 31.

The Council of State and the Higher Special Court (*Anotato Eidiko Dikastirio*), in a series of judgments after 2012 that were not related to cuts in salaries, pensions or other measures taken to comply with the MoUs, have held that any measure which can help to prevent fiscal risk may provide an acceptable foundation for limitation of rights. These cases relate to the so-called 'privileges of the state', i.e. the short limitation periods for claims of citizens against the state and the lower rate of interest charged on such claims compared with the rate charged on claims of the state against individuals. Whereas until 2012, the case law of the Council of State, under the influence of the jurisprudence of the ECtHR, considered that these privileges were not compatible with the principle of equality (Art. 4 Constitution), the provisions of Art. 6 ECHR and Art. 1(1) of the First Additional Protocol to the ECHR, the case law changed after a decision by the Higher Special Court.[93] According to the rationale of the decision, the shorter limitation period for private claims against the government serves fiscal purposes, in particular the rapid resolution of cases with budgetary costs, which helps the state revenue-expenses balance. A similar shift was observed in the case law of the ECtHR in *Giavi v. Greece*.[94] The ECtHR, making a shift from earlier decisions,[95] held that the severe economic crisis can be an imperative reason of public interest, which imposes the restriction of rights arising from Art. 6 ECHR and Art. 1(1) of the Protocol. Therefore, with regard to Greece, we can claim that the economic crisis also affected a number of rights that do not belong to the category of social rights, but fall into the category of individual rights and rights of due process.

Apart from the above rights, another category affected by the economic crisis is rights regarding labour relations. The MoUs impose measures affecting the constitutionally guaranteed collective autonomy (Art. 22), reducing the role of trade unions in collective bargaining as well as the substance thereof, to the benefit of rules imposed unilaterally by the Greek legislature.[96] It is a choice that moves in the opposite trajectory from the ECtHR's jurisprudence on collective autonomy.[97] Moreover, the two MoUs tend to restrict or even eliminate the role of arbitration, by prohibiting increases in salaries and fees granted through arbitration.[98]

[93] Judgment 25/2012.

[94] *Giavi v. Greece*, no. 25816/2009, 3 October 2013.

[95] *Meidanis v. Greece*, no. 33977/06, 22 May 2008; *Zoumpoulidis v. Greece*, no. 36963/06, 25 June 2009.

[96] See Achtcioglou and Doherty 2014, pp. 219–240.

[97] See *Demir and Baykara v. Turkey,* no. 34503/97, 12 November 2008. For this reason, the strategic litigation followed by the applicants before the ECtHR in the case *Koufaki and ADEDY v. Greece* was criticised, on the grounds that the applications to the ECHR were limited only to salary cuts, without further developing the issues related to the changes in working relations, see Gavalas 2014.

[98] However, the Council of State in a recent Judgment (2307/2014) ruled that the relevant prohibition is contrary to Art. 22(2) of the Greek Constitution.

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2.10 Common Constitutional Traditions

2.10.1 The question concerning whether the common constitutional traditions of the Member States can be an autonomous source of rights within the context of EU law cannot be answered definitively, since a convincing doctrine of sources from which fundamental rights are derived still remains elusive. However, the jurisprudence of the CJEU offers some guidelines which help us to determine the proper place of the constitutional traditions of the Member States within the context of EU law. On this issue, the jurisprudence of the CJEU on Art. 53 of the Charter is crucial (see Sect. 2.11 below). When the level of rights protection afforded by national constitutions is equivalent to that of the Charter, then common constitutional traditions can be a source of fundamental rights protection. In any other case, the CJEU focuses on whether or not the application of national standards touches upon the unity, primacy and effectiveness of EU law. The solution adopted by the CJEU is that rights protection under the Charter operates as a 'ceiling' for the afforded protection. Yet I consider the approach of the Advocate General in the *Melloni* case[99] to be more persuasive. Common standards of protection require common definitions. We should then 'differentiate between situations in which there is a definition at European Union level of the degree of protection afforded to a fundamental right … and those in which that level of protection has not been subject to a common definition'.[100]

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 We cannot examine the issue of stricter constitutional standards and the application of Art. 53 of the Charter without taking into account the CJEU's case law on the issue. According to the interpretation of Art. 53 given by the CJEU in the *Melloni* case, 'national authorities and courts remain free to apply national standards of protection of fundamental rights provided that … the primacy, unity and effectiveness of EU law are not thereby compromised'.[101] Thus, national courts should apply national standards of protection of fundamental rights under the condition that they do not undermine the primacy, unity and effectiveness of EU law. The courts may only enforce more protective constitutional rights when the basic elements of EU law are not undermined. In other cases, the Charter displaces the national constitution and, as a consequence, the level of constitutional protection is lowered. Yet we have to take into account that there are still situations that

[99] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[100] Opinion of AG Bot in Case C-399/11 *Melloni* [2013] ECLI:EU:C:2012:600, para. 124. On this issue see also Torres Pérez 2014, pp. 308–331, especially p. 326.

[101] Case C-399/11 *Melloni*, supra n. 99, para. 60.

are not entirely determined by EU law, situations where EU law leaves discretion to the Member States for the implementation of EU law. Arguably therefore, we might conclude that when a situation is entirely determined by EU law, the Charter displaces the level of protection afforded by national constitutions, whereas in cases that are not determined entirely by EU law a more flexible approach should be applied. For instance, there are cases in which the interpretation given to a constitutional right is considered, even by the CJEU, to be part of the national constitutional identity, which is being protected according to Art. 4(2) TFEU. In this regard, the possibility of applying a higher standard of protection provided by a national constitution should not be automatically excluded when the primacy, effectiveness and unity of EU law are involved. The wording of Art. 53 as such does not preclude an interpretation that incorporates a mandate for the CJEU to allow for higher levels of constitutional protection in specific cases, when there are no other rights or interests that should prevail.[102]

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1–2.12.3 According to the above-mentioned analysis, we can claim that the main obstacle in Greece concerning the debate on constitutional rights and values within the EU legal order touches upon the restricted judicial review exercised by the Greek courts in cases in which the crucial legal issue is the compatibility of a rule of EU law with the Greek Constitution. The Greek courts systematically avoid examining the cases at issue from the viewpoint of the protection of the constitutional identity of a Member State or the breach of competence of the EU institutions, as is the case with the jurisprudence of other supreme courts. In the recent cases concerning the MoUs, the Greek courts have refrained from making preliminary references to the CJEU, and thus they have refrained from starting a dialogue between a national court and the CJEU that would be crucial for the development of common standards for rights protection.

Considering the restricted standing of private parties to request a review of EU legislation, such omission restricts the level of rights protection in combination with the national courts' lack of jurisdiction to examine the compatibility of EU law with the national constitution. Therefore, it would be necessary to develop mechanisms which would overcome such lacunae in rights protection. Thus, I fully agree that the suspension of the application of, and the carrying out of a review of EU measures, where an important constitutional issue has been identified by a number of constitutional courts, would be a measure to the right direction. This could strengthen

[102] Torres Pérez 2014, p. 327.

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the federalist aspects of EU governance, while at the same time respecting a basic precondition for democracy, namely the constant re-evaluation of previous decisions.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.3 Concerns about the reduction in the standard of protection and the rule of law in the context of the EU are fairly sound, but the whole issue is not a zero-sum game. As the Greek case indicates, the role of institutions that are entitled to protect rights is crucial. Greek courts have reviewed the measures taken under the bailout agreements only in respect of their compatibility with the Greek Constitution and the ECHR. Such omission is important if we consider that, since the inclusion of the Charter of Fundamental Rights in primary EU law, the whole constitutional structure of the EU has shifted from a constitutional order oriented towards the fulfilment of economic goals to a constitutional order in which a list of fundamental rights has an equal footing. Thus, it would be crucial for the whole system of rights protection in the EU to push the CJEU to rule on the normative content of the rights included in the Charter.

On the other hand, scholars such as De Witte have pointed out that the centralised and unitary form of review exercised by the CJEU in respect of EU law does not fit into the multilevel system of EU governance, since some cases may fall within the scope of application of the Charter and domestic law.[103] Thus, it would be helpful if there were some changes concerning the primacy of the review by the CJEU. A more proactive role for the national courts and other national institutions and a more relaxed approach by the CJEU concerning national standards of rights protection than currently taken would considerably contribute to moving in the right direction.[104]

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The Constitution of Greece sets the cornerstone of the relationship between Greece and international law in Art. 2(2), according to which, 'Greece adhering to the generally recognised rules of international law, pursues the strengthening of

[103] De Witte 2013, pp. 1523–1538, especially p. 1527.

[104] Ibid., pp. 1527–1533.

peace and of justice, and the fostering of friendly relations between peoples and States'. Thus, general objectives for Greek foreign policy and international co-operation are set.

The way in which rules of international law are integrated in domestic law either automatically or following ratification is regulated by Arts. 28 and 36 of the Constitution. Article 28(1) distinguishes between 'generally recognised rules of international law' and 'international conventions', a distinction which corresponds to the distinction between unwritten and written international law. Customary international law and general principles of international law are considered rules with general international recognition, which are automatically integrated in domestic law without any further need for ratification. International conventions become operative according to their respective conditions as of the time they are sanctioned by statute and become an integral part of domestic law.[105]

The legislature has the competence to ratify international treaties, placing them accordingly above statutes. The judiciary is responsible for classifying an international rule as a generally recognised rule, thus integrating it into domestic law. 'Controversies related to the designation of rules of international law as generally acknowledged' are settled by the Special Highest Court in accordance with Art. 100(1)(f) of the Constitution. The President of the Republic has competence to conclude certain categories of treaties in accordance with Art. 36(1) of the Constitution. Treaties of peace, alliance, economic cooperation and participation in international organisations or unions are ratified by the President of the Republic and published in the government gazette. However, it is the Government that bears responsibility for the political choices reflected in such treaties. Article 36(1) provides that the President of the Republic shall announce them to the Parliament with the necessary clarifications, whenever the interest and the security of the state thus allow.[106]

Furthermore, the Constitution explicitly provides in Art. 36(2) for certain categories of treaties that require ratification by statute voted by Parliament. These include conventions on trade, taxation, economic cooperation and participation in international organisations or unions and all others containing concessions for which, according to other provisions of the Constitution, no provision can be made without a statute or which may burden Greeks individually. *A contrario*, international treaties that do not fall into these categories may be concluded by the Government or by authorised diplomats. However, unless they are ratified by a statute, according to the aforementioned Art. 28(1) of the Constitution, they do not become part of domestic law.

Hence the Constitution explicitly addresses monist and dualist approaches. The Constitution primarily adopts dualism, however the influence of monist theory is detectable in the automatic integration of generally recognised international rules. International law is integrated into the internal hierarchy of legal norms, retaining

[105] Contiades and Fotiadou 2014, p. 720.

[106] Ibid.

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its unique character. Generally recognised international rules and international conventions sanctioned by statute are placed beneath the Constitution and above statutes in the hierarchy of sources of law.[107]

3.1.2–3.1.3 Not applicable.

3.1.4 The Constitution provides an efficient legal framework for the participation of Greece in international organisations and the ratification of treaties. The above-mentioned recent, financial crisis-triggered discussion regarding concessions of sovereignty and the transfer of state competences to international organisations by the law incorporating the Memorandum, under Art. 28 of the Constitution, confirms that the Constitution provides the framework for dealing with concessions of sovereignty. Although Art. 28 was not employed by the Greek Parliament and the Council of State confirmed this choice, what was not questioned was the existence of constitutional paths to allow such concessions.

3.2 The Position of International Law in National Law

See Sects. 3.1 and 3.3.

3.3 Democratic Control

3.3.1–3.3.2 In Greece, international treaties and agreements relating to the areas noted in Sect. 3.1. of this report should be ratified by the Parliament. When such agreements make a concession of sovereignty and transfer state competences to international organisations (like the Troika), according to the Greek Constitution (Art. 28), a three-fifths, enhanced majority of the total number of Members of Parliament is required for ratification. An international agreement or treaty can be subject to referendum under to the Greek Constitution (Art. 44(2)); to be more precise, the relevant provision does not clearly provide for such option but also does not exclude it.[108] The Former Prime Minister proposed that a referendum could be used to ratify the loan agreements (see Sect. 1.4.2.). Yet even members of the Cabinet did not agree, and the referendum never took place.

[107] Ibid., p. 721.

[108] Article 44(2) 'The President of the Republic shall by decree proclaim a referendum on crucial national matters following a resolution voted by an absolute majority of the total number of members of the Parliament, taken upon the proposal of the Cabinet. A referendum on bills passed by Parliament, regulating important social matters with the exception of fiscal ones, shall be proclaimed by decree by the President of Republic, if this is decided by three-fifths of the total number of its members following a proposal of two-fifths of the total number of its members ...'.

The constitutionality of the loan agreement was challenged before the Council of State. One of the arguments in support of the unconstitutionality of the loan agreement was that the agreement was integrated in the Greek legal order as a piece of legislation by a simple majority and not the qualified majority required for international treaties and agreements. In fact, the ratification of the loan agreement and its compatibility with the relevant constitutional provisions has been the subject of a vivid public deliberation which took place within the community of Greek public law lawyers. No other treaty ratification in the past has been discussed so widely.[109] However, the Greek Council of State rejected the argument of unconstitutionality, ruling that the MoU is merely a political programme, without any legally binding effects on its own.[110] Consequently, the existing constitutional provisions provide only for the formal ratification by Parliament of treaties and international agreements. Yet, the observance of the relevant provisions by Parliament is not under an intense review by the courts, since judicial review by Greek courts does not exceed the so-called *interna corporis* of the Parliament. Thus, considering the Greek judicial practice of the past years, which asserts the observation that the courts have been less active when issues concerning the ratification of a treaty are under review for constitutionality, it might prove helpful if the Greek Parliament were to obtain the means to exercise an intense control over the implementation of treaties and international agreements.

3.4 Judicial Review

3.4.1 The judicial review of the MoUs in terms of their compatibility with the Greek Constitution, EU law and the ECHR are discussed above in Sect. 2.8. The following further issues are worth mentioning here.

In Greece, the relevant rules concerning the review of international treaties are set out in Art. 28 of the Greek Constitution (see Sect. 3.1).

Article 28(3) of the Greek Constitution allows for the delegation of state powers to supranational organisations if this does not conflict with the democratic foundations of the Constitution and human rights. This procedure, according to Greek constitutional theory, serves as a quasi-constitutional revision process outside of the strict standard provided for in Art. 110, since the ratification of a treaty may result in an informal revision of the Constitution. Up until the loan agreements, all international treaties had been ratified by the vast majority of the MPs on the basis of Art. 28. Thus, there are two standards on which judicial review concerning the ratification of a treaty or an agreement can rely, i.e. the ratification process (see

[109] See for example Karavokyris 2014, Mantzoufas 2014 and DSA (Athens Bar Association) Essays on the MOU 2013.

[110] On the legal Status of the MoU, see Vlachou 2012.

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above Sect. 3.3) and the content of the treaty, or the agreement in respect of the democratic foundations of the Constitution and human rights protection.

Thus, the critical question is whether the transfer of sovereignty inherent in the loan agreements and in being part of the European Monetary Union (EMU) affect the democratic system of government. The answer is based on an assessment made by the Parliament during the ratification of the relevant Treaty. As far as review by the courts of these matters is concerned, an assessment of the compatibility or otherwise of the Treaty on the Functioning of the EU or the loan agreements with the Greek Constitution would be a review with dubious legal consequences. If it were ruled that the TFEU was not compatible with certain articles of the Greek Constitution, the state would still be bound by the treaty and have legally binding obligations under the treaty. Such decision would not increase the credibility of the court, and would simultaneously reduce its legitimacy. So by the time the Greek judge ruled that the measures adopted in order to activate the European support mechanism are measures 'deriving from the status of Greece as a member of the EU and of its participation in the EMU',[111] the next step was to conclude that 'the measures are justified by invoking serious grounds of public interest which are objectives of common interest of the Member States of the EU',[112] (i.e. budgetary discipline and the stability of the euro area). The public interest has increasingly obtained an EU dimension and must be served by the policies of the countries participating in the EU. Further on, the question of whether participation in the EU raises issues of potential conflict between national constitutions and the provisions of EU law is only marginally considered by the Greek courts. Thus the national constitution is no longer the guarantor of popular sovereignty rooted in a political decision made by the people (popular sovereignty), but becomes a guarantor of a state's compliance with the obligations arising from participation in the EMU, regardless of a possible conflict between such obligations and policy decisions based on popular sovereignty.[113]

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 In Greece, the loan agreements have taken the form of MoUs and bilateral loans, in which the IMF is part of the Troika and thus one of the two 'signatories' parties. Consequently, the related public debate does not refer to the IMF as such or to the implication of its policies upon social rights. Instead, the discussion among public law theorists, the public debate in the press (including the

[111] See Judgment 668/2012, para. 35; see also the recommendation delivered by Judge E. Sarp on Judgment 668/2012, (in Greek) available at www.constitutionalism.gr. A recommendation is the proposal of one member of the judiciary on which the Court bases the judgment. Translation by the author.

[112] Ibid.

[113] See Drosos 2011, pp. 764–779, especially pp. 768–769.

Internet) and mass media, as well as the litigation in courts concerns the impact of the MoUs on social rights and the quality of democracy. However, we cannot ignore the fact that the austerity programme in Greece has a strong EU dimension, since it is related to the obligations undertaken by Greece due to participation in the EMU. Monetary integration is not the same as the general process of globalisation through trade liberalisation. The main difference is that it involves a deliberate institutional decision to give up national prerogatives over the exchange rate and interest levels for the sake of establishing a common currency. Within this context, democracy is affected only if we conflate democracy and state autonomy. If we escape such conflation, we should focus on the EU level and on the possible changes which should take place in order to make the EMU more compatible with democracy. In Greece, such a shift in the agenda is being proposed by political theorists dealing with European integration and less often by public law theorists. As far as the social rights agenda is concerned, a dimension often ignored in Greece is that the judicialisation of so-called mega-politics has had poor results.[114] The unprecedented recourse to the Greek courts has created hopes that austerity measures will be defeated in the courts. Yet, as mentioned above, the Greek supreme courts have been hesitant to intervene in the field of technocratic decision-making by the executive that is merely endorsed by the Parliament, since they feel that they are inadequately equipped to overturn such economic decisions. The most they could possibly ask from the governmental officials is a detailed cost-benefit analysis report justifying the necessity of adopted measures.[115]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 In all areas included in this section of the Questionnaire, there have been scholarly commentary and parliamentary debates. Yet, according to the analysis above, we can conclude that a prominent characteristic of the Greek case is that debates in the Parliament and scholarly commentary do not affect the practice of the courts, which seem to be very reluctant to review any measure that constitutes an obligation undertaken by Greece in the context of the EU with regard to its compatibility with the Greek Constitution or with EU law. Another observation we can make is that the jurisprudence of Greek courts during the crisis has put the boundaries of constitutional pluralism, as a main characteristic of European Public Law, to the test. Greek courts seem to be reluctant to engage in a dialogue with the CJEU; the dialogue between the Council of State and the European Court of Human Rights, which in the past has produced some fruitful results concerning rights

[114] Kaithatzis 2011.

[115] See dissenting opinion of Judge Karamanof to three judgments of the Council of State, 668/2012, 1972/2012, 38/2013.

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protection, has turned into a monologue under the 'shadow' of the financial crisis. What the financial crisis has dredged up are the functional aspects of constitutional pluralism, namely the evasion of conflicts, and not the more substantial elements like the displacement of authority by arguments within the context of constitutional discourse.

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Part IV
The Post-Totalitarian Constitutions of the 'New' Member States from the Post-Communist Area: A Detailed Bill of Rights, Rule of Law Safeguards and Constitutional Review Entrenched after the Recent Memory of Arbitrary Exercise of Power

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The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain

Samo Bardutzky

Abstract The 1991 Constitution of Slovenia belongs to the category of strong constitutions, with a detailed list of rights. The report informs that the concept of the rule of law mostly draws on German commentaries on the constitutional *Rechtsstaat*, and its main elements are expressly entrenched in constitutional provisions. Particularly notable are the detailed limits on the power of the state in prosecuting crimes and detailed guarantees for judicial protection, which are identified as more extensive than those in the ECHR and the EU Charter. The constitutional amendments for EU and international co-operation contain a clause on the respect for human rights, democracy and the rule of law. The report extensively documents areas where the above, potent constitutional tradition has come under strain in the context of EU law. The examples range from the Data Retention Directive – the implementation of which was rushed under the threat of EU fines – to concerns by scholars with regard to *Viking Line* and *Laval* that the Constitution limits the limitations on fundamental rights, and that economic freedoms ought not to trump fundamental rights despite the status that the former have been accorded by the ECJ. A particularly acute awareness emerges with regard to the changing role of courts in European Arrest Warrant cases, with warnings by lawyers about the danger of instrumentalising judges, and transforming judges into 'ticking box' automatons neglecting their duty of safeguarding fundamental rights. The constitutional protection of the right to water has also been debated with reference to an EU directive. More broadly, the report expresses concern that because of the different approach to judicial review of EU measures, the heavy

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books with commentary on the Constitution are no longer carried by civil servants to meetings to identify constraints on the exercise of public power placed by the Constitutional Court.

Keywords The Constitution of Slovenia · Constitutional amendments regarding EU and international co-operation · The Slovenian Constitutional Court Constitutional review statistics and grounds · German influences on the rule of law and the constitutional *Rechtsstaat* · Limitation of rights · Referendums on accession and on euro crisis measures · European Arrest Warrant, judicial review and defence rights · The changing role of courts · Data Retention Directive and the threat of EU fines · Article 53 EU Charter and the question of a higher standard of protection · The constitutional right to water

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The adoption of the Constitution of the Republic of Slovenia in 1991[1] followed two tectonic changes. The first was the transition from a non-democratic political system with socialist consensus economics and where the pivotal role in society was played by the Communist party, to a multi-party democracy, market economy and society based on respect for human rights and fundamental freedoms.[2] The second change was the declaration of independence from the Socialist Federal Republic of Yugoslavia of which Slovenia was a constituent part.[3]

Stemming from the decision of the Slovenian people to establish independence and democracy, the Constitution belongs to the category of strong constitutions. It possesses a dominant legal character, not only through the establishment of a

[1] *Ustava Republike Slovenije* in Slovene. The original text is published in the Official Journal of the Republic of Slovenia (*Uradni list Republike Slovenije*, hereinafter UL) 33/91-I, with subsequent amendments in UL 42/97, 66/2000, 24/03, 69/04, 68/06 in 47/13. I have drawn on the English translation available from the website of the Constitutional Court, http://www.us-rs.si/en/about-the-court/legal-basis/constitution/.

[2] 1989 Amendments XIII–XXXIV to the 1974 Constitution of the Socialist Republic of Slovenia introduced several elements of economic liberalisation, while the 1990 Amendments XCI–XCV provided for a basis for the first democratic election to the tricameral Assembly of the Republic, which took place in April 1990.

[3] The Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (UL 1/91-I), proclaiming Slovenia to be an independent state on 25 June 1991 (4 months before the adoption of the Constitution), continues to be considered a 'valid constitutional act' of Slovenian constitutional law by the Constitutional Court (CCRS Rm-1/09, Opinion of 18 March 2010, UL 25/2010).

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special Constitutional Court charged with safeguarding the Constitution and vested with the power to annul legislation (Chap. VIII),[4] but also through the subjection of the courts (Art. 125) and the public administration (Art. 120(2)) to the Constitution. Furthermore, human rights and fundamental freedoms are exercised *directly* on the basis of the Constitution (Art. 15(3), emphasis added). This is complemented by the detailed, almost technical phrasing of some of the constitutional guarantees (e.g. Art. 20(2)).

However, some of the solutions adopted in the 1991 Constitution also draw on the tradition of the pre-1991 constitutional system. The superior position of the representative assembly in relation to the other branches of government serves as a simple example. To what extent the aspiration of the Constitution to regulate or at least broadly define the country's economic and social system can be understood as a legacy of the pre-1991 system is a more complex issue, capable of influencing the understanding of the nature and content of the Slovenian constitutional identity.[5] The gradual *legal* transition from the old to the new constitutional system (the old 1974 constitution was amended in 1989 and 1990 before the adoption of a new constitutional text) is an additional argument against viewing the Constitution as a revolutionary constitution.[6] In that sense, it is somewhat helpful to invoke Rosenfeld's 'pacted transition model of constitution-making',[7] but only to appreciate the limits of the categorisation proposed in the questionnaire and its relevance for the Slovenian case.[8]

1.1.2 The Constitution is concerned with both the organisation of the state and limiting public power, and both elements of the rationale are important. Regarding the latter, the provisions on human rights and fundamental freedoms, along with some of the central principles of the Constitution, such as the separation of powers, are of pivotal importance. This can be said for lawmaking, where constitutional standards are enforced through the case law of the Constitutional Court, as well as with regard to decision making in the judiciary and the public administration. At the same time, the fact that the democratic system in Slovenia is relatively young means that the constitutional provisions establishing the system of government are frequently invoked in public discussions triggered by events in the everyday political life of the country. The financial crisis has to a significant extent also led to a political crisis resulting in unstable governments, snap elections and referendums. In many cases these events have been unprecedented in the history of the nation, sparking the constitutional imagination of the general and professional public.

We can add to the discussion on the rationale of the Constitution that it also purports to lay down the fundamental features of the socio-economic system

[4] Plesničar and Modic 2007.

[5] The 'third rationale' of the Constitution (Ch. III) is outlined below in Sect. 1.1.2.

[6] See above n. 2.

[7] Rosenfeld 2009, pp. 197–201.

[8] Rosenfeld's categorisation would also struggle to provide an adequate framework within which the Slovenian path to constitutionalism at the end of the XX century can be understood.

(Chap. III: Economic and Social Relations). This extends beyond protecting economic and social human rights (some of the third generation human rights, e.g. the right to social security including old-age pension, health care and education, are also entrenched in Chap. II 'Bill of Rights'). The provisions of Chap. III further protect collective industrial action,[9] natural and cultural heritage, free economic initiative within the boundaries of the public interest, etc. Some of the provisions in the chapter enjoy the status of a justiciable human right (e.g. right to a healthy living environment, Art. 72).[10] Other provisions (e.g. on housing, Art. 78) have a programmatic character.[11] Proposed amendments to Chap. III are discussed below in Sect. 3.6.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The first EU-related constitutional reform was the 1997 amendment of Art. 68, the provision on acquisition of land by foreigners. The 'Europe Agreement', an association agreement between the members of the then European Communities and Slovenia, envisaged a liberalisation of land acquisition by foreigners.[12] The agreement was found partly unconstitutional by the Constitutional Court, which triggered an amendment process.[13] With the constitutional reform, land acquisition was liberalised and subjected to conditions laid down by a statute or an international agreement.[14]

The central EU-related constitutional reform took place in 2003, which saw yet another amendment of Art. 68, an amendment of Art. 47 (the absolute prohibition on extradition of a national citizen was relativised) and the introduction of the 'Europe clause' (Art. 3.a).[15] The latter allows for transfer of the exercise of part of Slovenia's sovereign rights to international organisations by virtue of ratification of an international treaty (para. 1; see Sect. 1.3.1). It also provides for a referendum that can be called prior to the ratification of such a treaty (para. 2; see Sect. 1.4.2). Article 3.a also refers to the law of the international organisations mentioned in

[9] See also Sect. 2.2.1.

[10] Čebulj 2011, p. 1027.

[11] Kresal 2011, p. 1080.

[12] Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part, [1999] OJ L 51/3.

[13] CCRS Rm-1/97 (OdlUS VI, 86).

[14] Constitutional Act amending Art. 68 of the Constitution of the Republic of Slovenia, UL 42/97. See also Ribičič 2003, pp. 31–34.

[15] Constitutional Act amending Chapter 1 and Arts. 47 and 68 of the Constitution of the Republic of Slovenia, UL 24/03.

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Para. 1 (Para. 3; see Sect. 1.3.1) and entrenches the rights of Parliament in the new situation arising post-accession (Para. IV; see Sect. 1.4.1).

In 2013, a 'fiscal rule' was introduced in Art. 148 in order to comply with the obligations undertaken by Slovenia under the Treaty on Stability, Coordination and Governance.[16] The rule requires that the revenues and expenditures of the state budget must in principle be balanced in the medium term, without borrowing (or revenues must exceed expenditures). Article 148 foresees that a statute, adopted by the same majority as required for a constitutional amendment, will lay down the way in which the fiscal rule works in more detail.[17]

1.2.2 A proposal to initiate the procedure for amending the Constitution can be lodged by twenty deputies of the National Assembly, the Government or at least thirty thousand voters. The National Assembly votes upon such proposals. If a proposal is supported by two-thirds of the deputies present, the procedure to amend the Constitution is initiated (Art. 168 Constitution).

A successful vote is followed by a procedure in the Constitutional Commission, a body of the National Assembly. The Commission is composed of deputies from the political parties, proportionally to the size of each party's parliamentary group in the National Assembly. The Commission, however, also convenes an *ad hoc* expert group, typically composed of law professors.

If the idea for the amendment of the Constitution enjoys sufficient support in the Constitutional Commission, the latter drafts the amendment for the National Assembly. Importantly, the drafting is thus withdrawn from the influence of the subject that initially triggered the procedure (e.g. the Government). The National Assembly (in plenary session) may not change the text (Arts. 172–181 Rules of Procedure of the National Assembly; hereinafter PoDZ-1).[18]

The proposal must be adopted by a two-thirds majority of all deputies. An amendment can still be subjected to a constitutional referendum if one-third of the deputies so require (Arts. 169–170 Constitution). This is a relatively onerous requirement, and no such referendum has yet been held.[19]

1.2.3 The prevalent view was that the accession to the EU required a constitutional amendment. The principal reasons were threefold. The first reason was that transfer

[16] Constitutional Act amending Art. 148 of the Constitution of the Republic of Slovenia (UZ148), UL 47/13.

[17] I.e. the mode and timeframe of exercising the rule, criteria to determine whether exceptional circumstances prevent it, etc. This statute was to be adopted within 6 months of the constitutional reform (Sect. II UZ148). The draft Fiscal Rule Act (ZFisP-1) was still in parliamentary procedure in June 2015 (EPA 0227-VII).

[18] Rules of Procedure of the National Assembly, UL 92/07, 105/10, 80/13.

[19] Kaučič ascribes this difficultly attainable quorum of deputies to a drafting error. Kaučič 2011b, p. 1545.

of a part of sovereignty to another entity under an international treaty would be unconstitutional without express authorisation in the text of the Constitution. Secondly, without a collision rule between EU law and national constitutional law, the Constitutional Court could find itself in a position where it would have to declare EU law unconstitutional. Thirdly, given the symbolic and constitutive value of sovereignty, accession to the EU required a high level of transparency in constitutional lawmaking.[20]

Despite the fact that Art. 3.a was adopted in order to provide a constitutional basis for the entry of Slovenia into the EU, the text of the article does not expressly refer to it. It instead refers to an international organisation. Matej Avbelj traces this approach to constitutional drafting back to the 'international law' approach to the understanding of the EU, which does not sufficiently distinguish the EU from the sphere of international law and international organisations.[21]

At the time of drafting, a more concretised text was also on the table, explicitly referring to the EU. It seems that the abstract, 'minimalist' approach was chosen for the following reasons. First, a broad phrasing can accommodate the different outcomes of the evolution of the legal nature of the EU and the related terminology (Community/Union). Secondly, the Slovenian membership was not completely certain at the time of drafting. Thirdly, the abstract phrasing of the constitutional provisions, capable of accommodating a wide range of legal and factual situations, was considered to be part of the Slovenian constitutional tradition. Moreover, it seems that there was an important time factor that in the end curtailed discussions in the Constitutional Commission of the National Assembly.[22]

The abstract approach to the wording of the 'Europe clause' was advocated by the Government that initiated the amendment procedure. An increasing number of experts advised against the approach taken by the Government, and this opposing view also became prevalent in the expert group of the Constitutional Commission. However, the expert group failed in its attempt to replace the abstract approach with a compromise 'combined' approach in the final stages of the procedure in the Constitutional Commission. Under the combined approach, there would have been a clause that explicitly authorised the transfer of the exercise of part of sovereignty to the EU, but also another clause which would have abstractly allowed for the exercise of sovereignty to be partly transferred to an international organisation or international tribunal.[23]

1.2.4 There have been no further amendment proposals in relation to the EU that have not materialised in practice.

[20] Cerar 2003b, pp. 6–7.

[21] Avbelj 2012b, p. 6.

[22] Cerar 2003a, pp. 1463–1474; see also Sect. 1.4.2.

[23] Cerar 2003a, pp. 1464–1465.

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1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Transfer of the exercise of a part of Slovenia's sovereign rights to 'international organisations' and the conditions therefor are envisaged in Art. 3.a(1):

> Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Hence, according to the text of the Constitution, only the *exercise* of sovereignty and not sovereignty itself can be transferred. Behind this wording is arguably the idea that transfer is not eternal in the sense that Slovenia could at some point in the future resume exercising its sovereignty. However, this phrasing and its explanation have been met with scepticism.[24] Notably, the majority required for the ratification of an Art. 3.a treaty is the same as the majority required for a constitutional amendment.

In line with the abstract 'international organisation' approach of Art. 3.a, the text of para. 3 provides that

> [l]egal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

This accommodates the supremacy and direct effect of EU law in the Slovenian constitutional order.

1.3.2 The key decision in the case law of the Slovenian Constitutional Court on sovereignty is its 2003 decision on the 'Vatican Agreement'.[25] Adopted after Art. 3. a had already been inserted into the Constitution (albeit not on this basis), it emphasises that neither the internal nor the external element of sovereignty are absolute, the latter because of public international law. Sovereignty prevents the state from transferring sovereign powers to other states or institutions; Art. 3.a is the only exception (allowing for transfer *of the exercise* of sovereign powers).[26]

The position in the *Vatican Agreement* decision served as the basis for the recent *State Holding & Bank Stability Referendum* decision of the Constitutional Court, with which it prevented the holding of a legislative referendum on two anti-crisis measures.[27] Avbelj has commented that in this decision, the Court demonstrated its awareness that Slovenia will have to take into consideration the existence of a host

[24] Cerar 2003a, pp. 1471–1474.

[25] Agreement between the Republic of Slovenia and the Holy See on legal issues, UL 13/2004.

[26] CCRS Rm-1/02, UL 118/2003, paras. 22– 24.

[27] CCRS U-II-1/12, U-II-2/12, UL 102/2012.

of transnational actors and learn to react to their impulses if it is to retain its 'legal and political' sovereignty.[28]

The National Assembly opposed the referendum by claiming that failure to enact the Act on the Measures to Strengthen Bank Stability (ZUKSB)[29] would push Slovenia into a bail-out situation. European and IMF financial assistance would lead to an encroachment upon sovereignty contrary to Art. 3.a. The Constitutional Court rejected this view and held that the sovereignty of Slovenia entails the prerogative to conclude international agreements. A financial assistance agreement with the IMF would not *per se* amount to an impermissible encroachment on sovereignty, rather it is the substance of the international agreement that would need to be examined.

1.3.3 The text of the Constitution itself sets a limit to transfer of the exercise of sovereign rights. Such transfer may only be to an international organisation that is based on (1) respect for human rights and fundamental freedoms, (2) democracy and (3) the principles of the rule of law (*pravna država*[30] in Slovenian). This provision was modelled after Art. 23(1) of the German *Grundgesetz* and can be understood as introducing a kind of *causa* for accession to the EU.[31] The selection of the three substantive limits by the constitutional legislature (human rights, democracy, *pravna država*) was careful and reflects the general perception of what the essential constitutional principles are. Each of these three principles is unattainable unless all three are respected, while at the same time they set limits to one other.[32]

The limits to transfer cannot be understood as empowering the Constitutional Court to reject the application of individual EU legal norms that would be found incompatible with the Constitution. The limits would probably only be invoked should the EU at some point 'in its fundaments' digress from these constitutional principles. In such a scenario, the limits could provide a legal basis for the Slovenian authorities to reject the application of EU legal acts and refuse to execute decisions of the EU.[33] Nevertheless, the text prescribing the limits to transfer can serve to infuse the Slovenian court with some self-confidence when it needs to take a stance with regard to the effects of EU law.[34]

1.3.4 The Constitution does not explicitly declare itself supreme, but it does, however, command that all 'statutes, regulations, and other general acts' must be in conformity with it (Art. 153(1)), in reference to domestic legal norms. The Constitution also envisages control of the conformity of treaties with the

[28] Avbelj 2013c, p. 6. See also the opinion of Judge Petrič infra n. 150.

[29] UL 105/12.

[30] See Sect. 2.1.3.

[31] Testen 2011, p. 91.

[32] Cerar 2011, pp. 78–79.

[33] Ibid.

[34] Testen 2011, p. 91.

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Constitution (discussed below in Sect. 3.4.1). Theoretically then, a review of the constitutionality of a new treaty of EU primary law is not excluded.[35] When it comes to EU secondary law, the Constitutional Court, citing *Foto-Frost,* has declared its respect for the exclusive jurisdiction of the Court of Justice (ECJ) over questions of validity.[36] At the same time, the Court has not relinquished its jurisdiction over domestic legal acts implementing EU law.[37] As we have recently seen in U-I-295/13 (see Sect. 2.6.1), it seems that the Constitutional Court will exercise this jurisdiction in dialogue with the ECJ. However, the Court has so far refused to choose between the unconditional supremacy of EU law over the Constitution on the one hand and the possibility that EU law would in exceptional circumstances have to give way to the Slovenian Constitution. The Court again refused to rule on this issue in the *State Holding & Bank Stability Referendum* case (see Sect. 1.3.2). Notably, in this case the Court found that it did not face a dilemma due to the 'gravitas of the respect for EU law as a value of constitutional law', based on Art. 3. a Constitution.[38]

1.4 Democratic Control

1.4.1 The essential guarantee of the participation of the National Assembly in EU affairs is entrenched in the Constitution, establishing a 'Danish model' of the relationship between Parliament and Government in EU affairs.[39] According to Art. 3.a(4):

> In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a statute adopted by a two-thirds majority vote of deputies present.

However, should the Government disregard its duties to inform and to take the positions of the National Assembly into consideration, only a political sanction could be imposed.[40] A more detailed system of parliamentary participation is laid down in a statute adopted with a qualified majority of two-thirds of deputies present.[41]

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[35] See also Nerad 2012, p. 387.

[36] CCRS U-I-113/04, Order of 8 July 2004, UL 83/04, para. 7; Oven 2014, p. 25.

[37] For example in CCRS U-I-65/13, Order of 26 Sept 2013, para. 7.

[38] CCRS U-II-1/12, U-II-2/12, UL 102/2012, para. 53.

[39] Avbelj 2012a, p. 346.

[40] Grad 2007, p. 112.

[41] UL 34/04, 43/10, 107/10. See also Grad 2007, p. 111.

In the Act on Cooperation between the National Assembly and the Government in EU Affairs (ZVSDZVZEU), the National Assembly has recognised that it is the Government that represents Slovenia and furthers its positions in the processes in the institutions of the Union. The Government is independent and accountable in EU affairs, but within the boundaries set by the Constitution, the statute regulating the Government and the ZSDZVZEU (Art. 2). This dominant position of the Government is balanced by the rights of the National Assembly safeguarded in the ZSDZVZEU. The National Assembly, through its standing committees, participates in the formulation of the positions of Slovenia in those EU affairs that would – given their substance – otherwise fall within the competence of the National Assembly (Art. 4). The Government's duty to extensively inform is with regard to Art. 4 EU affairs (Arts. 8–9). The Act instructs the National Assembly to discuss any proposed changes to the founding Treaties and adopt a position. A position on the political direction that Slovenia will take in the EU institutions is also to be adopted in a plenary debate once a year (Art. 5).

The ZSDZVZEU only safeguards the rights of the National Assembly and does not foresee any role for Slovenia's weak and unusually composed second chamber of Parliament, the National Council. The latter challenged the ZSDZVZEU before the Constitutional Court, claiming that the Act is incompatible with the Lisbon Treaty (sic). The Court established that the distribution of powers among organs of the state in relation to EU affairs is by and large a matter for national law. Given that the National Council is not mentioned in Art. 3.a, the Court found that the ZSDZVZEU was in conformity with the Constitution.[42]

1.4.2 There has only been one EU-related referendum, held on 23 March 2003. The electorate was asked to vote not only on Slovenian membership in the EU, but also in the North Atlantic Treaty Organization (NATO).[43] Unlike several other Member States that joined the EU in the 2004 enlargement but had been members of NATO for some time, Slovenians faced two major decisions on the (geo)political course that their country was about to take at exactly the same time. Joining the EU enjoyed significantly broader support than joining NATO.[44]

As was mentioned above (Sect. 1.2.3), time was an important factor in the referendum story. The referendum was called by the National Assembly on 30 January 2003, and the date of the ballot was set. The referendum was called as a *consultative* referendum, i.e. a referendum without legally binding results for the organs of the state.[45] Less than a month later, on 27 February 2003, the

[42] CCRS U-I-17/11, UL 87/2012.

[43] See Sect. 3.1.1 regarding membership in NATO.

[44] 89.64% of the votes cast were in support of EU membership, in comparison to 66.08% in favour of joining NATO. The turnout was approximately 60%. See National Electoral Commission, Report on the referendum on the accession of Slovenia to the EU, 1 April 2003, http://www.dvk-rs.si/files/files/porocilo-o-referendumu-EU.pdf.

[45] Ordinance calling a consultative referendum on the accession of the Republic of Slovenia to the European Union, UL 13/03.

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constitutional amendment inserting Art. 3.a into the text of the Constitution was adopted, and para. 2 of the new Art. 3.a laid down the rules for referendums on transfers of powers:

> Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of voters who have cast valid votes vote in favour of the same. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the statute on the ratification of the treaty concerned may not be called.

The constitutional act also provided that the EU and NATO referendums shall be considered to fall under Art. 3.a.[46] The popular vote was thus linked to the EU amendments, albeit in a peculiar manner.

The haste with which the referendum was coupled with the constitutional reform seems to have been behind the questionable decision for an 'abstract approach' to the phrasing of Art. 3.a. Applying Art. 3.a to the March 2003 referendums first and foremost meant that the result was legally binding on the National Assembly. As far as future referendums are concerned, it is important to note that an Art 3.a referendum is not obligatory. Whether such referendum will be called or not lies within the discretion of the National Assembly.

Igor Kaučič has warned that, strictly speaking, the object of an Art. 3.a referendum is not the treaty in question nor the statute ratifying the treaty, but an individual question that is of crucial or central importance to the treaty.[47] In 2003, the voters voted on whether they were in favour of Slovenia becoming a member of the European Union. This approach put into question the 'usefulness' of an Art. 3.a referendum for future reforms of the European Union, where it might be more difficult to identify the central question of the treaty. The relevance of a referendum where the electorate decides on a narrow point addressed by the treaty in question is likewise questionable. This inevitably raises the question whether the Art 3.a referendum was at all conceived as a functional tool of direct democracy in the processes of supranational integration or rather as an *una tantum* event based on an abstractly worded constitutional basis.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 The 2003 reform The decision for a constitutional reform was based predominantly on the scholarly opinion that without such reform, accession to the EU would be unconstitutional. However, it seems that the influence of scholars was much more limited when it came to the shaping of the amendments. It seems that in the desire to provide additional, 'constitutional' legitimacy and weight to the

[46] Sect. II, Constitutional Act amending Chapter 1 and Arts. 47 and 68 of the Constitution of the Republic of Slovenia, UL 24/03.

[47] Kaučič 2011a, p. 85.

referendum, politicians were ready to settle for a suboptimal phrasing of Art. 3.a, sacrificing a lengthier and more profound debate. This settling and sacrifice seem to have been unnecessary in relation to the process of joining the EU. The 89.64% vote in favour of joining the Union reflects the wide support that European integration enjoyed among the electorate. As far as the European Union was concerned, engaging in legal engineering instead of a substantial debate seems to have been uncalled for. It has to be taken into account, however, that the parallel process of joining NATO was much more controversial and might have lead the political elite to rig the rules of the game somewhat.[48] In that sense, choosing an abstract, 'minimalist' approach to the constitutional reform and intentionally avoiding any explicit reference to the EU or NATO might have served the additional purpose of 'pooling' the legitimacy of both integration processes in order to ensure a smooth entry into both organisations. It seems that the whole process would have been more democratically and intellectually honest if the Constitution had, in the words of Confucius, 'called things by their proper name'.

This is not, however, to dismiss the explanations for the choice of the 'abstract' model provided by Slovenian scholars. In particular, the argument was put forth that the abstract model is compatible with the standard practice of constitutional drafting, which often opts for laconic phrases, combining them with a rule that prescribes that a statute is required to regulate the matter further.[49] From my personal experience in observing and participating in the drafting of constitutional amendments (albeit not the EU-related ones), the prominent constitutionalists indeed seem to have a certain sense of what kind of wording is appropriate in the text of the Constitution. This indefinable aesthetics of constitution-making is probably a result of practice or custom and connected to the otherwise frequently cited belief that constitutional amendments are to be written 'with a trembling hand', i.e. with great caution and reserve. The laconic, 'aesthetic' approach might well partly be behind the division of the matter of the fiscal rule between constitutional and statutory text, discussed in Sect. 1.2.1.[50]

Regarding some of the other matters covered by EU amendments in other Member States, a possible explanation for why Slovenia has not enacted similar clauses is that the Constitution in its original text was to a certain extent already one of 'open statehood'. It is worth noting, for example, that the original text of the Constitution (1991) foresaw the possibility for a statute to grant electoral votes to foreigners, and the legislature indeed did so even before Slovenia joined the EU.[51]

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[48] Traynor, I. (2003, March 22). Slovenia split in run-up to Nato referendum. The Guardian. http://www.theguardian.com/world/2003/mar/22/iantraynor.

[49] E.g. Art. 12.

[50] The other possible reason would be strategic: by 'throwing a bone', i.e. introducing the constitutional reform, the country probably assuaged the financial markets and bought time before more invasive measures were taken with the adoption of the fiscal rule statute.

[51] The active right of permanently resident foreigners to vote in the indirect elections to the National Council, the upper chamber of Parliament, was recognised in 1992. Article 2 National Council Act; however, the right to vote in local elections dates back to 2002, before accession.

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The 2013 reform of Art. 148 The introduction of the fiscal rule was not uncontested. First, opinions diverged on whether the treaty required Slovenia to change the constitutional text.[52] Secondly, Slovenian constitutional scholars felt that there was no room for a strong expression of ideology or one particular economic doctrine in the constitution. Constitutionalisation represents a long-term commitment that would require considerable effort to be overturned in the future, when the economic reality or policy may change.[53] Additionally, the reasonableness of pursuing the European project by imposing a top-down constitutional reform on the Member States was questioned.[54] It has also been pointed out that tension between debt limitations and the concept of the social state is inevitable, with calls made for the priority of the latter as a fundamental value of the Constitution.[55]

1.5.2 Not applicable.

1.5.3 The national constitution remains a powerful tool in the hands of the citizenry of a Member State whenever concerns arise that the power to make decisions on issues that affect them might shift from the democratic organs of the Member State to more distant centres, or simply wither away, with the hands of the elected politicians tied, as was the case with the Fiscal Compact (see above Sects. 1.2.1 and 1.5.1). The eurozone crisis has shown how quickly the Member States positioned the newly established rules and mechanisms (European Stability Mechanism; the Banking Union) in the grey postnational zone of *Ersatzunionsrecht* rather than within EU law.[56] A strong case can be made for the requirement that such treaties must be submitted to a regime similar to the Art. 3.a regime (heightened ratification threshold, and substantive requirements for respect for human rights, *pravna država* and democracy). However, given the wording of Art. 3.a., it is likely that they would fall outside its scope of application. In a potential future constitutional reform, especially one that would introduce a clause calling Europe by its proper name (see above Sect. 1.5.1), I would support combining the latter with a more broadly applicable provision. Such a clause would be capable of submitting a range of different mechanisms of global and regional governance to the requirement of respect for the fundamental values of the Constitution.

[52] On this debate, see Ahtik et al. 2014, p. 530.

[53] Bugarič 2012, p. 3; Vuksanović 2011, pp. 41– 42.

[54] Nahtigal 2012, p. 22.

[55] Nahtigal 2012, p. 22; Strban 2012, p. 3.

[56] Federal Constitutional Court of Germany, 2 BvR 1390/12, Judgment of 12 September 2012, para. 153; Bardutzky and Fahey 2014, p. 343.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Constitution, as one of its basic principles, establishes the duty of the state to protect human rights on its territory (Art. 5). It further provides for a comprehensive catalogue of human rights (Chap. II).

The initial provisions of the Chapter guarantee equality in the exercise of human rights (Art. 14(1)) and provide for structural rules on the exercise and limitation of human rights and fundamental freedoms (Art. 15(1–3)). Importantly, the non-enumeration clause (Art. 15(5)) opens the catalogue: no human right or fundamental freedom entrenched in a legal act that is in force in Slovenia may be restricted on the grounds that it is not recognised by the Constitution (see Sect. 3.2.2).

The Constitution guarantees judicial protection of human rights and fundamental freedoms and restitution of the consequences of human rights violations (Art. 15(4)). An individual alleging a human rights violation by an individual legal act (court judgment, administrative decision, etc.) can access the Constitutional Court via a constitutional complaint (modelled after the German *Verfassungsbeschwerde*) after other remedies have been exhausted (Art. 160).

The Constitution expressly prohibits the retroactive effect of statutes, regulations and other general acts, and lays down the only exception from this rule (Art. 155).[57] Legal certainty, protection of legitimate expectations and, perhaps most notably, proportionality are considered elements of the principle of *pravna država*, entrenched in Art. 2 Constitution (see Sect. 2.1.3).

Pravna država is not considered a human right, so one cannot base a constitutional complaint to the Constitutional Court on an allegation that it has been violated. Nevertheless, Art. 2 can and does serve as a yardstick in the procedure for the review of constitutionality of legislation (and other general acts). This procedure can be abstract, triggered by a number of privileged and semi-privileged applicants, concrete (a preliminary ruling-like mechanism initiated by the *iudex a quo*) and, under certain conditions, also accessible to individuals aggrieved by the norm in question.

2.1.2 The Constitution distinguishes between defining the manner in which a human right is exercised (Art. 15(2)), on the one hand, and limiting a human right (Art. 15(3)) on the other.

A statute can define how a human right is to be *exercised* 'whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom'. For example: '[e]very citizen has the right, *in*

[57] 'Only a statute may provide for retroactive effect of some of its provisions, if this is required in the public interest and under the condition that no acquired rights are infringed.' (Art. 155(2)).

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accordance with statute, to participate either directly or through elected representatives in the management of public affairs' (Art. 44 Constitution, emphasis added).[58]

On the other hand, human rights and fundamental freedoms can only be *limited* by the rights of others and in the cases that are provided by the Constitution. First, as for limitations based on the rights of others, the text of the Constitution does not explicitly state that such right must be a constitutional or human right; however, a limitation imposed on a human right is not likely to pass the proportionality test if it is grounded in a right of lower rank (e.g. statutory, contractual).[59] Secondly, there can be a statutory reservation that limits a human right. For example, the right to free movement (which is to be distinguished from the right to personal freedom) can be limited by statute only when this is necessary to ensure the conduct of criminal procedure, to prevent the spread of a contagious disease, to protect public order or if this is required for the defence of the state (Art. 32). In addition, the Constitutional Court has recognised that human rights can be limited on a third ground: the public interest.[60]

It is difficult to distinguish between a statutory provision that regulates the exercise of a human right (a para. II case) and a limitation of a human right (a para. III case). The distinction is nevertheless important: a lower threshold will be applied to cases where the legislature has regulated the exercise of a human right: it will suffice to show that the legislative solutions are not arbitrary, irrational, etc. However, whenever there is a limitation on a human right, the legislation will be submitted to a proportionality test.[61]

2.1.3 The Constitution (Art. 2) declares Slovenia to be a *pravna država*, a concept that can be considered equivalent to the German *Rechtsstaat.* The Slovenian term almost literally translates into (or from) the German equivalent; it is customarily translated into English as 'state governed by the rule of law'. Scholarship considers *pravna država*, democracy (Art. 1) and the social (welfare) state (*socialna država*; Art. 2) to be fundamental general constitutional principles.[62]

The discussion of the contents of this principle in the only commentary of the Constitution mostly draws on German commentaries of the *Grundgesetz* (Maunz/Duerig).[63] The majority of what is traditionally considered to be safeguarded by the principle of *Rechtsstaat* is entrenched *expressis verbis* in several provisions of the Slovenian Constitution: the principle of separation of powers (Art. 3), limitations on restrictions of human rights (Art. 15, see Sect. 2.1.2), the binding of the executive to statutory legislation (Art. 120(2)), the hierarchy of legal acts (Art. 153), the

[58] CCRS U-I-47/94, OdlUS IV, 4, para. 2; Avbelj 2011, p. 732.

[59] Testen 2002a, p. 198.

[60] Ibid., p. 200.

[61] Ibid., p. 196.

[62] Šturm 2002, p. 53. Brkan and Nendl 2012 accord *pravna država* a pivotal role in the constitutional order.

[63] Šturm 2002, p. 54.

prohibition of retroactive effect (Art. 155), the obligation to publish legal norms (Art. 154), the right to appeal and judicial review (Art. 25), the right to a constitutional complaint (Art. 160, see supra) and a system of procedural guarantees across the different procedures conducted by organs of public power (Arts. 17–31).

There are, however, three essential elements of *pravna država* not expressly codified in the text of the Constitution, but which have instead been recognised as such by the Constitutional Court:

- the principle of proportionality;[64]
- the principle of the protection of trust in the law, which requires that legal regulation be stable and foreseeable, and sets a limit on the *de facto* retroactive effect of legal norms;[65]
- the principle of clarity and coherence of legal norms, which aims at determining legal relationships to a sufficient level of exactness to exclude the arbitrariness of the organs of public power.[66] Norms need to be clear and precise so that it is possible to determine the meaning of the norms using the methods of legal interpretation.[67] This principle also precludes the formulation of a norm in such a loose manner that the definition of the content of the norm would *de facto* lay in the hands of the authority enforcing the norm.[68]

In the context of this report, this becomes important when read together with the provisions of the Constitution that require that certain norms can only be adopted in the form of a statute (*zakon*). In addition to the rules mentioned above (only a statute can regulate the exercise of a human right and statutory reservations, etc.), the form of a statute is generally required whenever rights or duties are conferred on 'citizens and other persons' (Art. 87), in order to define criminal offences (*nulla poena nullum crimen sine lege praevia* – Art. 28) and in order for the state to 'impose taxes, customs duties, and other charges' (Art. 147).

The provision set out in Art. 87 accords the role of the 'essential legal acts' in the Slovenian legal system to statutes.[69] Peter Pavlin has remarked that this is not merely true on the normative level; the statutes play this very role in the reality of the legal system as well. Sub-statutory, i.e. executive or other general legal acts can only regulate certain details regarding the exercise of a certain right or duty, and cannot hollow out or substitute its contents. 'Rights' in the sense of Art. 87 are not

[64] The principle of proportionality is also crucially linked to Art. 15(3), the provision on limitations on human rights and fundamental freedoms (see above Sect. 2.1.2). First, limitations on human rights and fundamental freedoms have to pass a proportionality test. Secondly, limitations are themselves limited, this also means that there are cases where the proportionality test cannot be used to justify a limitation (I am grateful to Andraž Zidar for this remark).

[65] See e.g. CCRS U-I-47/94, UL 13/95.

[66] See e.g. CCRS U-I-282/94, OdlUS IV, 108.

[67] CCRS U-I-32/00, UL 73/03.

[68] CCRS U-I-287/95, UL 68/96.

[69] CCRS U-I-40/96, OdlUS VI, 46.

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only human or constitutional rights, but all rights.[70] It should be added that the impact of the use of the *zakon* as a legal form goes beyond the democratic legitimacy bestowed through the deliberations and vote in the directly elected National Assembly. Before a *zakon* comes into force, it is also exposed to potential further verification through a possible veto in the National Council and a legislative referendum that can be demanded by 40,000 voters. After a *zakon* has entered into force, however, it enjoys a privileged position in the legal system: courts of law are only bound by the Constitution and statutes (Art. 125 Constitution). They can refuse to apply a sub-statutory act that is not in conformity with the Constitution or the statutes (*exceptio illegalis*).

Pravna država and the derived or related principles are widely applied in the review of constitutionality and are the basis of extensive Constitutional Court case law.

In addition to the field of constitutional law, *pravna država* plays an important political role. The recent economic crisis (2009–ongoing) has caused a strong sentiment in society that the legal system was unable both to prevent and later to penalise the actions that damaged the economic system (politically sanctioned toxic loans issued by state-owned banks in order to finance managerial takeovers, acts of corruption and cartel agreements in large public tenders, etc.). Consequently, the public has criticised what it perceives as 'inefficiency' or even a 'lack' of rule of law, and expects that the legal system, in simplified terms, will ensure that the innocent walk, but even more that the guilty end up serving time. Given this atmosphere, it is not surprising that the winning party in the 2014 parliamentary election had stated that *pravna država* was its primary value and objective. The increased use of this notion in political discourse has probably already led to its diverging, multi-layered meanings. In the future, the challenge may lie in retaining the relevance and awareness of the core ideas of *pravna država* that are essential for the protection of the individual from excessive use of public power.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 There is no available evidence that the courts have transformed the optic or adjusted the balancing approach in a way that would favour economic freedoms over human rights. However, this could simply be due to the relatively limited engagement with EU law in Slovenian courts.[71]

In a contribution by Katarina Kresal Šoltes, a labour law scholar, the national constitution was explicitly positioned as relevant for the *Viking* and *Laval*

[70] Pavlin 2011, pp. 1154–1155.

[71] See Sect. 2.8.1.

controversy. The importance of the right (autonomy) of collective industrial negotiation was underlined, and it was emphasised that despite the status that the economic freedoms have been accorded in ECJ case law, they cannot trump fundamental rights, especially the right to collective industrial action that is entrenched in a range of international documents.[72] Kresal Šoltes also claims a (national) constitutional status for the right to autonomous collective negotiation, derived from the provisions of Art. 76 Constitution,[73] and warns that the Constitution limits the limitations on human rights and fundamental freedoms (Art. 15(3), see Sect. 2.12). Kresal Šoltes has called for an interpretation of the 'free market and competition rules of EC law' that would – regardless of the *Viking* and *Laval* case law – refrain from limiting the right to collective industrial negotiation beyond the extent permitted under the constitutional traditions of the Member States.[74] Worth noting is also the perspective of Damjan Kukovec, who discusses the *Viking* and *Laval* controversy by openly describing himself as a legal scholar from a periphery Member State (i.e. Slovenia). In his view, the typical framing of the *Viking* and *Laval* discussion, i.e. freedom of movement *versus* right to collective industrial action, overlooks the centre-periphery dynamics of European integration.[75]

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

Introductory remark There are several clauses of the Slovenian Constitution that set limits on the power of the state in investigating and prosecuting crimes. Compared to international human rights documents, these provisions can be considered quite detailed: even some time limits are laid down by the Constitution itself. By way of illustration, a narrow selection of directly relevant articles – Art. 19 (Protection of Personal Liberty), Art. 20 (Orders for and Duration of Detention), Art. 23 (Right to Judicial Protection), Art. 25 (Right to Legal Remedies), Art. 27 (Presumption of Innocence), Art. 28 ((Principle of Legality in Criminal Law) and Art. 29 (Legal Guarantees in Criminal Proceedings) – contain almost 600 words (in their English translation). The text of these provisions has been partly provided in the footnotes in Sect. 2.3.

[72] Kresal Šoltes 2009.

[73] 'The freedom to establish, operate, and join trade unions shall be guaranteed.'

[74] Kresal Šoltes 2009, p. 485.

[75] Kukovec 2014.

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2.3.1 The Presumption of Innocence

2.3.1.1 The European Arrest Warrant (EAW) has not been contested based on the presumption of innocence.[76] This can possibly be traced back to the phrasing of the relevant constitutional provision.[77] In light of the Constitutional Court's case law, it is doubtful whether Art. 27 could be perceived as an argument against a measure such as the EAW. The Court does not consider the presumption of innocence to be an obstacle to the judicial detention of a criminal defendant ordered on the basis of the probability that the person in question might *repeat* the criminal act (Art. 201(1) (3) ZKP). The presumption of innocence is related to criminal guilt (*nullum poena sine culpa*)[78] and the key consequences derived from this presumption are closely linked to the establishment of criminal guilt: the *onus probandi* is on the state rather than on the defendant. Moreover, the risk of failing to prove the case is borne by the state, as the defendant is protected by the principle of *in dubio pro reo.*[79]

2.3.1.2 A person who is to be surrendered to another Member State on the basis of an EAW has to first be brought before an investigating judge. The scope of the judicial review before surrender, in a nutshell, is the following: the judge will instruct the person with regard to his or her rights, the contents of the warrant and the possibility of consenting to surrender (Arts. 19–22 ZSDČEUKZ-1). If the person does not consent to surrender, the judge will hear the testimony of the person to determine whether there are statutory reasons for refusal to surrender (Art. 23).[80]

The only information on refusals of EAWs by the courts is available from a study by the Institute of Criminology, which looked at all 58 warrants received in the first three years (2004–2007) after the entry into force of the European Arrest

[76] The author is grateful to Mojca Plesničar for confirming that this argument did not appear in the qualitative study that was based on a number of interviews with practitioners and policy-makers. See Šugman Stubbs and Plesničar 2009, pp. 501–522.

[77] Article 27 Constitution: 'Any person charged with criminal conduct shall be presumed innocent until found guilty by a final judgment.' Zupančič positions the Slovenian constitutional provision between the broader guarantee of the French Declaration on the Rights of Man and of the Citizen of 1789 on the one hand and the narrower phrasing of Art. 6 ECHR, lamenting that the thus phrased provision is 'no longer a broad ethical postulate, but is rather limited to the context of criminal law'. Zupančič 2002, p. 302.

[78] Bele 2011, p. 412.

[79] CCRS U-I-18-93, UL 25/96, para. 67. We must note the institutional consequences of this understanding of the presumption of innocence. By unloading the burden and the risk of *probation* onto the 'state', it distinguishes the state in principal terms from the independent judiciary (Zupančič 2002, p. 303). This, in turn, requires that there is a prosecutor, an attorney of the state, who will pursue the state's case in an adversary manner.

[80] See also Šugman Stubbs 2008. It is in practice commonly considered the duty of the person to be surrendered to invoke grounds for refusal rather than this being an *ex officio* task of the court. Šugman Stubbs and Plesničar 2009, pp. 506–507.

Warrant Act (hereinafter ZENPP).[81] Five of these warrants were rejected: three cases involved Slovenian citizens where the offence was committed on Slovenian territory, one was rejected due to amnesty/pardon and one warrant was rejected because the requesting authority failed to provide assurances.[82] It seems that at least in the first years of the operation of the system, there were no refusals to execute an EAW based on concerns related to the presumption of innocence.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle of *nullum crimen sine lege praevia* is expressly entrenched in Art. 28 Constitution as the 'principle of legality in criminal law'.[83] This article lays down a further formal requirement by referring to a statute (*zakon*); indeed, the provision set out in Art. 28 has been linked to Art. 87 Constitution by commentators (see above Sect. 2.1.3 on Art. 87).[84] Also, the Constitutional Court has found that the requirement that a statute defining a criminal offence be clear and precise (*nullum crimen nulla poena sine lege certa*) derives from the text of Art. 28.[85]

Mojca M. Plesničar and Katja Šugman Stubbs have warned that the significant differences between the Member States' penal laws and the definitions of individual offences in the different systems can lead to a number of difficulties and to violation of the principle of legality as the fundamental principle of criminal law. The Slovenian lawyers who participated in the process of implementing mutual recognition, interviewed by Plesničar and Šugman Stubbs, assessed that the EU's plunge into mutual recognition in the field of criminal law was too hasty, but at the same time they felt that it was too late for a renegotiation through which the review of double criminality could be reinstated. As an alternative, it was suggested that each Member State could compile a list of offences (criminalised under its own penal law) that belong to the categories set out in Art. 2 of the EAW Framework Decision[86] (EAWFD). In addition to this 'positive list', Member States could enact a 'negative list' which would enumerate the offences under penal law that definitely

[81] UL 37/04. ZENPP was substituted by the Cooperation in Criminal Matters with the Member States of the European Union Act in 2008 (ZSKZDČEU; UL 102/07). A new act (ZSKZDČEU-1) was adopted in 2013.

[82] Šugman Stubbs and Gorkič 2008, Sect. 11.4.2.e.

[83] '(1) No one may be punished for an act which had not been declared a criminal offence under statute or for which a penalty had not been prescribed at the time the act was performed. (2) Acts that are criminal shall be established and the resulting penalties pronounced according to the statute that was in force at the time the act was performed, except where a more recent statute adopted is more lenient towards the offender.'

[84] Zupančič 2002, p. 312 citing the dissenting opinion of Judge Zupančič, joined by Judges Šturm and Šinkovec, to the CCRS decision Up-40/94 (OdlUS IV, 136).

[85] CCRS U-I-247/96, UL 70/98, para. 11; Zupančič 2002, p. 313.

[86] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

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do not fall within the EAWFD categories. This latter solution, however, was found to be more difficult to implement in practice.[87]

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 In the Slovenian context, the issue of the right to a fair trial and the EAW was raised by the failed challenge of Zoran Matešič, whose surrender was requested by an Italian court, against the ZENPP before the Constitutional Court.[88] The constitutional concerns were also presented by Mr. Matešič's attorney in a periodical for legal professionals, and thus became more visible to academics and practitioners.[89]

The case did not raise issues relating to *in absentia* trials, but rather addressed the right to a fair trial more generally. First, the challenge invoked the Art. 23(1) right to judicial protection, which not only guarantees everyone a formal appearance before a court, but also that the competent court will substantively review the matter at hand.[90] However, by limiting the court to a review of purely formal non-execution grounds, the EAW procedures prevent the judiciary from providing any substantive judicial protection. Similarly, this can be seen as a violation of the Art. 25 right to a legal remedy:[91] the Higher Courts that review the orders issued by the first instance panels do not exercise any substantive second instance control. Thirdly, the criminal procedural guarantees set out in Art. 29 Constitution, entrenching everyone's right to a fair trial and more precisely the right of a person 'to present all evidence to his benefit' are ignored.[92] The requested person *de facto* has no possibility to present evidence and if he did, it would be to no avail: even if

[87] Šugman Stubbs and Plesničar 2009, p. 207; Šugman Stubbs and Gorkič 2009a, p. 262; Šugman Stubbs and Plesničar 2009, p. 505.

[88] CCRS U-I-14/06, order of 22 June 2006, not reported. Šugman Stubbs and Plesničar 2009, pp. 516–517.

[89] Kovačič Mlinar 2006a, p. 13.

[90] Article 23 (Right to Judicial Protection):

'(1) Everyone has the right to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent, impartial court constituted by statute.

(2) Only a judge duly appointed pursuant to rules previously established by statute and by judicial regulations may judge such an individual.'

[91] 'Everyone shall be guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other state authorities, local community authorities, and bearers of public authority by which his rights, duties, or legal interests are determined.'

[92] Article 29 (Legal Guarantees in Criminal Proceedings): 'Anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the following rights:
the right to have adequate time and facilities to prepare his defence;
the right to be present at his trial and to conduct his own defence or to be defended by a legal representative;
the right to present all evidence to his benefit;
the right not to incriminate himself or his relatives or those close to him, or to admit guilt.'

the person were able to present convincing evidence that would disprove probable cause or refute the claims made against him or her in the requesting state, this would not have any impact whatsoever on the outcome of the judicial proceeding in the Slovenian court.[93]

The challenge against the ZENPP was submitted to the Constitutional Court while the EAW procedure was still pending before the first instance court, together with a motion for interim relief. However, the Constitutional Court refused to grant interim relief. As a result, immediately after the second instance criminal court had confirmed the decision to surrender Mr. Matešič, he was surrendered to Italy by the police. Having been surrendered, he lost legal standing in the procedure before the Constitutional Court, and his challenge was dismissed on procedural grounds. The decision was ascribed to the Constitutional Court lacking the courage to take an active position on the protection of human rights in the context of EU law.[94]

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Šugman Stubbs and Plesničar interviewed a Slovenian defence attorney who often represents persons requested under an EAW. The following is their summary of the lawyer's experience with requested persons, who are usually

> completely ignorant of the proceedings on EAW and expect that the hearing will give them a chance to prove their innocence. When faced with what seems to be merely an identification process they feel lost and bewildered. They are assigned a defence lawyer but usually are unable to communicate with him/her directly because of the language barriers between them. To requested persons, the entire process seems depersonalised and confusing, since they are usually unfamiliar with the system of surrender based on EAW, with the system in the executing State and very frequently with the system in the issuing country.[95]

To my knowledge, there is no assistance available to persons surrendered on the basis of an EAW after surrender.[96] In discussing the burdens upon surrendered persons, three points should be made.

First, the burden of transportation to another country and undergoing a criminal trial there should in any case be made conditional upon a suitable standard of proof.

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[93] Kovačič Mlinar 2006a p. 13.

[94] Kovačič Mlinar 2006b, p. 15; Erbežnik 2008, II–VII.

[95] Šugman Stubbs and Plesničar 2009, pp. 520–521.

[96] Article 11(2) EAWFD was from the beginning implemented in such a way that a person who is subject to an EAW has to be represented by a criminal defence attorney from the moment the person is brought before the investigating judge up to the actual surrender, with the attorney appointed *ex officio* if the person does not appoint one himself (Art. 15(4) ZENPP, Art. 16(1) ZSKZDČEU, Art. 17(1) ZSKZDČEU-1). Hence, while the legislature has recognised the need for legal counsel and representation in EAW procedures, it has confined this assistance to the territory under its jurisdiction.

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According to the Slovenian Constitution, a *judge* may only order the *detention* of a person who can be *reasonably suspected* of having committed a crime (Art. 20 Constitution; emphasis added).[97] I see no compelling reason to adopt a lower standard for judges to detain and surrender persons under an EAW.

Secondly, in cases such as *Symeou*, where the person was surrendered on the basis of an EAW to face inhuman detention conditions, true concern for human rights protection in Europe does not limit itself to fear for the wellbeing of the fellow nationals of one's own Member State upon potential surrender to another Member State.[98] A finding that persons who are detained in a certain Member State suffer undue hardship should lead us not only to contest the system of judicial co-operation but the systemic violations of human rights in that Member State as well.

Thirdly, the potential for better ensuring the effective protection of the human rights of surrendered persons lies in involving a wide array of actors and institutions, from NGOs and defence lawyers to institutions on the national and European level, including ombudspersons. Traditionally, consular authorities are one of the initial points of assistance and information for a non-national facing a foreign repressive system. Despite the protection of this right being provided for in EU law (Art. 7 Directive 2013/48/EU[99]), this unfortunately remains to a great extent dependent on the facilities and capabilities of the Member State. Slovenia, for example, has never had representations in all of the EU Member States, and has recently even closed some of its existing representations due to cuts in public spending. While this has happened in a number of countries, we cannot escape the fact that it is comparatively much more burdensome for smaller countries to

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[97] Article 20 (Orders for and Duration of Detention):

'(1) A person reasonably suspected of having committed a criminal offence may be detained only on the basis of a court order when this is absolutely necessary for the course of criminal proceedings or for reasons of public safety. (2) Upon detention, but no later than twenty-four hours thereafter, the person detained must be handed the written court order with a statement of reasons. The person detained has the right to appeal against the court order … .'

It should be noted that the Constitution safeguards personal liberty also in a more general (in scope) yet nevertheless detailed provision of Art. 19 (Protection of Personal Liberty):

'(1) Everyone has the right to personal liberty.

(2) No one may be deprived of his liberty except in such cases and pursuant to such procedures as are provided by law.

(3) Anyone deprived of his liberty must be immediately informed in his mother tongue, or in a language which he understands, of the reasons for being deprived of his liberty. Within the shortest possible time thereafter, he must also be informed in writing of why he has been deprived of his liberty. He must be instructed immediately that he is not obliged to make any statement, that he has the right to immediate legal representation of his own free choice and that the competent authority must, on his request, notify his relatives or those close to him of the deprivation of his liberty.'

[98] I am grateful to Monica Claes for this remark.

[99] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.

maintain a diplomatic and consular presence abroad. This becomes compounded, as smaller countries tend to first close their representations in other small countries.[100]

2.3.4.2 To my knowledge, data on subsequent acquittals is not collected. A case could, however, be made for the collection and processing of a similar data set, as even some Slovenian judges feel that having knowledge of the outcome of the procedure that follows after a person has been surrendered would gradually deepen mutual trust between the judiciaries.[101]

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 See Sect. 2.3.3.1.

2.3.5.2 In his critique of mutual recognition in EU criminal law, Anže Erbežnik has warned that while *Cassis de Dijon*-style mutual recognition under the former first pillar has served to enhance European citizens' freedoms in the common market, transplanting this principle to criminal law without the prior substantial harmonisation of defence rights has mostly benefitted state authorities.[102] The experts interviewed by Šugman Stubbs and Plesničar similarly found that former first-pillar EU law typically does not involve such subtle balances between the rights of the state and the rights of individuals.[103] This is aggravated by the fact that in the former third pillar, this principle was introduced as an intergovernmental project, in absence of a democratic debate.[104]

2.3.5.3 Scholarship has warned that the 'uncritical application of the principle of mutual recognition bears the danger of transforming the judge into a kind of a "ticking box" automaton checking only pre-established criteria and neglecting his/her duty of a critical assessment and safeguarding fundamental (constitutional) rights to the defendant'. This argument is grounded in the principle of separation of powers.[105] Zvonko Fišer has found the ZENPP to instrumentalise the judge.[106] In similar vein, the interpretation of the provision abolishing the dual criminality check for the 32 categories of offences, which was favoured by the European Commission and according to which the judge in the executing state is barred from

[100] Unfortunately, this observation goes hand in hand with Albi's concern that there are no proactive NGOs that would monitor such cases in smaller Member States. Albi 2015, p. 171.

[101] Šugman Stubbs and Plesničar 2009, p. 520.

[102] Erbežnik 2014a, pp. 138–139; citing Möstl 2010; Mitsilegas 2006.

[103] Šugman Stubbs and Plesničar 2009.

[104] Erbežnik 2014a, pp. 138–139.

[105] Erbežnik 2014a, p. 131.

[106] Fišer 2008, Sect. 3.4. Fišer currently serves as State Prosecutor General.

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checking *prima facie* whether the legal qualification put forward by the requesting state is correct or even sensible, has been considered as insulting to the judicial function.[107] More generally, reducing the scope of judicial review has been considered to also reduce 'the awareness that it is for the judiciary to observe and to enforce procedural safeguards as guaranteed by national constitutional orders, thus preserving the delicate balance between the individual and the state … [certainly,] the balance has shifted'.[108]

2.3.5.4 In my view, it is a fundamental premise of the exercise of public power that interference with the rights and freedoms of the individual must be in proportion with the legitimate interests pursued. The image of a judge whose intellectual activity has been reduced to ticking boxes and who has been purged of the constitutional constraints that should be present at all times is incompatible with this fundamental premise (and with the guarantees of Art. 20 Constitution, see Sect. 2.3.4.1). Stories such as that of Neeme Laurits,[109] for whom the execution of what proved to be a groundless EAW led to grave consequences for his private and family life, have to make us consider the guarantees provided by Art. 8 of the European Convention on Human Rights (ECHR) and analogous national constitutional provisions.

As an illustration of how the right of family life (Arts. 53, 54 and 56 Constitution) can soften the effect of the penal system in a situation where a person is to be separated from his environment and sent abroad, consider the *Vizgirda* decision of the Slovenian Constitutional Court. The case is not connected to the issues of mutual recognition and does not apply EU law. However, the complainant, a Lithuanian citizen, had been convicted in a Slovenian court and was to be expelled from the national territory.[110] The Supreme Court had rejected Mr. Vizgirda's request for an extraordinary suspension of the expulsion sentence, in which he had pleaded that he had fathered a child – a Slovenian citizen, living in Slovenia. The Constitutional Court found that the penalty of expulsion served a legitimate goal of public safety. Nevertheless, in Mr. Vizgirda's case, it was not proportionate in light of the constitutional right to family life and the rights of the child. Relying on ECHR case law, the Constitutional Court stressed that the deeper the integration of the person concerned in the country in question, the higher the level of protection from expulsion must be. The state was under a duty to consider a range of circumstances before it adopted a final decision.[111]

The *Vizgirda* decision undoubtedly arose in a very different legal setting, which has to be taken into account when comparing it to EAW cases. Nevertheless, it demonstrates how constitutional judges are prepared to protect an individual's right to family life even in the face of compelling public interest. That, I would suggest,

[107] Šugman Stubbs and Gorkič 2008, Sect. 9.1.2.

[108] Šugman Stubbs and Gorkič 2009b, p. 242.

[109] Albi 2015, p. 171.

[110] Expulsion of a foreign national as a criminal sentence was abolished in 2008.

[111] CCRS Up-690/10, UL 42/2012.

should be a serious argument when analysing the law and policy behind cases such as that of Mr. Laurits.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

In Slovenia, the state prosecutor (*državni tožilec*) is perceived as one of the parties in criminal proceedings. This role is not quasi-judicial, as is the case in some other Member States.[112] Erbežnik has warned that it is unsettling for a state such as Slovenia to sanction a direct execution per its judges of a decision taken by a state prosecutor in another Member State. The perception of the role of a prosecutor in a state is often historically rooted as an element of the state's legal culture and identity. Erbežnik fears that a possible spillover effect of the system of mutual recognition might be the obliteration of the differences in the perception of the role of the prosecutor in different Member States, and an overall trend towards the judicialisation of the prosecutor's role, with the prosecutor being armed with various powers over criminal suspects.[113]

Language seems to be an issue in the operation of systems based on mutual recognition. Smaller Member States can experience practical difficulties in arranging for the adequate translation of EAW requests, especially those issued by other small Member States, i.e. written in the less commonly spoken languages of the Union.[114] In 2014, a police officer of the Ljubljana Schengen Compensatory Measures Unit wrote a very interesting short note defending the legal stance of the Police. The Police had refused to detain a Romanian citizen who was subjected to an EAW until a Romanian translator was found.[115]

2.4 The EU Data Retention Directive

2.4.1 A constitutional challenge against the Electronic Communications Act (ZEKom-1),[116] the legislation implementing the Data Retention Directive,[117] was

[112] The Office of the State Prosecutor General is a constitutional institution (Arts. 135–136).

[113] Erbežnik 2010, p. 213; Erbežnik 2014a, pp. 141–143.

[114] EAW requests are also accepted by Slovenian authorities if they are issued or translated into English (Art. 6(6) ZSKZDČEU-1). The concerns raised by this rule among the Slovenian practitioners, in a country highly sensitive of its linguistic identity, were recorded by Šugman Stubbs and Plesničar 2009, p. 520. As the official languages of Slovenia are defined by the Constitution (Art. 11), the use of other languages in legal proceedings could present a constitutional issue.

[115] Jurič 2014, pp. 8–10.

[116] UL 109/12.

[117] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available

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filed by the Information Commissioner in 2013.[118] The claim of the Commissioner was that the retention of data on such a massive scale is a disproportionate limitation on freedom of movement (Art. 32 Constitution), the right to privacy (Art. 35), the right to privacy of correspondence and other means of communication (Art. 37) and the right to protection of personal data (Art. 38). The Commissioner also put forward a claim that the implementation of the directive was flawed, as the Slovenian legislature defined a broader set of legitimate objectives than provided in the text of the Directive.

The Information Commissioner underlined that data retention under ZEKom-1 effectively violated the freedom of movement as it enabled location tracking and, as such, was capable of providing a complete record of an individual's movements. In that sense it was comparable to a hypothetical general obligation to carry location tracking chips. Similarly, there were concerns regarding freedom of speech, as the control of communications on such a scale can be expected to lead to self-censorship by individuals communicating with one another. With billions of calls and messages recorded and only several hundred requests made to the processors every year, as few as 0.012% of the personal data retained is ever used in pursuit of the objectives for which data retention was introduced.

The Commissioner also warned of a function creep. In the course of inspecting communication providers, it was established that the providers were receiving requests unrelated to criminal investigations, but rather in connection to, for example, civil litigation or labour disputes.[119]

In September 2013, the Constitutional Court decided to stay the proceedings and wait for the outcome of the cases C-293/12 and C-594/12 in the ECJ.[120] The decision to stay and wait was based on the finding that the Commissioner's claim was in effect that the Directive violated Arts. 7 and 8 of the Charter of Fundamental Rights.[121] Hence, the Constitutional Court noted that 'the decision on the validity of the Directive is of key relevance to the review of constitutionality of national legislation'.[122] The Court did not refer any questions for a preliminary ruling, as

electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[118] The Information Commissioner is an independent authority charged with the protection of personal data and access to documents. The Commissioner reviews decisions to deny access to public documents and refusals to disclose personal data. (Act on the Information Commissioner, UL 113/05 and 51/07). The Commissioner has standing before the Constitutional Court, when in a procedure conducted by the Commissioner, a question of the constitutionality of the legislation that the Commissioner has to apply is raised. (Art. 23.a ZUstS).

[119] The request of the Information Commissioner is available (in Slovene) at https://www.ip-rs.si/fileadmin/user_upload/Pdf/ocene_ustavnosti/ZEKom_-_Zahteva_za_oceno_ustavnosti__data_retention_.pdf.

[120] The Court found that the ECJ decision in Case C-301/06 *Ireland v. Council* was 'with regard to the issue of legal basis *only*' (emphasis added). CCRS U-I-65/13, Order of 26 Sept 2013, para. 9.

[121] U-I-65/13, para. 5.

[122] Ibid., para. 8.

similar proceedings were already in progress.[123] In the resumed proceedings (after the ECJ judgment), the Court established that even after the annulment of the Directive, data retention remained a matter for EU law: Directive 2002/58/EC[124] allows the Member States to adopt legislative measures encroaching on the confidentiality of data in transit, including data retention, when this is necessary, appropriate and adequate in a democratic society to serve a number of legitimate aims. The Constitutional Court found these requirements to correspond, in substance, to the requirement of proportionality that must be fulfilled in order for a limitation on a human right to be legal under Slovenian constitutional law. The Court annulled the contested provisions and ordered the processors to immediately destroy all retained data. While the Information Commissioner invoked several human rights provisions of the Constitution, the review by the Court was based on Art. 38(1), which focuses on the personal data aspect of the issue:

> The protection of personal data shall be guaranteed. The use of personal data contrary to the purpose for which it was collected is prohibited.[125]

It is clear from this case that the annulment of a 'source' directive is not sufficient to remove the legal norms that implement it from the Slovenian legal system. It is, however, questionable whether the precious resources of the Constitutional Court are well allocated with the Court taking over this 'purification' function, which could be left to the legislature. A solution (that would admittedly probably require some dialogue among the branches of government) could be found where the Court would only resume the proceedings (in the interest of protecting the individuals aggrieved by the implementing measure) if the legislative and executive branches were dragging their feet after an ECJ annulment. This is far from saying that the Court should not engage with EU law that violates human rights; in fact, it is almost the opposite. Rather than waiting for the ECJ to deliver a judgment and then going through the mental exercise of checking the conformity of the implementing measure with the Constitution, feeding on the arguments of the ECJ, the Court should do the mental exercise at an earlier stage and incorporate the results of the mental exercise into a reference for a preliminary ruling.

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[123] Bardutzky 2014b.

[124] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), [2002] OJ L 201/37.

[125] The focus on Art. 38(1) is interesting in its own right, as the provisions of Art. 37 (Protection of the Privacy of Correspondence and Other Means of Communication) offer stricter guarantees: '(1) The privacy of correspondence and other means of communication shall be guaranteed.

(2) Only a statute may prescribe that on the basis of a court order the protection of the privacy of correspondence and other means of communication and the inviolability of personal privacy be suspended for a set time where such is necessary for the institution or course of criminal proceedings or for reasons of national security.'

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2.5 *Unpublished or Secret Legislation*

2.5.1 It is almost completely unimaginable that unpublished or secret legislation could ever be compatible with the Slovenian constitutional order. The very concept evokes nightmarish flashbacks of the Communist Party controlled regime that was removed in 1990–1991 – *inter alia* by adopting the new Constitution. There were two types of secret legislation in the former Yugoslavia. First, in addition to the Official Gazette, there was also a secret official gazette that was made available to only between 22 and 40 authorised recipients. The federal secret official gazette was established in 1980, and in the following year, all six constituent republics started issuing their own secret official gazettes. The scope of secret legislation was broad and comparable to the scope of 'public' legislation. In addition to numerous executive and sub-statutory acts, as many as 55 *statutes* (i.e. acts of the legislature of general application) were published in the federal secret official gazette; often, economic and financial regulation was published in this way. Secondly, before and after the introduction of the secret official gazette, there were legal norms in use that were too classified even for 'secret publication'. These norms primarily dealt with state security. Based on this experience, the opinion was formed that secret legal norms are not legal norms at all; they merely pose as such and can never be part of the legal order.[126] According to the Constitutional Court, the 'mere existence of secret norms that contained authorisations for the political police was tantamount to a gross violation of human rights and fundamental freedoms'.[127]

The Constitution states that all general and abstract legal acts (*predpis*) have to be published before they can enter into force. Legal acts of the state are to be published in the Official Gazette; legal acts of the local communities are to be published in gazettes chosen by the communities (Art. 154). The Constitutional Court has built its Art. 154 case law mostly upon developing a material conception of the *predpis*. The form of a legal act is less relevant for the question whether the act needs to be published; the essential questions are whether the text contains any general and abstract legal norms, whether it regulates a right or a duty and whether it creates external legal effects.[128]

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[126] Šturm 1998, pp. 285–287; Testen 2002b, p. 1033.

[127] CCRS U-I-25/95, UL 5/98, para. 84. The case echoed in Sadurski's account as follows: 'No doubt the evocation of this recent history, from before the collapse of Yugoslavia, added a powerful persuasive force to the court's hostility towards the use of such secretive means, even for the perfectly justifiable ends of fighting crime, particularly organised crime.' Sadurski 2005, p 147.

[128] Šturm 2011, pp. 1363 et seq. In 1998, the Constitutional Court was seized with a challenge against a secret agreement between the defence ministries (or rather the military intelligence services) of Slovenia and Israel. The Court dismissed the challenge on procedural grounds given that there was no legal act whatsoever that the Court could review; however, *obiter dicta*, the Court made it clear that without complying with a proper procedure of ratification and publication, an agreement between two states cannot become part of the Slovenian legal order. CCRS U-I-128/98, Order of 23 September 1998, OdlUS VII, 173. See also Sect. 3.1.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 The first request for a preliminary ruling from the Constitutional Court expresses doubt as to the legality of the Commission's 'Banking Communication'.[129] At the time of writing, the case was pending before the ECJ.[130] A challenge was brought against the provisions of the Banking Act (ZBan-1)[131] that were the legal basis for a bail-in operation, executed via decisions of the Bank of Slovenia and that affected the holders of bonds of five different Slovenian banks.

In response, the Government and the National Assembly argued that the contested provisions were adopted in order for Slovenia to comply with the requirements put forward by the European Commission in the Banking Communication. The only way that the Commission would find that the state aid given to the banks was legal was if Slovenia complied with the Banking Communication in advance.[132] In effect, the enactment of the problematic provisions of the Banking Act was allegedly a 'transposition' of this, at least by name, soft law measure. The Constitutional Court has therefore first asked whether the Banking Communication, 'taking into account the legal effects that are *de facto* created' and given the exclusive competence of the European Union in state aid law, is to be interpreted as being binding for the Member States.

The Court has also asked for a preliminary ruling as to the validity of the Communication, to first determine whether it was within the boundaries of the Commission's competences. However, even if this should be the case, the Constitutional Court has its concerns with regard to the principle of protection of legitimate expectations and the right to private property.

According to the Court, legitimate expectations might be disrupted for the persons who held instruments of equity and debt that had been issued before the Banking Communication was issued. At the time of investing their assets, the affected persons did not know that in the future, state aid to banks would be made conditional upon negative changes to the instruments in their hands. With the exception of insolvency proceedings, there was no legal regime in existence that could lead to the deterioration or obliteration of their entitlements at the time when they chose to invest in the affected instruments. At the same time, the Court has recognised that there is an element of public interest in not limiting the temporal

[129] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), [2013] OJ C 216/1; CCRS U-I-295/13, Order of 6 November 2014.

[130] Case C-526/14 *Kotnik and Others* [2006] ECLI:EU:C:2016:570.

[131] UL 99/10 etc., the provisions contested in U-I-295/13 were inserted by the ZBan-1L amendments (UL 96/13).

[132] CCRS U-I-295/13, Order of 6 November 2014, para. 10.

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scope of the Banking Communication. To do so would increase the strain on public finances and harm competition.[133]

There is no doubt that the measures required by the Banking Commission encroach upon the right to private property of the persons affected. The question thus is whether the encroachment is permissible under EU law.[134] The Court doubts that the encroachment is proportionate, as it does not necessarily make it possible for the concrete circumstances in the individual Member States which could determine the proportionality of the encroachments to be taken into account.

The Constitutional Court has evoked ECHR case law on appropriate compensation for encroachments upon private property and questioned the proportionality of the erasure of the affected entitlements that is based only on an evaluation of the liquidation value of the bank, whereas the actual liquidation will never take place.

The Court is concerned that the persons affected by the Banking Communication measures will be excessively burdened with the costs of restructuring the bank. This is especially the case under the contested regime, as not all categories of stakeholders in the banks participate in the losses; on the contrary, depositors and senior bond holders only reap the benefits of the state aid that will subsequently be given to the bank in question. At the same time, the Court recognises that the Communication pertains to the stakeholders whose position has been more exposed to risk from the beginning.[135]

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 The European Stability Mechanism (ESM) – or the participation of Slovenia therein – has not been challenged before the Constitutional Court. Given the substantial commitment undertaken by Slovenia upon participating in the ESM (the entire capital subscription amounts to almost one-third of the annual state budget),[136] it is notable that the political debate was almost non-existent. The record of the discussion at the plenary session of the National Assembly in which the ratification statute was adopted is no longer than 1,121 words. The representatives of the largest governing party and the largest opposition party took the floor. For the former, the ESM Treaty was 'in the utmost interest of Slovenia', while according to

[133] Ibid., para. 44.

[134] Ibid., para. 48.

[135] Ibid., paras. 50–51.

[136] Slovenia's share in the total authorised capital stock of the ESM is 0.42%, which amounts to 2.993 million EUR (ESM Treaty – consolidated version following Lithuania's accession to the ESM, Annex I). The State expenditure for 2015 is 9.485 million EUR (Budget of the Republic of Slovenia, UL 102/13, 14/15).

the latter, 'any measure that strengthens the common currency is more than welcome'.[137]

2.7.2 While the ESM has not been contested in Slovenia, there was a constitutional challenge to one of its predecessors, the European Financial Stability Facility (EFSF). A group of 37 deputies of the National Assembly challenged the ZPZFSEu, the statute that provided the legal basis for the participation of Slovenia in the EFSF, before the Constitutional Court.[138] The deputies claimed that the ZPZFSEu, in determining only the total sum and duration of Slovenia's guarantees for the EFSF's funding instruments, violated Art. 149 Constitution.[139] The deputies asserted that the Constitution demands a special statute for each state guarantee, which lays down all the elements of the guarantee. Failure to provide such statute also amounts to a violation of the principle of separation of powers, as the role of the National Assembly is limited to being informed of any guarantees given.[140]

The Constitutional Court rejected all of the deputies' claims and found that the ZPZFSEu does not envisage a series of guarantees. It is the legal basis for one large scale guarantee, with withdrawals to be made gradually, over a longer period of time, and in proportion to what is required.[141] In laying down the grounds for its ruling, the Court formulated some important positions. First, long term economic effects and their consequences for financial stability cannot be evaluated by looking at an individual measure, but rather require constant observation and continuous assessment. This, however, is not a task for the courts. It is for the Government and the Parliament to undertake and, in doing so, they are to enjoy a wide margin of appreciation. Hence, the judicial review of such questions has to be reserved.[142]

Secondly, even before the fiscal rule was introduced in the Constitution (see Sect. 1.2.1), the Court had found that Art. 149 Constitution cannot be interpreted as allowing the National Assembly to provide a *carte blanche* to the Government in matters of borrowing: the obligations undertaken must be, if not determined, at least determinable. This is regardless of the fact that Art. 149 does not set any material conditions or limitations for state borrowing or guarantees. The determinability of (future) obligations is required by the principle of *pravna država* and, not less

[137] Record of the plenary session of the National Assembly of 19 April 2012. However, Ahtik et al. 2014, p. 529 report on the calls of parliamentarians to be more fully involved in the Economic and Monetary Union governance.

[138] Act Regulating the Guarantees of the Republic of Slovenia for Ensuring Financial Stability in the Euro Area (UL 59/10, 79/11).

[139] Art. 149: 'State borrowings and state guarantees for loans are permitted only on the basis of a statute.' See Bardutzky 2011, p. 1338.

[140] CCRS U-I-178/10, UL 12/2011, para. 1.

[141] Ibid., para. 29.

[142] Ibid., para. 9.

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importantly, the principle of the social (welfare) state (*socialna država*) that commands that

> the State, in any given moment and also for future generations, which are to bear the burden of the debt incurred in the present, must provide the social minimum, that amounts not merely to the minimum required to survive, but ensures the possibilities to foster social relationships and to participate in social, cultural and political life.[143]

It is quite striking that the Court not only looked beyond the constitutional provisions that would conventionally be considered most narrowly related to the issue at hand, but it also invoked none other than the principle of *socialna država*. The latter traditionally stands for demands for solidarity within society and recognises the value of wide access to public services. It can potentially present a strong obstacle to a spectrum of different designs for Europe's economic constitution. In the hands of the Slovenian Constitutional Court, visibly influenced by the discourse prevalent in the German Federal Constitutional Court, it was deployed in order to establish an 'unwritten debt cap'. Meta Ahtik, Maja Brkan and Živa Nendl have thus justifiably wondered whether the Court has not taken 'a step too far in limiting the state's margin of manoeuvre for guaranteeing the respect for the value that the Court appears to hold at the heart of its reasoning'.[144] Whether the Court's concern for the welfare state (of future generations) will consequently be employed in the future to further the ordoliberal ideals of prudent public spending, remains to be seen.

2.7.3 Perhaps the most commonly mentioned reason for the Slovenian economic crisis is the large influx of cheap capital between 2004 in 2008.[145] This was cut short by the global financial crisis when lenders refused to extend loans which businesses were unable to repay, thus exposing the fact that the borrowing was excessive. The banking sector itself was not inflated (as was for example the case in Cyprus),[146] but it was detrimental that the majority of it was state owned, as the losses of the banks immediately impacted state finances.[147] State ownership of the banks and the resulting political influence over lending decisions led the banks to finance managerial takeovers of state-owned businesses in the real sector. This contributed to the sum of toxic loans in the banks' balances. In general, Slovenia stands out somewhat from the other post-socialist Member States of the European Union, as its process of privatisation of state-owned companies has been exceptionally slow and is in fact not yet finished.[148] As a consequence, foreign direct investment in the country remains low.

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[143] Ibid., para. 25.

[144] Ahtik et al. 2014, p. 535.

[145] See for example Križanič 2012.

[146] (2013, November 30). Slovenia's financial crisis: Stressed out. The Economist. http://www.economist.com/news/finance-and-economics/21590956-fight-avoid-sixth-euro-zone-bail-out-reaches-climax-stressed-out.

[147] Jazbec 2014.

[148] For an overview of the privatisation process in Slovenia until 2005, see Mencinger 2006.

Slovenia has so far avoided having to ask for financial support and entering an externally imposed austerity programme. However, as there were severe difficulties with the state's public finances in recent years, Slovenia found itself in a situation where the bailout scenario appeared to be an inevitable reality.[149] In my view, the general public was prevalently opposed to the possibility of a bail-out and, consequently, to any austerity programme designed by the EU and the IMF. This might be attributable to the fact that at the time Slovenia was facing this scenario, the public was already aware of the experiences of other countries that had gone down that road before, especially Greece.[150] A scenario of external financial support was by and large considered undesirable by Slovenian lawyers and economists;[151] however, this view was not unanimous. Avbelj discussed the possibility of the troika as a 'catalyst for democracy'. In his argument, the insolvency of a state is a reflection of its dysfunctional democratic process. The most persuasive out of a range of possible reasons for this dysfunction is that the system has been captured by smaller interest groups that prevent it from cleansing itself of bad rulers. If this were the case, the right to vote would become no more than illusory; once the state is totally captured, the only solution is an intervention from outside. This option harbours the potential to liberate the state from its captors, thus reinstating factual democracy. In reality, it is unlikely that the troika would wield sufficient power to truly prevent the interest groups from releasing their grip on the state.[152]

[149] Slovenia remains in an excessive deficit procedure (Regulation 473/2013) that has been ongoing since 2009, and is considered to be experiencing excessive macroeconomic imbalances in the sense of Regulation 1176/2011.

[150] That the image of Greece and its experience was present even in the discussions of the judges of the Constitutional Court is revealed in the concurring opinion of Judge Petrič (a professor of international law) in U-II-1/12, U-II-2/12 (the decision is discussed above in Sect. 1.3.4): 'The position of Greece in relation to those, who *de facto* (albeit in the form of negotiations) determine the conditions of assistance and subsequently oversee the implementation of that agreement (including the parliaments of the other EU/Eurozone Member States), from a substantive point of view amounts to a limitation of Greece's sovereignty, even if the country – from a formal point of view of international law – remains a sovereign state.', para. 4.

[151] As an example, the opinion of Bogomir Kovač, Professor of Economics at the University of Ljubljana, that the reforms of economic governance have turned the EU into a tyranny, with the troika as the essence of European democracy rather than a deviation from it (Kovač, B. (2014, January 24) 1, 2, 3. Mladina.). See also Trampuš, J. (2013, October 10). Klicanje trojke (Calling the troika). Mladina, for a selection of views of politicians and other public figures on the consequences of possible entry into an austerity programme for Slovenia.

[152] Avbelj 2013a, b.

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2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Slovenian courts have not been very active in requesting preliminary rulings from the ECJ (nine requests altogether since the 2004 accession).[153] The eight requests filed by the Supreme Court, the Administrative Court and the High Court of Maribor were all with regard to the interpretation of EU law.[154] Only the request filed by the Constitutional Court (currently pending) regards the conformity of an EU soft law measure with superior EU law and legal principles (see Sect. 2.6.1).

2.8.2–2.8.3 The tables below indicate the intensity of judicial review before the Constitutional Court between 2009 and 2013. The data presented is with regard to the two most important types of procedure: the review of abstract legal norms, including parliamentary legislation, executive and local regulations, etc. (the 'U-I' docket), and constitutional complaints against individual legal acts (the 'Up' docket; see Sect. 2.1.1). In general terms, the Constitutional Court controls the regulatory activity of the legislative and executive branches and of the local governments in U-I cases. In Up cases, it oversees the compliance of the judiciary with human rights requirements.

In the observed period, between 7 and 15% of challenges against the different abstract legal norms were successful, as described in Table 1.[155]

With regard to constitutional complaints, it must first be noted that the Constitutional Court is seized every year with more than one thousand complaints, but only a tiny percent advance to the merit stage.[156] Of the less than one hundred cases heard on the merits, a huge majority are successful. However, it is clear that many unfounded cases are dealt with in the admissibility stage. Therefore, in order to provide an accurate picture of the Constitutional Court's review of other

[153] Zagorc and Bardutzky 2010, p. 444.

[154] The database of preliminary rulings requested by Slovenian courts other than the Constitutional Court is maintained by the Supreme Court and available at http://www.sodisce.si/znanje/sodna_praksa/baza_seu/.

[155] The numbers in the table encompass all challenges regardless of the type of act that was challenged (parliamentary legislation, executive regulation, local act) and the type of applicant (state institution, private citizen or court by way of *incidenter* proceedings). Under 'successful challenges', I have counted all the cases where a norm was annulled or a situation of nonconformity with superior law was merely established. Under 'unsuccessful challenges', I have counted all cases where the Court has ruled that the measure is not contrary to superior law and the cases where a private citizen's claim was rejected, which occurs when a claim is either manifestly unfounded or does not address an important issue (Art. 26(2) ZUstS). Challenges are dismissed on procedural grounds mostly when the private citizen that filed a claim is not considered to be affected by the contested measure (*pravni interes*; Art. 24 ZUstS), but also when other procedural requirements are not fulfilled.

[156] Legislation enables the Court to weed out the complaints that neither bear grave consequences for the complainant nor lead to the resolution of an important question (Arts. 55–56 ZUstS).

Table 1 Outcome of the review of legislation and other abstract legal norms

Year	2013	2012	2011	2010	2009
Successful challenges	26	31	49	25	32
	7.16 %	8.86 %	14.45 %	9.77 %	9.61 %
Unsuccessful challenges	77	50	76	42	68
	21.21 %	14.29 %	22.42 %	16.41 %	20.42 %
Challenges dismissed on procedural grounds	260	269	214	189	233
	71.63 %	76.86 %	63.13 %	73.83 %	69.97 %
Total	363	350	339	256	333

Source Annual Report of the Constitutional Court (2013)
The figures are from the Annual Report of the Constitutional Court (2013), p. 77, http://www.us-rs.si/media/rsus_porocilo_o_delu_2013_web.pdf

Table 2 Success of constitutional complaints in 2009–2013

Year	2013	2012	2011	2010	2009
All cases received	1031	1203	1358	1582	1495
Cases admitted	23	47	26	74	58
Percentage of cases admitted (%)	2.2	3.9	1.9	4.9	3.9
All cases where final decision was made	22	44	26	58	63
Complaint granted	18	41	21	57	37
Complaint rejected	4	3	8	1	26
Percentage of successful cases out of all cases where final decision was made (%)	81.82	93.18	80.77	98.28	58.73

Source Annual Report of the Constitutional Court (2013)
The figures are from the Annual Report of the Constitutional Court (2013), p. 79

Slovenian courts, the numbers have to be read together; these are provided in Table 2.

2.8.4 See Sect. 1.3.4.

2.8.5 In my opinion, the perception of whether there is a gap in judicial review will depend to a great extent on the outcome of the recent, first request for a preliminary ruling made by the Constitutional Court (see Sect. 2.6.1) and especially on the course of the judicial dialogue.

2.8.6 The situation where different sets of rules would apply to a 'purely domestic' criminal case on the one hand and a case with an element of EU law on the other has been described using Ronald Dworkin's concept of 'checkerboard laws': 'laws that treat similar [cases] differently on arbitrary grounds'.[157] In light of the position of the scholarship that 'the Constitution of the Republic of Slovenia which, even in the circumstances of the full Slovenian EU membership, precludes any decrease in

[157] Erbežnik 2010, p. 216; Dworkin 1986, p. 179.

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the already existing constitutional standards of human rights protection',[158] it seems inevitable that this issue will be addressed in Slovenian constitutional law. The gruesome example of the 'anticanon' *Dred Scott* case teaches us that historically, the existence of checkerboard laws has led to the absolute harmonisation of constitutional rights on the federal/supranational level.[159] A possible alternative to the process of harmonisation is to institute a 'maximum standard' mechanism, as proposed by Ciril Ribičič: the law that provides the higher standard of human rights protection is applied.[160]

It should be noted that the equality clause in the Slovenian Constitution (Art. 14(1)) expressly guarantees *equal human rights and fundamental freedoms* to everyone regardless of their personal circumstances. If the EU human rights 'checkerboard laws' were to face a constitutional challenge based on Art. 14(1), the Constitutional Court would probably administer a strict proportionality test.[161] It is likely that the Court would recognise mutual recognition among the Member States of the EU as a legitimate goal; however, the result of the balancing phase of the test is less predictable. If in weighing equality against mutual recognition the Court were to favour the former, this would mean adopting a maximum standard approach. If, on the other hand, the Court were to let mutual recognition prevail, it is hard to imagine that it would not accompany this move with a *Solange* type caveat. This, in turn, could contribute to a move for absolute harmonisation on the EU level.

2.9 Other Constitutional Rights and Principles

Implementation and minimum standards Boštjan Zalar has reported on how the implementation of the Asylum Procedures Directive,[162] which defines minimum standards for the procedure in which refugee status is recognised and withdrawn, has led to the lowering of procedural standards in Slovenian refugee law.[163] What is especially problematic is that these standards were established by the case law of the Slovenian Constitutional Court. Zalar has observed that, nevertheless, 'the Constitution itself and the existing case law of the Constitutional Court … are not considered strong enough factors to force the executive and legislative branch of government towards the preservation of fundamental standards of human rights in the transposition of the [Directive]'.[164]

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[158] Avbelj and Peršolja 2012, pp. 395–396. In a similar vein, see Novak 2004, p. 113.

[159] *Dred Scott v. Sandford*, 60 U.S. 393 (1857); Erbežnik 2012, p. 9; Halberstam 2015.

[160] Ribičič 2006, n. 7. See Halberstam 2015 for scepticism toward the 'higher standards' approach.

[161] CCRS U-I-425/06, UL, especially paras. 7 and 14.

[162] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L 180/60.

[163] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13.

[164] Zalar 2008, p. 202.

Choice of legal form for implementation Implementation of EU law has not brought about a significant change in the legal form in which legal norms are adopted. The constitutional rule under which the rights and duties of citizens and other persons may be determined by the National Assembly only by statute (Art. 87 Constitution, see Sect. 2.1.3; for the reflection of this provision in the rules on the ratification of treaties see Sect. 3.1.1) functions as a bulwark against a large-scale erosion of this kind.[165] The rights and duties of individuals, however, are not the only type of legal norms for which the preferred form in the Slovenian legal system under normal circumstances would be a statute. When it comes to the assignment of different tasks to the various administrative organs, for example, the instructions found in the text of the Constitution (Art. 3 – separation of powers and Art. 120 – organisation and work in the state administration) are perhaps less direct than in Art. 87. Nevertheless, the Constitution also demands the use of a statute in a number of situations based on these clauses. In these types of cases, I believe it might happen that EU legislation, especially when the implementation deadline is approaching, would be implemented in the Slovenian legal system with the use of a sub-statutory instrument; however, later, the situation would be remedied in legislation.[166]

2.10 Common Constitutional Traditions

2.10.1 Traditions, by definition, originate in the past that is (or has been) passed on to the present. At first sight, the different historical characteristics of the Member States' constitutions (even beyond the strong/evolutionary divide, see Sect. 1.1.1), could lead us to a finding that there is little commonality in the Member States' traditions. In addition, a 'statistical' analysis of constitutional texts could easily turn into a cynical operation through which a minimum common denominator is to be identified, possibly leading to a reduction in the scope of European human rights law. At the same time, there is in my opinion nevertheless a message that is common to European constitutionalism as a whole: the rejection of the various totalitarian regimes that have abused public power and trampled on the integrity and dignity of the individual. In that sense, the constitutional traditions common to the

[165] I am grateful to Peter Pavlin for an informative discussion on this matter.

[166] I have been able to find one such example. In 2011, the Governmental decree on the implementation of legal acts of the European Union on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (UL 18/11), in order to implement Council Resolutions 2008/615/JHA and 2008/616/JHA of 23 June 2008, assigned the execution of the relevant legal norms to the Ministry of Internal Affairs and designated the different units of the Police as national contact points. In 2013, the National Assembly adopted the new Police Tasks and Powers Act (UL 15/13). The Act, in Art. 161, assigned (again) the execution of the same norms to the Ministry and gave an authorisation to the Government to designate the national contact points pursuant to the Council Resolutions.

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Member States are legal expressions of the 'never again' cries that have followed periods of suffering and injustice in Europe.[167] However, the text of Art. 6(3) TEU assigns a future-oriented purpose to the essentially retrospective concept of constitutional tradition. If it is to become a workable tool for the European courts, an approach will have to be identified that can apply historical lessons not only to the problems of which we are presently aware (e.g. data retention), but also to a host of yet unforeseeable challenges.

2.10.2 As discussed in Sect. 1.3.1, the principles of supremacy and direct effect of EU law have not been accommodated in Slovenian constitutional law explicitly, but with a rather more abstract provision according to which the legal acts of Art. 3.a. organisations (i.e. the EU) 'shall be applied in Slovenia in accordance with the *legal regulation*' of such organisations.[168] The term 'legal regulation of such organisations' is most commonly interpreted as a device that accommodates supremacy and direct effect as structural principles of EU law within the Slovenian constitutional order. However, supremacy and direct effect are not the only principles of this rank. Zalar has recalled that respect for the common constitutional traditions, via Art. 6(3) TEU, also needs to be considered part of this 'legal regulation'.[169] Indeed, the traditions inform the general principles governing the body of EU law. Were we to accept Zalar's reading of Art. 3.a, this would mean that pursuant to this article, EU law would have to be applied in Slovenia in accordance with respect for the common constitutional traditions. In effect, the Slovenian Constitution would bind EU law, insofar as it is applied in Slovenia, to the Member States' constitutions. A demand that fundamental rights, as they result from the common constitutional traditions, be respected by EU law, would then be based not only in the TEU, but also in the Constitution.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 In the domestic context, Constitutional Court Judge Ribičič has vocally opposed the practice of reducing the standard of human rights protection from the higher Slovenian constitutional level to the lower level of the ECHR. His reasoning is that the mission of the Council of Europe system of human rights protection, including the Convention and the Strasbourg Court, is to progressively ensure as high as possible minimum standards. To allow the states to drop from established standards would put an end to the positive development of human rights standards

[167] Cf. Jambrek 2012, p. 32.

[168] See above Sect. 1.3.1. Emphasis added.

[169] Zalar 2005; Ahtik et al. 2014, p. 771. It is unlikely that this was the intention of the drafters who adhered to what I have referred to as the indefinable aesthetics of constitution making (Sect. 1.5.1); however, the more laconic the wording, the wider the field of interpretation.

in Europe, amounting to abuse of the Convention as prohibited by Arts. 17 and 18 ECHR.[170] Ribičič's position – in my opinion – accurately illustrates the perception of the ECHR as an absolute 'floor' among Slovenian lawyers.[171]

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 The Government took the usual steps to include the views of the public in the process of drafting the ZEKom-1, the implementing statute for the Data Retention Directive (see Sect. 2.4.1). It invited written comments and held two public consultation sessions. Throughout the dialogue with the public, fifty different entities (state authorities, businesses, individuals) submitted comments (however, the ZEKom-1 regulates the entire area of electronic communications, and therefore the consultation and the public discussion covered several issues beyond data retention).[172] Concerns were repeatedly expressed regarding the provisions on data retention: whether data retention is truly necessary and whether the data retained indeed is useful in criminal investigations. The Government 'warned' the public that the Commission had lodged an action against Germany for non-implementation of the Directive, imposing a daily penalty of 315,036.54 EUR until implementation.[173] In this sense, the implementation of the Data Retention Directive in Slovenia is an example of infringement proceedings for non-implementation echoing in domestic lawmaking procedures.

2.12.2–2.12.3 In Art. 260 TFEU proceedings, a Member State should be allowed to raise a 'constitutional defence' if it has failed to implement a directive because the implementation encountered serious constitutional obstacles articulated in the course of procedures established at the national level for the review of constitutionality, such as a procedure before the constitutional court or an analogous procedure in parliament.[174]

[170] CCRS U-I-272/98, UL 48/2003, Concurring opinion of Judge Ribičič, para. 8.

[171] See also Erbežnik 2014b and the discussion in Sect. 2.8.6. I would also like to acknowledge Mojca Plesničar's comment that all the practitioners and policy-makers interviewed in the framework of the study on the EAW (see Sect. 2.3) expressed fears that the standard of human rights protection was being reduced, towards a minimum common denominator.

[172] Predlog ZEKom-1, Sect. I.2.3.d.

[173] Ibid., Sects. III. and XIII.

[174] Bardutzky 2014a; see also Douglas-Scott 2002, pp. 411–413.

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2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.3 I believe that to a certain extent Slovenia has faced a reduction in the standard of protection of fundamental rights as one of the consequences of European Union membership. Even though it was later successfully challenged before the ECJ, I believe that data retention can serve as an example. If this had been a purely domestic legislative project, it would have probably met insurmountable constitutional and democratic obstacles. But as it originated in the EU, it became part of the law in a very different atmosphere (see Sect. 2.12.1).

The reduction in standards is likely to be accepted among the citizenry as a trade-off for the benefits of integration. It is not to be dismissed that Slovenians, perhaps in contrast to other post-socialist Member States, have only recently begun to take advantage of the freedom of movement as a consequence of the economic crisis. This has made the benefits of membership very visible, especially among the young, educated and unemployed. In addition to the economic benefits of integration, I believe that governance on the European level is perceived as an additional check on national politics, with the latter enjoying relatively low respect among Slovenians.

While this may explain the forgiving attitude of the citizenry with regard to the reduction in standards, it does not supply an 'across the board' justification, at least not from the point of view of a constitutional lawyer. Whenever a supranational measure sits uncomfortably with domestic constitutional standards, the tension cannot simply be decided in favour of the former by saying the magic words 'effectiveness and unity'; a certain type of weighing is in order to ascertain whether the attainment of effectiveness and unity is needed sufficiently urgently as to justify the setting aside of constitutional standards.

Primarily, this is a matter for the courts. The recent 'new era' (to borrow the words of Giuseppe Martinico)[175] of preliminary references from constitutional courts to the ECJ is a promise of a more proactive attitude. Constitutional courts should not shy away from eloquently sharing their concerns and positions with the ECJ, substantiating them with national constitutional (case) law whenever they question the validity of EU secondary law, measured against the yardstick of fundamental rights. The ECJ should respect fundamental rights as informed by the constitutional traditions common to the Member States by building these arguments into the fundaments of its reasoning.[176]

[175] Martinico 2010, p. 221.

[176] As a small comparative side note, the US Supreme Court is known to let constitutional issues 'percolate' upward through the judicial system before it grants *certiorari* to one of the cases dealing with a particular issue and finally resolves the issue. In other words, before the Justices take a stand on a matter, they wish to have before them an array of the different possible solutions provided by the lower courts (and scholarly commentary!). Although in a much less hierarchical setting, this logic might make sense in the courts of the European Union as well. In situations

This is not to idealise the conciliatory effects of judicial dialogue. Even in a situation where national constitutional courts are proactive and 'in the mood for dialogue' (to borrow more of Martinico's vocabulary),[177] and the ECJ is responsive, it cannot be excluded that the standards are simply different. In mutual trust scenarios (such as *Melloni*), Daniel Halberstam's 'safety valve' proposal should be considered seriously.[178] It remains open whether a similar solution can be found beyond scenarios involving mutual trust.

2.13.4 While in the scholarly quest for democracy and constitutionalism in the European Union attention on the Member State level is most often paid to national parliaments and (constitutional) courts, this focus of attention leaves out a crucial element: the administration. I acknowledge my personal bias in this matter, having previously served in a government department in a Member State; indeed my observations are based on my personal experience. Civil servants are important gatekeepers of the legal system and have enormous potential to prevent the adoption of unconstitutional norms. They draft legislation, including implementing legislation. At the same time, they exert influence on lawmaking at the European level, either directly or by way of expertise provided to the ministers.[179] Again, based on my personal experience, the national constitution is far from a solemn monument to dwindling sovereignty; it is rather a workable tool, a source of arguments and a constant yardstick. We did not carry the heavy commentary of the Constitution to meetings in other departments to celebrate the country's sovereignty; we did it because in our work, we felt constrained by the constitutional court case law and scholarly opinion.

This account is of course part prescriptive and part descriptive. The claim here is not that all bureaucrats are staunch defenders of constitutionalist values. Whether the words 'the Constitutional Court will never allow it' gets the person who utters them in a meeting in a government department attention or gets him waved off by his interlocutors depends on a number of factors. The first factor is education, including continuous professional development. The second is the position and role of the professional civil service in the system of government. Third, the constitutional judiciary can (and has to) play a crucial role here by developing consistent

where a number of constitutional courts are seized of challenges to EU (implementing) legislation, procedural solutions could be established and a principle could be formulated according to which the ECJ would ensure that national constitutional courts' concerns are articulated, so that the ECJ can adequately respond to them. Perry 1991, pp. 230–234.

[177] Martinico 2010, p. 221.

[178] Halberstam 2015.

[179] Notably, Plesničar and Šugman Stubbs 2009, p. 212 recorded the discontent of Slovenian civil servants regarding the implementation of the EAW. The limited capacities of the (small Member State's) public administration mean that the persons in charge of the legislative drafting in the ministries are not the ones negotiating the instruments in EU lawmaking procedures; the small number of staff at the permanent representation to the EU prevents a sufficient specialisation among them; often, the transfer of information between the negotiators and the implementers is inadequate.

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and well-argued case law. Pythic holdings may be useful for disguising disagreement on the bench, but they are unlikely to strengthen the constitutionalist discourse among government lawyers.[180] A transparent and consistent stance on the scope of the court's deference to the legislative branch is also likely to strengthen the legitimacy of the court's judgments by dispelling the impression among the readers of the case law that the court is acting on prevalently political motives.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Ratification of treaties The Constitution distinguishes between international treaties that are to be ratified by the National Assembly and all other international treaties. Only the international treaties that are ratified by the National Assembly enjoy an elevated position in the hierarchy of legal acts: they are superior to all other legal acts except the Constitution, including statutes. International treaties that are not ratified by the National Assembly are only superior to sub-statutory legal acts.

The text of the Constitution does not delimit the two categories of international treaties further nor designate the body responsible for the ratification of 'sub-statutory' treaties. The legislature, by virtue of the Foreign Affairs Act (FAA),[181] has vested the power of ratification of 'sub-statutory' treaties in the Government. The FAA further provides that the Government shall only ratify an international treaty if the incorporation of the treaty does not require statutory reform. Also, the Government only ratifies international treaties which:

- regulate questions that would, pursuant to the domestic legal order, fall within the Government's sphere of competences;
- are concluded in order to execute acts of international organisations that bind Slovenia, previously concluded international treaties and decisions of international cooperation in defence or internal affairs matters;
- regulate diplomatic and consular relations.

All other treaties need to be ratified by the National Assembly (Art. 75 FAA). The division of competences between the executive and legislative branches in the ratification of international treaties hence follows the dividing line drawn between the branches in domestic lawmaking. As was discussed above in Sect. 2.1.3, the Constitution demands that rights and duties be conferred by a statute, which accords

[180] In the context of the ECJ, a similar argument was recently presented in Bobek 2013, p. 207.
[181] UL 113/03, 20/06, 76/08, 108/09, 80/10.

a relatively strong position to the National Assembly in terms of the breadth of its competences.

The ratification and publication of treaties is considered of constitutional importance; the Constitutional Court considers secret international agreements to be contrary to the fundaments of the Slovenian constitutional system.[182]

Transfer of powers Article 3.a Constitution does not refer to the European Union, but generically to 'international organisations' and provides a legal basis for transfer of the exercise of sovereign powers (see Sects. 1.2.1 and 1.3.1). To this day, this limb of Art. 3.a has only been used in relation to the European Union; however, this is not to say that it would be inapplicable to possible accession to international organisations in the future.

Article 3.a was also adopted in order to provide a legal basis for the accession of the Republic of Slovenia to the North Atlantic Treaty Organization (NATO). With that purpose, the text of the provision, in its second limb, also includes an authorisation for the state to 'enter a defensive alliance with [other] states', provided that such alliance is based on the respect for human rights and fundamental freedoms, democracy and the rule of law. In Slovenian constitutional law, membership in defence alliances thus represents a special category of Slovenian participation in mechanisms of global governance.

3.1.2 There has been no reform of this kind.

3.1.3 A few years before the EU-related reform of the Constitution, Ivan Kristan wrote in favour of expanding Art. 8 Constitution. While Kristan also proposed Art. 8 as the *locus* for the legal basis for accession to the EU, he would additionally *in concreto* anchor Slovenia's membership in some of the important international organisations (United Nations, NATO, Organization for Security and Co-operation in Europe) in Art. 8.[183]

3.1.4 See Sect. 1.5.3.

3.2 The Position of International Law in National Law

3.2.1 As mentioned above in Sect. 3.1.1, Slovenian constitutional law recognises two categories of international treaties with different positions in the hierarchy of legal norms. Statutes (and all other lower norms) also have to be in conformity with the 'generally valid principles of international law' (Art. 153(2)).

The Constitution also provides for the direct applicability of international treaties that have been ratified and published (Art. 8). Legal commentary adds that not all international treaties (or all provisions of a treaty) are suitable for direct

[182] See above n. 128.

[183] Kristan 2001, p. 4.

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applicability; only those with a self-executing character can be applied directly.[184] The Constitution is silent on the form of ratification; as per Art. 169(1) PoDZ-1, treaties are ratified by statute (*zakon*).

3.2.2 It would seem that the dualism-monism dichotomy is of little use when attempting to conceptualise the position of the sources of international law in the Slovenian legal (constitutional) system. The way the Constitutional Court has worded its position on the purpose of Art. 8, namely that it 'defines, in principal terms, the relationship between the international legal order and the Slovenian legal order'[185] has been interpreted as stemming from a position of dualism, namely recognising that these are two separate legal spheres.[186] However, Urška Umek has also underlined the important elements of monism in the Slovenian system: first, treaties are incorporated into the legal system by simple adoption; secondly, treaties thus incorporated can be directly applicable.[187]

At the same time, Art. 8 cannot be read in isolation from the non-enumeration clause (Art. 15(5)) mentioned above (see Sect. 2.1.1). The position of the Constitutional Court is that by virtue of Art. 15(5), human rights and fundamental freedoms enshrined in international treaties that are in force in Slovenia are accorded 'constitutional rank'.[188] The tangible consequence of this position is that the Constitutional Court has in its history already issued a decision, which in its operative part established that the complainant's ECHR right had been violated.[189] Upon finding that the text of the Constitution did not explicitly provide for the human right in question while the ECHR did, the Constitutional Court adopted the provision of the ECHR as *premissa maior* in the concrete case. It explained that the non-enumeration clause in Art. 15(5) Constitution is (*inter alia*) a response to the requirement of Art. 13 ECHR, the latter calling on States Parties to provide for effective remedies for violations of Convention rights.

Sketching the case of direct application of the ECHR by the Constitutional Court ultimately serves to illustrate the relative ineptitude of the concepts of dualism and monism when it comes to explaining the everyday interplay of the different instruments of human rights protection in action. There is enough support in the text of the Constitution for us to understand the Slovenian constitutional system as one open to international law. Seeing domestic and international law as two separate systems cannot be understood as an impediment to the perception of international law as a functional tool in the hands of the citizen and the judge. This openness

[184] Umek 2011, p. 133.

[185] CCRS U-I-274/02, OdlUS XI, 204, para. 4.

[186] See also CCRS Rm-1/09, para. 18. The Court used the phrase 'separate legal system' and immediately stressed the importance of international law for the interpretation of domestic law where the substance of domestic law originates from international law obligations.

[187] Umek 2011, p. 135.

[188] Up-43/96, OdlUS IX, 141.

[189] CCRS Up-555/03, Up-827/04, Ur. list 78/2006.

reaches its highest level in the case of international human rights law, with the recognition of the constitutional rank of the rights recognised by its instruments.

3.3 Democratic Control

3.3.1 In the case of international treaties that have to be ratified by the National Assembly, the National Assembly is involved not merely in the procedure of ratification, but also earlier, in the phase that precedes the negotiations.[190]

The internal aspect of the procedure to conclude an international treaty commences with the formulation of an official initiative to conclude a certain treaty. The initiative is sponsored by the Ministry of Foreign Affairs or another department of the Government and must already state the reasons in favour of conclusion of such a treaty and the draft positions of the future state delegation negotiating the treaty. It must nominate the members of the state delegation. If possible, a draft text of the treaty is to be attached together with a statement of the essential elements of the treaty. The initiative must provide an assessment of the financial impact of the treaty, of conformity of the treaty with valid law and whether the potential conclusion of the treaty will require legislative reform.

In any case, the Government must approve the initiative before negotiations can start. If an international treaty requires ratification in the National Assembly, the initiative is also sent to the Assembly's Committee of Foreign Policy for confirmation (Art. 70 FAA). The state delegation is bound by the positions in the approved initiative; should the negotiations diverge from the foreseen course, new positions need to be approved by the parliamentary committee (Art. 71 FAA).

The legislative branch and the directly elected representatives of the people are thus not only present, but are also given a veto power over a draft from the very beginning. Indirectly, the National Assembly will also be able to exert its influence over all the elements of the international treaty that are already included in the text of the initiative and thus co-decide the frame of the negotiations.

The National Assembly then plays the central role again when it comes to ratification of the treaty, i.e. the adoption of the ratification statute. The ratification statute will contain little more than the text of the international treaty. As further amendments to the text of the international treaty are inadmissible in this phase (Art. 169(4) PoDZ-1), the National Assembly expedites this quasi-legislative

[190] The response to question 3.3.1 refers to the National Assembly, the lower chamber of the Slovenian Parliament. The National Council as the upper chamber does not have any competences under the FAA. In practice, the National Council can still exercise the general powers that it has within the legislative function (Art. 97 Constitution) also with regard to ratification statutes. Thus the International Relations and European Affairs Committee of the National Council regularly scrutinises the international treaties ratified in the National Assembly and issues consultative opinions. At least in theory, the National Council could use its power of suspensive veto to prevent the ratification of a treaty approved by the National Assembly.

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procedure by following the procedural rules applicable to the emergency procedure (Art. 169(3) PoDZ-1). The emergency procedure is otherwise applied when for reasons of security, defence or due to a natural disaster, etc., the adoption of a statute cannot wait (Arts 143-144 PoDZ-1).

The National Assembly can adopt declarations to 'express general positions on issues of internal and external policies … '. (Art. 110 PoDZ-1). Such declarations do not produce legal effects. The National Assembly has made use of this possibility infrequently, but it has used it, notably, to formulate the starting points of Slovenia's general strategy in international relations.[191] With regard to global governance, the 1999 Declaration on the Foreign Policy of Slovenia, for example, listed the international organisations that Slovenia was planning to join at the time and the values and objectives that Slovenia would advocate in global politics.[192] The instrument of declaration harbours potential for the increase of parliamentary participation in global governance affairs, especially in areas that are beyond the reach of the Parliament's power to ratify international treaties, e.g. the participation of Slovenia's representatives in international organisations. The process of adopting a declaration is an opportunity for the participation not only of the parliamentary opposition but also of civil society in the formulation of priorities, objectives and values that are to be pursued in foreign policy. Despite the fact that the text of the declaration is *de facto* drafted in the executive branch, the parliamentary procedure offers an appropriate platform that can attract an exchange of views across society.[193] Whether the potential of the declaration to pursue these goals is developed to the full extent of course depends on the interest and capability of the parliamentarians to take an active role in global governance affairs.

3.3.2 The 2013 revision of the Constitution changed a number of defining features of the system of direct democracy in Slovenia.[194] The reform was introduced after

[191] Declaration on the Foreign Policy of Slovenia (DeZPRS), UL 108/99. The National Assembly has issued declarations e.g. to formulate its position on the role of Slovenia in global climate change policies (Declaration on the Active Role of Slovenia in the Shaping of a New Global Climate Change Policy), UL 95/09) or to define Slovenia's position towards the countries of the Western Balkans (Western Balkans Declaration, UL 58/10).

[192] For example: 'In the area of global and regional international economic relations, the Republic of Slovenia will stand for solutions that will ensure full employment, higher quality of life and conditions for economic and social progress and development.' DeZPRS, Introduction.

[193] The 2014 coalition agreement between the political parties forming the government foresees a new declaration on foreign policy to be adopted by the National Assembly in 2015 'by broadest possible consensus, following negotiations within the coalition and the parliament, a public debate and with consideration to other strategic documents of the state …'. Coalition Agreement for the Parliamentary Term 2014–2018, p. 52, http://www.vlada.si/fileadmin/dokumenti/si/dokumenti/2014_Koalicijski_sporazum_parafiran.pdf.

[194] Constitutional Act amending Arts. 90, 97 and 99 of the Constitution of the Republic of Slovenia, UL 47/13. No revision was made to Art. 3.a (discussed above) nor to Art. 170 discussed above in Sect. 1.2.2. Albeit adopted in the same session of the National Assembly (24 May 2013), this is nevertheless formally a separate constitutional revision from the amendments to Art. 148 introducing the fiscal rule (discussed above in Sects. 1.2.1 and 1.5.1).

the 2010–2012 'referendum wave' with a number of controversial decisions.[195] The central element of the reform was the removal of the right of the National Council and the parliamentary minority to demand that a referendum be called (Art. 90(1)). Even after the reform, 40,000 voters can require the National Assembly to call a referendum as a matter of right. However, the previously extraordinarily strong role of the legislative referendum was also curtailed by limiting referendums *ratione materiae,* i.e. a referendum is no longer possible if the statute regulates certain questions. The list includes statutes ratifying international treaties.[196]

The proposal for the revision of the Constitution filed by a group of National Assembly deputies did not include ratification statutes in the list of limitations on legislative referendums.[197] This additional limitation was added to the draft text following a suggestion by the expert group to the Constitutional Commission (see above Sect. 1.2.2), i.e. by constitutional lawyers rather than politicians. The expert group pointed out that the possibility to challenge the ratification of an international treaty is unusual in the comparative perspective, where treaties are rarely ratified by statute but rather by another type of parliamentary legal act (e.g. decree).[198] For the expert group, it was the 'specific nature of the way international treaties are concluded' that called for referendums on ratification statutes to be banned.[199] The expert group did not elaborate further how this specific nature collides with the possibility of a referendum. With the adoption of the Constitutional Act, there is now no opportunity in Slovenian constitutional law to challenge a decision of the National Assembly to ratify an international treaty by popular vote with a legally binding result. What remains is the general possibility for the National Assembly to call *sua sponte* for a non-binding, consultative referendum (Arts. 26–29 Referendum and Popular Initiative Act).[200]

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[195] Referendums were used not only in attempts to block economic reforms (see Skledar 2013) but also to prevent the coming into force of a family law reform that featured significant moves towards sexual orientation equality (Ribičič and Kaučič 2014, p. 904).

[196] Article 90(2) Constitution. In addition to ratification statutes, a legislative referendum is not allowed for

- statutes enacting emergency measures to ensure the defence of the state or security or that remedy damage caused by natural disasters;
- statutes on taxes and other compulsory contributions and on the statute for the execution of the state budget;
- statutes adopted to remedy an unconstitutional situation.

[197] Proposal of Katarina Hočevar et al. to initiate the procedure to amend the Constitution (13 September 2012, EPA 620-VI).

[198] See also above n. 190 with regard to the consequences of choosing statute as the form in which the Parliament ratifies treaties.

[199] Report of the Constitutional Commission of the National Assembly on the Proposal for the initiation of the procedure for an amendment of the Constitution of the Republic of Slovenia – UZ 90, 97, 99 (15 January 2013, EPA 620-IV), p. 13. See *contra* Vuksanović 2013, p. 13.

[200] As the expert group stressed, certain international treaties (Art. 3.a) could still be subjected to a referendum (the Art. 3.a referendum was discussed above in Sect. 1.4.2).

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Generally speaking, the referendum-related constitutional revision of 2013 was necessary to put a stop to the erosion of the power of representative democracy and the disproportionate rise of direct democracy, which was happening at the expense of constitutional democracy.[201] However, this observation may not apply to the limitation imposed on referendums on ratification statutes. The laconic case for the elimination of referendums on ratification statutes makes it quite difficult to provide a clear-cut analysis of this reform. Two objections can be raised against the argumentation put forward by the expert group. First, in its case against the ratification statute referendum, it did not engage to a sufficient extent with the details of the ratification procedure in Slovenian foreign affairs law, especially not with the attention paid in diplomatic practice to the internal procedures of ratification.[202] Secondly, while displaying consideration for the rules of international lawmaking, it failed to take into account the growing role of global governance, its impact on the everyday life of citizens and the erosion of constitutionalism to which it can lead.

Holding a referendum on a ratification statute may not be the optimal solution for the inclusion of direct democracy in domestic processes of participation in international lawmaking. It is very much a zero-sum game, capable of taking the negotiators as well as legislators by surprise at the very last moment when the expectations of international partners are the highest. The problem that we can observe is that the process of constitutional reform at this important moment was restrained from looking beyond the established categories and types of referendums. We could also speculate that the debates on the important domestic question of limiting referendums overshadowed the global governance dimension of the issue. Should the discussion be reopened, it would need to be liberated from exclusively using the language of Slovenian constitutional law while at the same time retaining the values of the Slovenian Constitution. This is the first precondition if we want to see the constituent power conjure up, on the national level, a robust system of decision making in foreign policy that strikes a workable balance between the pace dictated by the processes of globalisation on the one hand, and the requirements of constitutionalism and democracy on the other.

3.4 Judicial Review

3.4.1 The Constitution (Art. 160(2)) establishes a special procedure before the Constitutional Court where the Court issues a legally binding opinion on the constitutionality of a treaty. This procedure is somewhat different from the review of constitutionality of statutes and other norms. There are comparatively few subjects with legal standing: the President of the Republic, the Government, or one-third of the deputies of the National Assembly. In contrast to the procedures for

[201] Compare Ribičič and Kaučič 2014, p. 901.

[202] See below Sect. 3.4.1 and especially n. 209.

the review of domestic norms (see Art. 24 ZUstS), there is no standing for the individual citizen. However, this is the only procedure for review of constitutionality that the President can initiate. This is likely related to the President's functions in the field of foreign affairs (Arts. 102 and 107 Constitution).

In contrast to the generally *a posteriori* procedures before the Constitutional Court, the opinion on an international treaty is issued *a priori,* 'in the process of ratifying an international treaty'. According to Nerad, this is to prevent the state, by ratification, from committing to international law obligations at odds with the Constitution, which would happen if there were self-executing legal norms in the treaty or if the treaty contained an obligation for the state to adopt an unconstitutional legal act.[203]

There have so far been five proceedings of review of an international treaty before the Slovenian Constitutional Court. Three of them were brought by the Government and two by the parliamentary minority.[204] It is notable that the Constitutional Court has used 'interpretative decisions' three times in procedures of treaty review.[205] These are decisions where the Court uses the operative part of its decision to declare how to interpret a contested provision in order for it to stay within the confines of the Constitution. The Court – at least within *a priori* procedures, much less so in *a posteriori* cases – has not shunned away from full review on the merits and has in that sense confirmed the position of Mirjam Škrk (herself formerly a judge of the Court) that

> [w]hile the executive and legislative branches, also when it comes to *a priori* review, may expect a 'kind' attitude from the Constitutional Court, since the executive branch has already externally displayed the interest of the state to conclude the treaty under review, one should nevertheless not lose sight of the fact that the internal ratification of the international treaty is in the exclusive domain of the sovereignty of every state and subject to the decision of independent political (or judicial) organs that hold the respective competences.[206]

A priori review of the constitutionality of international treaties does not create a tension with the principle of *pacta sunt servanda.* This is mainly because in diplomatic practice, for Slovenia, the signing (or acceptance) of an international treaty does not yet represent consent to be bound.[207] For a treaty to enter into force,

[203] Nerad 2011, p. 1441.

[204] Drenik 2013, pp. 77–78. There have also been attempts to contest a statute ratifying an international treaty. For example the Constitutional Court in Opinion Rm-1/09 reviewed the Croatia-Slovenia Arbitration Agreement, and later, after the Agreement had been ratified, in its Decision U-I-180/10, the ratification statute.

[205] CCRS Rm-1/97 (the European Accession Agreement), CCRS Rm-1/02 (the Agreement with the Holy See), CCRS Rm-1/09. Škrk 2006, p. 83.

[206] Škrk 2006, p. 95.

[207] Jager Agius 2013, p. 13. Signature is an expression of the state's intent to bind itself and not to act contrary to the purpose of the treaty. Should the treaty include a provision stating that the parties will be bound by it by force of signature, Slovenia has to sign the treaty with a 'subject to ratification' reservation. For Škrk, the Slovenian legal system does not recognise signature as a possible way of concluding an international treaty. Škrk 2006, p. 77.

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it needs to be ratified, and diplomatic practice distinguishes internal ratification (procedure in the National Assembly or the Government) and international ratification (exchange of ratification instruments between the states parties to the treaty).[208] In that sense, the Art. 160(2) procedure falls squarely within the internal phase of ratification; the President will only issue a ratification instrument once the ratification statute has been published in the Official Gazette.[209]

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 Slovenia has not been subject to a programme of financial assistance. The constitutional implications of such a scenario were discussed hypothetically in the Constitutional Court's *State Holding & Bank Stability Referendum* decision (see Sect. 1.3.2).

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

The right to water In the past two years, demands have been voiced for the introduction of constitutional protection for the right to water. After the 2013 initiative of the National Council, proposals were formulated by groups of National Assembly deputies. A proposal submitted in 2014 failed, as the parliamentary term came to an end. At the time of preparing this report, a new proposal had been tabled.[210]

The proposal refers to the experience of Greece, Portugal, Italy, Spain and France, where privatisation of the water supply system has led to an increase in the prices charged to the end users and to a decrease in the quality of water. In several

[208] Jager Agius 2013, p. 16.

[209] Drenik 2013, pp. 64–65 (Table 1). With regard to the discussion above in Sect. 3.3.2, the same logic also applies to the legislative referendum (that is no longer admissible since 2013). The referendum would in any case be held *after* the adoption of the statute in the National Assembly and *before* the statute is promulgated by the President of the Republic (Art. 9 Referendum and Popular Initiative Act). In other words, it is impossible that the ratification statute would be struck down *after* the ratification instruments have been exchanged, thus violating Slovenia's international obligations. In this sense, the *a posteriori* legislative referendum is different from *a posteriori* judicial review of constitutionality. The former will always be held before the promulgation of the statute by the President and its publication in *Uradni list*. The latter can be filed at any time after the statute has entered into force and hence long after the ratification instruments have been exchanged and the treaty has entered into force.

[210] (2015, February 17). *Znova predlog o ustavni zaščiti pitne vode* (Again a proposal for constitutional protection of potable water). Delo. http://www.delo.si/novice/okolje/znova-predlog-o-ustavni-zasciti-pitne-vode.html.

cases, privatisation of the water supply was demanded by the 'troika' as part of the conditionality for the country to receive financial support. It mentions Bolivia as an example of a country where privatisation of the water supply was one of the conditions put forward by the World Bank in order to extend a loan. The purpose of the initiative is thus to prevent changes in water regulation: the proposal mentions that Directive 2014/23/EU[211] initially planned to liberalise the system of concessions for water. To that end, two paragraphs would be added to Art. 70 of the Constitution:

> Everyone has the right to potable water.
>
> Water sources that supply potable water and household water to the population shall be exploited in the form of a non-profit public service.[212]

Transatlantic Trade and Investment Partnership (TTIP) The TTIP has been met with criticism in Slovenia predominantly from environmentalist NGOs and trade unions. A number of them have jointly demanded from the government ministers that Slovenia reject the introduction of the investor-state dispute settlement (ISDS) mechanisms in the TTIP. This protest rejects any scenario according to which states would be exposed to legal claims against their public policies in arbitration tribunals.[213] The concerns seems to have spread comparatively widely among the population, as Slovenia is among the countries where the number of signatures in support of the 'Stop TTIP' initiative has reached the 'country quorum' (Art. 7, Regulation 211/2011/EU).[214,215]

It seems that the concerns with regard to the TTIP are slowly making their way into the institutions of the state. The National Council, in early 2015, hosted an NGO-convened conference with the telling title of 'TTIP – are corporations to kidnap our future?'[216] In the Government commissioned study on the effects of the TTIP on the Slovenian economy, scholars warn of the unpredictable outcomes of the ISDS mechanisms and recommend maintaining the jurisdiction of national and

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[211] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, [2014] OJ L 94/1. The 2014 proposal for constitutional reform mentioned that the pressure from the environmental NGO Right2Water which collected 1.5 million signatures demanding that water services be excluded from liberalisation (http://www.right2water.eu/news/vote-right-water-european-parliament-approaches) led Commissioner Michel Barnier to announce that the water services would be excluded from the scope of Directive 2014/23/EU. See Art. 12 ('Specific exclusions in the field of water') Directive 2014/23/EU.

[212] Order of the National Council of 15 May 2013, No. 802-01/13-6; Proposal of Brane Golubovič et al. to initiate a procedure to amend the Constitution (20 March 2014, EPA 1861–VI).

[213] http://www.umanotera.org/wp-content/uploads/2015/02/Javni-poziv-za-izklju%C4%8Ditev-mehanizma-ISDS.pdf.

[214] Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, [2011] OJ L 65/1.

[215] https://stop-ttip.org/signatures-member-states/.

[216] http://www.umanotera.org/wp-content/uploads/2015/02/POSVET-vabilo-TTIP.pdf.

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European courts over TTIP disputes.[217] Finally, the relevant committees of the National Assembly have adopted a position on the TTIP, the Comprehensive Trade and Economic Agreement with Canada and the WTO Trade in Services Agreement. The committees have called on the Government to negotiate for the exclusion of ISDS mechanisms from the agreements, to ensure that the agreements will not compromise the level of EU standards in environment, health and labour and social rights, and to defend the position that the Comprehensive Economic and Trade Agreement (CETA) and TTIP are mixed agreements.[218]

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[217] Damijan et al. 2014. http://www.vlada.si/fileadmin/dokumenti/si/projekti/2015/TTIP/TTIP_Analiza__1_.pdf.

[218] National Assembly, Resolutions of the Joint Session of the EU Affairs Committee (22nd Session) and the Economic Committee (5th Session), 12 February 2015.

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The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context

Stanisław Biernat and Monika Kawczyńska

Abstract The report outlines the Polish constitutional culture and explores the interaction with EU and international law before the 2015–2018 illiberal turn in the country. The report recalls that the Communist Constitution had been political and its observance was fictional. After the transition in 1989 and in the new 1997

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The report is an analysis of the Polish Constitution and of the jurisprudence of the Polish Constitutional Tribunal before a serious systemic crisis, which formally began at the end of 2015. See selected judgments of the Polish Constitutional Tribunal: http://trybunal.gov.pl/en/. At that time, the first statutes limiting the systemic role of the Constitutional Tribunal were adopted, and three judges were elected to the Constitutional Tribunal in violation of the Constitution. Despite unfavourable legal and political circumstances, in 2016 the Constitutional Tribunal was able to issue three judgments declaring the statutory amendments to the legislation governing the Constitutional Tribunal unconstitutional. It was not until May 2018 that the judgments were officially published, which was contrary to the clear obligation provided for in Art. 190(2) of the Constitution (http://konstytucyjny.pl/nieopublikowane-wyroki-tk-w-wersji-angielskiej). The currently binding statutes concerning the Constitutional Tribunal were adopted in November and December 2016. Moreover, in 2017, the Parliament adopted new legislation relating to the Polish judiciary which, in the opinion of the vast majority of experts, raises grave constitutional concerns regarding judicial independence (cf. opinions of the Venice Commission http://www.venice.coe.int/webforms/documents/?country=23&year=all; Rule of Law Recommendations of the European Commission and its reasoned proposal under Art. 7(1) TEU for a Council Decision http://europa.eu/rapid/press-release_IP-17-5367_en.htm; and selected judgments of the Polish Constitutional Tribunal: http://trybunal.gov.pl/en/). Many other statutes adopted since 2016 have raised serious constitutional concerns, e.g. Public Prosecutors' Law, Civil Service Law and the Law on Assemblies.

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Constitution, emphasis was on the direct application of constitutional provisions, the rule of law principle, the democratic and social state, a broad catalogue of rights and freedoms with the precise permissible grounds for their limitation, as well as institutional guarantees and judicial procedures against violations of those rights and freedoms. The Constitutional Tribunal carried out stringent review of legal provisions. The main grounds for declaration of unconstitutionality were violation of the rule of law, the right to a fair trial, the principle of proportionality and exceeding powers delegated to the executive. The Constitutional Tribunal also exercised review over EU and international treaties and measures implementing EU law. Although the Constitutional Tribunal stated that the Constitution was the supreme law of Poland, it respected the autonomy of EU law and the competences of the ECJ, adopting the approach of a consistent interpretation of Polish law with EU law. Some key examples of the case law include constitutional challenges regarding the Accession Treaty, the Brussels I Regulation, the European Arrest Warrant (EAW) and the ESM Treaty. The EAW judgment led to a constitutional amendment allowing the surrender of Polish citizens under certain circumstances. The conditions and grounds for limitation of rights are more restrictive than in EU law.

Keywords The Constitution of Poland · Constitutional provisions regarding EU and international co-operation · The Polish Constitutional Tribunal Constitutional review · The rule of law, fundamental rights and their limitation Constitutional safeguards and judicial review · The principles of proportionality, legal certainty and legitimate expectations · Defence rights, presumption of innocence · Constitutional review of EU law · Accession Treaty · European Arrest Warrant · ESM Treaty · International extradition treaties · Referendum

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The history of Polish constitutionalism dates back to the 16th century.[1] The crowning achievement was the Constitution of 3 May (*Konstytucja 3 Maja*), adopted by the Parliament (*Sejm Wielki*) in 1791. It is considered to be the second written constitution in the world and the first in Europe. The Constitution, formally enacted as Governmental Act (*Ustawa Rządowa*), introduced the principle of sovereignty of the people, the separation of powers into legislative, executive and judiciary and guaranteed a number of important individual liberties. It was influenced by viÔews of the French philosophers J.J. Rousseau and C.L. Montesquieu. The Constitution was an attempt to reform the political system after many years of

[1] Uruszczak 2010, p. 222.

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political stagnation at the time of Poland's dependence on powerful neighbours. The Three Partitions of Poland (1772, 1793 and 1795), the territory of which was seized by the Russian Empire, Prussia and the Austrian Empire, effectively ended Polish national sovereignty until 1918. Although in effect for only a short time, the Constitution of 3 May became a symbol of Poland's national identity based on constitutional values and allowed its principles to survive for the upcoming years of foreign domination.[2]

Poland regained its independence after World War I in November 1918. During the time of the Second Polish Republic until the outbreak of World War II in 1939, three constitutions were adopted: the Little Constitution of 1919 (*Mała Konstytucja z 1919*), the Constitution of 1921 (*Konstytucja Marcowa*) and the Constitution of 1935 (*Konstytucja Kwietniowa*).

After World War II, the Polish Parliament controlled by Communists adopted the provisional Little Constitution in 1947 (*Mała Konstytucja z 1947*). On 22 July 1952 the Parliament enacted a Communist constitution, based on the Stalinist Soviet Constitution of 1936, and the name of the state was changed to the People's Republic of Poland. The sovereign was described as the working people of towns and villages, and the system was structured upon socialised ownership of the means of production and central planning. The structure of state organs was based on the principle of the uniformity of state authority. The political constitutional provisions were only a facade hiding the real system of government, subordinate to the principle of leadership of the Communist Party with limits on Polish sovereignty imposed by the USSR,[3] irrespective of the fact that the systemic role of the Communist Party was only formally introduced into the Constitution in 1976. The rights and freedoms of individuals were regulated in the final part of the Constitution, giving clear priority to social and economic rights. The Constitution of 1952 did not introduce institutional guarantees or judicial procedures against violations of rights and liberties, and therefore its observance was only fictional.[4] The nature of the Constitution was predominantly political and its role as the legal act having superior position in the system of national law was considerably reduced.[5]

A new chapter in the history of Polish constitutionalism started in 1989. Changes in the Constitution reflected the political and economic transition towards a democratic state and market economy. The amendment re-established the traditional name of the Polish state – the Republic of Poland (*Rzeczpospolita Polska*), restored the principle of the sovereignty of the Nation and introduced the principle of a democratic state ruled by law.[6]

The current Constitution, which is one of the newest constitutions in Europe, was adopted by the National Assembly on 2 April 1997 and approved by a national

[2] Brzezinski 1991, pp. 60–70; see also Davies 2005, pp. 511 et seq.

[3] Garlicki 2010b, p. 15.

[4] Prokop 2011, pp. 24–25.

[5] Garlicki 2010b, p. 16.

[6] Prokop 2011, p. 27.

referendum held on 25 May 1997.[7] It entered into force on 17 September 1997. It falls within the category of basic laws of the state that were created after the fall of a Communist regime.[8] Accordingly, the Preamble emphasises that in 1989, the Homeland recovered the possibility of a sovereign and democratic determination of its fate. Article 13 provides that political parties and other organisations with programmes based upon totalitarian methods and the modes of activity of Nazism, Fascism and Communism, shall be prohibited.[9] The present Constitution remains within the category of constitutions that have a legal character and are enforceable in courts. The main approach to constitutional regulation relevant to the founders of the Polish Constitution, as in other countries of Eastern and Central Europe, was an emphasis on the legal nature of the norms contained in the basic law of the state.[10] According to Art. 8(2), provisions of the Constitution shall apply directly, unless the Constitution provides otherwise. Chapter II of the Constitution entitled 'The Freedoms, Rights and Obligations of Persons and Citizens' contains a wide catalogue of rights and freedoms which may be invoked directly on the basis of constitutional norms before the courts and administrative organs of the state.

1.1.2 Compared to other European constitutions, the Polish Constitution is quite long. It is composed of a preamble and 13 chapters, including 243 articles. The legal commentary explains this unique feature as a consequence of seeking the widest possible democratic compromise during the creation of the basic law.[11]

The Polish Constitution contains provisions proclaiming the sovereignty of the Nation and the organisation of the State, as well as provisions limiting the power of public authorities by protecting the constitutional rights and freedoms, the rule of law and the separation of powers with due checks and balances. Chapter I entitled 'The Republic' contains provisions regarding the principle of a democratic state ruled by law (Art. 2), the principle of sovereignty of the Nation (Art. 4), the independence and territorial integrity of the state (Art. 5), the principle of legality (Art. 7), the principle of separation and balance between the legislative, executive and judicial powers (Art. 10), political pluralism (Art. 11) and the decentralisation of public power (Art. 15).

Having in mind the negative experience regarding the Constitution of 1952, the founders of the current Constitution gave priority to the provisions concerning human and citizens' rights and freedoms as well as the ways to protect them, placing them before the provisions on the functioning of the state and its organs.[12]

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[7] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, item 483.

[8] Albi 2005, pp. 19–21.

[9] All translations of constitutional provisions are from the unofficial translation of the Polish Constitution provided by the Parliament available at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[10] Grzybowski 2002, p. 12.

[11] Rakowska and Skotnicki 2007, p. 219.

[12] Sokolewicz 2001, pp. 19–20.

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On the one hand, such solution proves that the state authorities have a subsidiary role in relation to the individual, and on the other hand it creates the highest guarantee and respect for individual rights and freedoms. Chapter II contains provisions devoted to general principles (Arts. 30–37), personal freedoms and rights (Arts. 38–56), political freedoms and rights (Arts. 57–63), economic, social and cultural freedoms and rights (Arts. 64–76), means for the defence of freedoms and rights (Arts. 77–81) and obligations (Arts. 82–86). Provisions concerning rights and freedoms of the individual are also found in the Preamble, and in Chapters I, IV and XI. It must be concluded that such provisions account for more than 25% of the Constitution.[13]

Further chapters of the Constitution concern sources of law (Chapter III), the Parliament (*Sejm*) and the Senate (Chapter IV), the President of the Republic (Chapter V), the Council of Ministers and government administration (Chapter VI), local government (Chapter VII), courts and tribunals (Chapter VIII), organs of state control and for defence of rights (Chapter IX), public finances (Chapter X), extraordinary measures (Chapter XI) and amendment of the Constitution (Chapter XII).

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The Agreement establishing an association between the European Communities, its Member States and Poland (Europe Agreement) was signed in December 1991. Among various issues discussed in the course of preparatory work on the new Constitution was the so-called 'integration clause' or 'European clause' concerning the transfer of competences to international organisations and forming a legal basis for future accession to the European Union. The integration clause was included as Art. 90(1) in the Constitution of 1997. Article 90 is contained in Chapter III of the Constitution entitled 'Sources of Law'. The discussion on the drafting of the provision concerned phrases such as 'supranational organisation', 'transfer of the exercise of the competences' and 'public organs'.[14] Finally the expressions 'international organization or international organ', 'transfer of competences' and 'organs of State authority' were used. It must be emphasised that the Polish word '*przekazanie*', used in Art. 90(1) of the Constitution may be translated alternatively as 'transfer', 'delegation' or 'conferral' of competences.[15]

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[13] Jabłoński 2010, p. 80.

[14] Biernat 2007, p. 247; Wojtyczek 2007, p. 17; Działocha 1996, pp. 6–11.

[15] The unofficial translation of the Polish Constitution uses the word 'delegation'. The word 'conferral' is used by the Constitutional Tribunal Publication Office in *Selected rulings of the Polish Constitutional Tribunal concerning the law of the European Union (2003–2014)*, vol. LI, Warsaw 2014. http://trybunal.gov.pl/publikacje/wydawnictwa/art/7070-tom-li-selected-rulings-of-the-polish-constitutional-tribunal-concerning-the-law-of-the-european-un/. The authors of the

According to Art. 90(1) of the Constitution, '[t]he Republic of Poland may, by virtue of international agreements, transfer to an international organization or international institution the competence of organs of State authority in relation to certain matters'. The procedure concerning ratification of such an agreement is specified in Arts. 90(2)–(4) of the Constitution. A statute granting consent for ratification of the agreement may be adopted by a two-thirds majority vote of the *Sejm* (lower chamber of the Polish Parliament) and the Senate or approved in a nationwide referendum. The resolution in respect of the choice of procedure for granting consent to ratification (by Parliament or national referendum) shall be taken by the *Sejm* by an absolute majority vote taken in the presence of at least one-half of the statutory number of Deputies. Accordingly, the ratification of international agreements concerning transfer of competences requires greater democratic legitimacy granted by the Parliament, or by the Nation, than other international agreements specified in Art. 89 of the Constitution (see Sect. 3.1.1). To date, the procedure specified in Art. 90 of the Constitution has been used twice, in both instances in relation to the European Union. Consent for ratification of the Accession Treaty signed in Athens on 16 April 2003 was given in a national referendum held on 7 and 8 June 2003 by 77.45% of voters. In accordance with the result of the referendum, the President ratified the Accession Treaty on 23 July 2003. Consent for ratification of the Lisbon Treaty was given by the *Sejm* and the Senate with a two-thirds majority vote and ratified by the President on 10 October 2008.

During preparatory work for the new Constitution, the provisions concerning the position of primary and secondary EU law within the system of sources of law applicable in the territory of Poland were also discussed. The drafters of the Constitution decided that the main sources of primary law – the EU Treaties – shall not be distinguished from other ratified international agreements in the Polish legal system (Arts. 91(1) and (2) of the Constitution). After promulgation, an international agreement constitutes part of the domestic legal order and applies directly, unless its application depends on the enactment of a statute. If such an agreement is ratified upon prior consent granted by a statute, in the case of a conflict of norms, the agreement has precedence over statutes (see Sect. 3.2.1). As for secondary EU law, Art. 91(3) of the Constitution states that '[i]f an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws'. In the course of parliamentary drafting work, Deputies and Senators opted not to establish the precedence of EU secondary law over 'norms of national law' (including the Constitution), in favour of 'statutes'.[16]

Since its adoption, the Constitution of 1997 has been amended only twice. The amendment of 8 September 2006 was directly related to membership in the

present contribution share the view that the word 'transfer' corresponds best to the meaning of the word '*przekazanie*'.

[16] Wojtyczek 2007, p. 25.

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European Union and concerned the prohibition of the extradition of Polish citizens provided in Art. 55(1) of the Constitution.[17] The Constitution was amended in order to give effect to Council Framework Decision 2002/584 on the European Arrest Warrant[18] (see Sect. 1.2.3).

1.2.2 Poland's Constitution is considered to be a 'rigid constitution' because the process of amendment prescribed in its Art. 235 is detailed and requires political consent. A bill to amend the Constitution may be submitted by at least one-fifth of the statutory number of Deputies, the Senate or the President. A bill to amend the Constitution shall be adopted by the *Sejm* by a majority of at least two-thirds of votes in the presence of at least one-half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least one-half of the statutory number of Senators. If a bill to amend the Constitution relates to the provisions contained in Chapters I, II or XII, all subjects authorised to submit the bill may require, within 45 days of the adoption of the bill by the Senate, that a confirmatory referendum be held. Such amendment of the Constitution shall be deemed to be approved if the majority of persons voting in the referendum express support for the amendment. The President shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland.

The amendment concerning Art. 55(1) of the Constitution related to Chapter II of the Constitution. It was adopted by a two-thirds majority of the Deputies and by an absolute majority of the Senators. A confirmatory referendum was not required.

1.2.3 The direct reason for the amendment of Art. 55(1) of the Constitution was the judgment of the Constitutional Tribunal relating to the European Arrest Warrant (EAW).[19] The aforementioned provision originally stated that '[t]he extradition of a Polish citizen shall be forbidden'. The Constitutional Tribunal decided that Art. 607t§1 of the Code of Criminal Procedure, to the extent that it permitted surrender of a Polish national to a Member State of the European Union, was inconsistent with Art. 55(1) of the Constitution. The Tribunal analysed whether there was any difference between 'extradition' (*ekstradycja*), within the meaning of Art. 55(1) of the Constitution, and 'surrender' (*wydanie, przekazanie*) used in the EAW Framework Decision. Different views were presented in the legal literature.[20] The Tribunal stated that the essence (core) of extradition lies in the transfer of a prosecuted or sentenced person for the purpose of conducting a criminal prosecution or

[17] Statute amending the Constitution of the Republic of Poland of 8 September 2006, Journal of Laws 2006 No. 200, item. 1471.

[18] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[19] Judgment of the Constitutional Tribunal of 27 April 2005, ref. No. P 1/05.

[20] Płachta 2002, pp. 71–72; Kruszyński 2004, pp. 9–10.

executing a penalty imposed against them. The surrender of a prosecuted person on the basis of an EAW is in essence the same. Accordingly, it should be viewed as a particular form of extradition. The Tribunal pointed out that considering Poland's obligations as implied by EU membership, it is essential that the applicable law be changed such as to enable full implementation of Framework Decision 2002/584.

The bill to amend Art. 55 of the Constitution was submitted to Parliament by the President on 15 May 2006. The Deputies, in line with the aforementioned judgment of the Constitutional Tribunal, decided that the surrender of persons on the basis of an EAW must be viewed as a form of extradition in the meaning of Art. 55(1) of the Constitution.[21] According to the new Art. 55 of the Constitution:

1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras. 2 and 3.
2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

(1) was committed outside the territory of the Republic of Poland, and
(2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

3. Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.
5. The courts shall adjudicate on the admissibility of extradition.

1.2.4 The current provisions including Arts. 90 and 91 of the Constitution are considered by some observers to be insufficient, considering further developments in the European legal order, especially those introduced by the Lisbon Treaty. Different proposals concerning the amendment of the Constitution relating to Poland's membership in the EU were formulated in the legal literature and were submitted to Parliament.[22] The most important proposals were presented by

[21] Extraordinary Commission for consideration of the draft legislation presented by the President of the Republic of Poland concerning the amendment of the Constitution and Code of Criminal Procedure, Bulletin No. 972/V of 21 August 2006.

[22] Laskowska 2011, pp. 201 et seq.

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President Bronisław Komorowski (on 16 November 2010, No. 3598) and by the Deputies (on 26 November 2010, No. 3687) and concerned the introduction of a new chapter Xa relating to Poland's membership in the EU in the Constitution.[23] The proposals were jointly considered by the Constitutional Committee and underwent two readings in the *Sejm*. They did not come into force due to a lack of political will on the part of the Deputies followed by the end of the VII term of office of the *Sejm* in November 2011.

The changes to the Polish Constitution related to membership in the European Union can be divided into the necessary and the desirable (see Sects. 1.5.2 and 2.13.4). In view of the future adoption of the euro, Art. 227 of the Constitution must be amended to guarantee the independence of the National Bank of Poland and ensure the competence of the European Central Bank associated with the issue of the common currency. Such amendment is necessary for compliance with Art. 131 TFEU.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The rules regarding the transfer of competences of the organs of state authority to the European Union are specified in Art. 90 of the Constitution (see Sect. 1.2.1). The primacy of secondary EU law over statutes and the direct applicability of such law is governed by Art. 91(3) of the Constitution (see Sect. 1.2.1).

1.3.2 The most comprehensive interpretation of Art. 90(1) of the Constitution was presented by the Constitutional Tribunal in the European Stability Mechanism (ESM) case,[24] where the Court stated that the essence of Art. 90 is to provide a guarantee for the sovereignty of the Nation and the state by providing formal restrictions to the transfer of competences vested in the organs of state authority. The transfer of competences is admissible under the following conditions: (1) the transfer is to an international organisation or organ; (2) the competences relate to certain matters and (3) consent is granted by the Parliament or alternatively by the sovereign acting by way of a nationwide referendum. This triad of constitutional restrictions must be preserved in order to maintain the conformity of the conferral with the Constitution. Taking into consideration its previous jurisprudence as well as views presented in legal commentaries, the Tribunal stated that Art. 90 shall be applied in the following situations: (1) the subject of the international agreement concerns competences on the basis of which the organs of state authority issue legal acts (in particular legislative acts); (2) the competence is conferred on an

[23] Chruściak 2013, pp. 59 et seq.

[24] Judgment of 26 June 2013, ref. No. K 33/12.

international (supranational) institution or organisation; (3) the effect of the conferral is that the organisation can exercise the competence to issue legal acts (in particular legislative acts) that are binding on individuals and state organs.

The Constitutional Tribunal has also developed the concept of 'activation of competences' as opposed to 'transfer of competences' in its jurisprudence. In the judgment concerning a declaration specified in the former Art. 35(2) TEU on acceptance of the jurisdiction of the European Court of Justice (ECJ) in the Third Pillar and in order to allow the submission of requests for a preliminary ruling by the Polish courts in the Third Pillar,[25] the Tribunal underlined that such competence was acquired by Poland by the Treaty of Accession, and that the declaration 'means only activation of that competence, and not its emergence'.

The Polish Constitutional Tribunal acknowledged the view presented in the legal literature that absolute sovereignty has been replaced by a modern and revised approach. In its judgment on the constitutionality of the Treaty of Lisbon,[26] the Tribunal emphasised that 'in the doctrine of international law, there is the view that the concept of absolute, unrestrained sovereignty is a thing of the past'. The Constitutional Tribunal stated that a distinction is drawn between, on the one hand, the limitation of sovereignty arising from the will of the state that is in accordance with international law and, on the other hand, the infringements of sovereignty which occur against the will of the state and which are inconsistent with international law. By incurring obligations, the state does not necessarily limit its freedom of activity, but at times extends its activity into fields where it has not acted before. The ability to incur international obligations is what international law implies in the legal character of the state, and what constitutes the identity of the state in international law. Therefore, this is not a factor that limits sovereignty, but it is rather a manifestation of sovereignty. The Constitutional Tribunal shared the view expressed in legal commentary that accession to the European Union is perceived as a sort of limitation of the sovereignty of a given state, but it does not mean the loss of sovereignty and is tied to a compensatory effect in the form of the possibility to partake in the decision-making processes of the European Union.

1.3.3 In its judgment on the constitutionality of the Treaty of Accession,[27] the Tribunal determined the limits to the transfer of powers by stating that the conferral of competences 'in relation to certain matters' must be construed as a prohibition against conferring all competences vested in a given organ of state authority, and conferring all competences within a given scope, as well as a prohibition against conferring competences concerning matters that fall within the scope of powers of a given organ of state authority. Therefore, it is necessary to precisely specify the areas and the scope of competences that are subject to conferral. At the same time,

[25] Judgment of 18 February 2009, ref. No. Kp 3/08.

[26] Judgment of 24 November 2010, ref. No. K 32/09.

[27] Judgment of 11 May 2005, ref. No. K 18/04.

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Art. 90(1) of the Constitution may not constitute a basis for granting an international organisation (or an organ thereof) the competence to enact legal acts or make decisions that would be inconsistent with the Constitution, in particular to the extent that Poland could not function as a sovereign and democratic state ('core' powers). Further, in the judgment concerning the Lisbon Treaty, the Tribunal shared the view expressed in the legal commentaries that the concept of constitutional identity determines the scope of matters excluded from the competence to confer competences. The matters for which conferral is prohibited are the fundamental principles of the Constitution: the principle of independent statehood, democratic governance, rule of law, social justice, human dignity and protection of the rights and freedoms of the individual.

1.3.4 According to Art. 8(1) of the Constitution, '[t]he Constitution shall be the supreme law of the Republic of Poland'. This principle is also upheld by Art. 91 of the Constitution that determines the position of primary and secondary EU law within the system of sources of law applicable in the territory of Poland (see Sect. 3.2.1). The most comprehensive interpretation of the supreme role of the Constitution over European Union law was presented in the judgment concerning the Treaty of Accession. The Constitutional Tribunal stated that given its supreme legal force, the Constitution enjoys primacy within the territory of the Republic of Poland. If an irreconcilable inconsistency were to appear between a constitutional norm and an EU norm, such a collision could in no event be resolved by assuming the supremacy of the EU norm over the constitutional norm. Furthermore, such collision could not lead to a situation where a constitutional norm loses its binding force and is substituted by an EU norm, nor could it lead to the application of the constitutional norm restricted to areas beyond the scope of EU law. This view was upheld by the Constitutional Tribunal in its judgments concerning the Lisbon Treaty and the Brussels I Regulation.

The principle of interpreting domestic law in a 'Europe-friendly' manner is clearly phrased in the case law of the Polish Constitutional Tribunal. However, there are limits to such interpretation and they result from the supreme power of the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum threshold which may not be lowered or questioned as a result of EU provisions. Undoubtedly, a ruling declaring the non-conformity of EU law with the Constitution should be an *ultima ratio* and ought to be delivered only when all other ways of resolving a conflict between Polish norms and the norms of the EU legal order have failed. In the event a 'Europe-friendly' interpretation is not possible, the Nation as the sovereign or an organ of state authority authorised by the Constitution to represent the Nation would need to decide to either amend the Constitution, seek modifications to the EU provisions or, ultimately, initiate Poland's withdrawal from the European Union.

The Brussels I judgment of the Polish Constitutional Tribunal was the first case in which the constitutional court of an EU Member State directly reviewed the

constitutionality of secondary EU law and issued a ruling on the merits.[28] The Constitutional Tribunal adjudicated that Art. 41, second sentence, of the Brussels I Regulation (Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)[29] was consistent with the right to a fair hearing and the equal rights of parties to court proceedings (Art. 45(1) in conjunction with Art. 32(2) of the Constitution). The admissibility of such control was closely related to the type of constitutional proceedings commenced by way of a constitutional complaint submitted by an individual (substantial review of norms).[30] According to Art. 79(1) of the Constitution, an individual may in a constitutional complaint challenge the conformity of a statute or other normative act (forming a basis for the court's judgment in his or her case) with the Constitution. According to the Constitutional Tribunal, 'normative act', within the meaning of Art. 79(1) of the Constitution, includes not only normative acts issued by one of the organs of the Polish state, but also – after fulfilling further requirements – legal acts issued by an organ of an international organisation. In view of the Tribunal, the regulation specified in Art. 288 TFEU may be regarded as a normative act within the meaning of Art. 79(1) of the Constitution. Allowing for the possibility of examining the conformity of EU secondary legislation with the Constitution, the Tribunal emphasised the need to maintain due caution and restraint in that regard, because of the principle of sincere cooperation referred to in Art. 4(3) TEU (see Sect. 2.8.4). The judgment in case ref. No. SK 45/09 opened a wide debate as to the limits of control of EU secondary law by the Constitutional Tribunal.[31] In the opinion of one group of authors, the Tribunal has no competence to control EU secondary law and should discontinue any such pending proceedings. The courts of the European Union have exclusive jurisdiction in that respect. By contrast, the authors belonging to another group share the view that the limits of control are determined by constitutional norms, as well as EU law. The Tribunal has competence to control EU secondary legislation (normative acts) only where the Constitution explicitly refers to the review of normative acts (i.e. within the framework of a constitutional complaint or questions of law referred by national courts). By virtue of the limitations imposed on the constitutional complaint procedure, the Tribunal would not be able to examine whether a given act was *ultra vires*, i.e. whether it was within the scope of competence conferred by Poland on the EU. If, however, an *ultra vires* action resulted in an infringement of Polish constitutional rights and freedoms, the complaint would have to be considered admissible. The Tribunal has no jurisdiction to declare

[28] Judgment of 16 November 2011, ref. no SK 45/09.

[29] [2001] OJ L 12/1.

[30] In its Order of 17 December 2009, ref. No. U 6/08, the Tribunal expressed the view that the constitutional review of norms of EU secondary legislation was inadmissible. The proceedings in that case were instituted by an application submitted by a group of *Sejm* Deputies and they concerned an abstract review of norms.

[31] Safjan 2012, pp. 339–367; Bogdanowicz and Marcisz 2012, pp. 47–53; Tatham 2013, pp. 252–259; Kawczyńska 2014, pp. 233–243; Dudzik and Półtorak 2012, pp. 245–255.

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that the acts of EU institutions are invalid. However, as other national courts, the Tribunal may consider the validity of an EU act.[32] In case of doubt, it should ascertain the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the ECJ for a preliminary ruling, pursuant to Art. 267 TFEU, as to the interpretation or validity of provisions that raise doubts. It is also worth mentioning that one of the proposals concerning amendment of the Constitution submitted by a group of *Sejm* Deputies in November 2009 postulated the competence of the Constitutional Tribunal to adjudicate the conformity of secondary EU law with the Constitution (new Art. 188(1a)). Legal experts unanimously held that such amendment would be incompatible with EU law (see Sect. 1.2.4).

1.4 Democratic Control

1.4.1 The participation of the national parliament in EU decision-making processes is regulated in the statute of 8 October 2010 on cooperation of the Council of Ministers with the *Sejm* and the Senate in matters related to the membership of the Republic of Poland in the European Union (hereinafter Cooperation Act).[33] It takes into account the provisions of the Treaty of Lisbon that strengthened democratic legitimacy within the EU. Cooperation between the executive and legislative powers covers five main areas: adoption of EU law and revision of the Treaties, adoption of national acts implementing EU law, lodging of complaints with the ECJ concerning breaches of the principle of subsidiarity by an EU legislative act, expressing opinions on candidates for certain posts in the EU and the participation of the representatives of the Polish Council of Ministers in the Council. According to the Cooperation Act, the Council of Ministers is obliged to provide the Parliament with information on Poland's participation in EU activities, transmit the documents of the EU which are subject to consultation with Member States, transmit Poland's draft positions on draft EU legislative acts, lodge complaints upon Parliamentary request to the ECJ concerning breaches of the principle of subsidiarity and present candidatures for certain posts in the EU.

The detailed rules concerning the participation of the Polish Parliament in EU decision-making are specified in the Rules of Procedure of the *Sejm* (Chapter XIIIa) and the Rules of Procedure of the Senate (Chapter VIIIa). There is a European Union Affairs Committee in each of the chambers that expresses the opinions of its members concerning drafts of EU legal acts and Poland's positions taken in the course of EU law-making procedures. Opinions expressed by the Committee should provide a basis for Poland's position. If a position taken or presented by the Polish

[32] Case C-314/85 *Foto-Frost* [1987] ECR I-04199.

[33] Journal of Laws 2010, No. 213, item 1395.

Council of Ministers in the Council or in the European Council does not take such opinions into consideration, the minister is required to explain the reasons why.

1.4.2 The Constitution provides for three types of nationwide referendum: (1) deciding on matters of particular importance to the state (Art. 125); (2) granting consent for ratification of an international agreement transferring the competences of organs of state authority to an international organisation or international organ (Art. 90(3)); and (3) amending Chapters I, II or XII of the Constitution (Art. 235(6)). In the first two cases the result of a nationwide referendum shall be binding if more than one-half of entitled voters have participated in the vote. The requirement regarding turnout is very demanding and may cause problems in fields where citizens are not very active.[34] During the parliamentary proceedings to adopt Art. 90(3) of the Constitution, the Constitutional Committee abandoned the idea of an obligatory referendum in cases concerning transfer of competences to an international organisation because it might have required the organisation of a referendum on a number of occasions.[35] In Poland there has only been one referendum related to EU matters, held on 7 and 8 June 2003, in which 58.85% of eligible voters participated. The Nation expressed its consent for the ratification of the Treaty of Accession by a 77.45% majority. A referendum concerning the adoption of the EU Constitutional Treaty was planned for October 2005, but this was abandoned due to the negative referendum results in France and the Netherlands.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The EU amendment to the Polish Constitution of 1997 is limited in its scope (see Sect. 1.2.3). The reason behind such disposition is the dispute about the necessity and scope of such amendments and the difficulty of the amendment procedure (see Sect. 1.2.2), especially in the *Sejm* where at least two-thirds of votes in the presence of at least one-half of the statutory number of Deputies is required. It is very difficult to obtain a political consensus between the governing coalition and the opposition (which mainly consists of Eurosceptics). The experts share the view that the Constitution in its present state allows Poland to fulfil its obligations arising from membership in the European Union.[36] However, in view of the future accession of Poland to the eurozone, the Constitution requires amendments

[34] In Judgment of 27 May 2003, ref. No. K 11/03, the Constitutional Tribunal stated that if the ratification referendum specified in Art. 90(3) of the Constitution did not deliver a legally binding result for reasons of an insufficient turnout (i.e. fewer than 50% of citizens with the right to vote participated), the *Sejm* could adopt a resolution governing the choice of procedure for granting consent for ratification again and, therefore, could choose whether to hold another referendum or to initiate the parliamentary procedure.

[35] Chruściak 2003, pp. 52–53.

[36] Biernat 2004, pp. 63–85.

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concerning the position of the National Bank of Poland and the Council for Monetary Policy (see Sect. 1.2.4). At present there is no political consensus for such an amendment.

1.5.3 The role of national constitutions in a context where power is increasingly exercised at supranational and global level is still fundamental. The authors of the present contribution share the view expressed by the Constitutional Tribunal in the Lisbon Treaty case that 'the EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state's sovereignty, maintain their significance'. The need for amendments depends on the wording of the given constitution, the constitutional traditions of the particular state and its political situation. The Polish Constitution is characterised by openness towards the European Union.[37]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Chapter I of the Constitution entitled 'The Republic' (*Rzeczpospolita*) expounds the systemic principles that serve as the foundation of the Polish constitutional system (see Sect. 1.1.2). One of the most important principles is contained in Art. 2 of the Constitution, which states that '[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice' (see Sect. 2.1.3). The Constitutional Tribunal has derived a number of general principles of law such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity of law and sufficient *vacatio legis* from this clause.[38] The Constitution also enshrines other general principles of law, such as subsidiarity (Preamble), legality (Art. 7), proportionality in limitation of rights and freedoms (Art. 31 (3)), *nullum crimen sine lege*, *nulla poena sine lege* and the non-retroactivity of criminal law (Art. 42(1)).

Personal, political, economic, social and cultural freedoms and rights are contained within the comprehensive Chapter II entitled 'The Freedoms, Rights and Obligations of Persons and Citizens'. The most fundamental principle is contained in Art. 30 of the Constitution, which states that '[t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'. In drafting these provisions the founders of the Constitution were inspired by the Universal Declaration of Human Rights of 1948,

[37] Biernat 2002b, pp. 439–45.

[38] See for example Judgment of 12 April 2000, ref. No. K 8/98.

the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966 and the European Convention on Human Rights of 1950 (ECHR) as well as the constitutions of other states.[39]

Rights and freedoms are enforceable in courts, unless the Constitution provides otherwise. According to Art. 77(2) of the Constitution, statutes shall not bar recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights. Institutional guarantees for the protection of rights and freedoms are specified in Chapter II of the Constitution. These include the right to a fair trial (Art. 45(1)), the right to compensation for any harm done by any action of an organ of public authority contrary to law (Art. 77(1)), the right to appeal against judgments and decisions made at first instance (Art. 78), the guarantee of at least two-stage court proceedings (Art. 176), the right to submit a constitutional complaint to the Constitutional Tribunal (Art. 79) and the right to apply to the Commissioner of Human Rights (Ombudsman) (Art. 80). Specific limitations are provided for in Art. 81 of the Constitution enumerating economic and social rights and freedoms that are enforceable only within the limits specified in a statute (minimum level of remuneration for work, full and productive employment, aid to disabled persons, consumer protection, ecological security and environmental protection).

2.1.2 Article 31(3) of the Constitution provides the conditions under which limitations can be imposed upon the exercise of constitutional freedoms and rights.

Commentators point out that the general limitation clause provided in the Polish Constitution is stricter than the limitation clause provided in Art. 52(1) of the EU Charter of Fundamental Rights (the Charter). Limitations to constitutional rights and freedoms must meet the following cumulative conditions: may be specified only by statute, must be necessary and must have one of only six particular aims enumerated in Art. 31(3) of the Constitution:[40]

Article 31(3).

> Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

However, this does not mean an absolute prohibition on placing restrictions on constitutional rights and freedoms by governmental regulation, but a statute (Act of Parliament) in this respect must play a decisive role.[41] The jurisprudence of the Constitutional Tribunal holds that particular rights and freedoms (of social and

[39] Masternak-Kubiak 2010, p. 32. The provision contained in Art. 30 of the Constitution was also inspired by the Basic Law of the Federal Republic of Germany of 1949; see Zajadło 1998, p. 53.

[40] Wróbel 2013, p. 1348.

[41] Bosek and Szydło 2016, p. 780.

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economic character) may be limited by governmental regulation (i.e. executive acts), issued on the basis of a specific authorisation contained in a statute (Art. 92(1) of the Constitution).[42]

Nevertheless, with regard to personal rights and freedoms, penal law and tax law, limitations may be imposed only by a statute adopted by the Parliament.[43]

Limitations to rights and freedoms in the Polish legal system may also stem from international agreements ratified upon prior consent granted by statute, or from EU regulations or EU decisions (that are applied directly in the national legal system).[44] According to Art. 91(2) and (3) of the Constitution, these acts shall have precedence over statutes.

The test of proportionality contained in the above Art. 31(3) is construed as the sum of three component principles: the principle of usefulness, the principle of necessity and a prohibition against excessive interference.

Notwithstanding the abovementioned clause, the Constitution contains provisions that exclude any restrictions to rights and freedoms (Art. 40) or allow restrictions to certain rights and freedoms only when introducing extraordinary measures (Art. 228).

The conditions that define the public interest that are enumerated in Art. 31(3) of the Constitution resemble those set out in the European Convention on Human Rights (compare Arts. 8–11) and the International Covenant on Civil and Political Rights (compare Arts. 12(3), 18(3), 19(3), 21(3) and 22(2)). It should be noted that the official Polish translations of the limitation clauses in the European Convention on Human Rights are somewhat ambiguous. They do not refer to 'law' as in the English or French versions ('prescribed by law' and '*prévue par la loi*'), rather they refer to statute ('*przewidziane przez ustawę*' i.e. 'prescribed by statute'). This does not mean that the Convention excludes acts issued by executive authorities, but additional requirements may arise from the different national legal systems. If the system is based – as in Poland – on the principle of exclusivity of statutes to regulate the legal situation of individuals, the limitations contained in executive regulations (issued without statutory authorisation) may be regarded as contrary to national law.[45]

The conditions specified in the general limitation clause in the Polish Constitution are interpreted strictly. This means that if a limitation imposed on rights or freedoms is not justified by any of the six aims enumerated in Art. 31(3) of the Constitution, the limitation is prohibited, unless the specific provision of the Constitution provides otherwise.[46]

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[42] Judgment of the Constitutional Tribunal of 25 July 2006, ref. no. P 24/05.

[43] Judgment of the Constitutional Tribunal of 6 March 2002, ref. no. P 7/00.

[44] Bosek and Szydło (2016), pp. 782–783.

[45] Garlicki 2010a, p. 486.

[46] Garlicki 2003, p. 22.

The Polish Constitution contains other (specific) limitation clauses in addition to Art. 31(3) of the Constitution. Some are wider than the general limitation clause. For example, freedom of economic activity may be limited only for 'important public reasons' (Art. 22). Some of the limitation clauses are narrower than the general limitation clause. For example, the freedom to publicly express religion may be limited only where this is necessary for the 'defence of State security, public order, health, morals or the freedoms and rights of others' (Art. 53). As another example, limitations on the right to obtain public information and access to public documents may be imposed solely to 'protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State'.

2.1.3 According to Art. 2 of the Constitution, the Republic of Poland shall be a democratic state ruled by law. This provision enacts a constitutional principle equivalent to the rule of law or *Rechtsstaat*. It was introduced in December 1989 as an amendment to the Constitution of 1952. The Constitutional Tribunal has derived a number of principles of law from this clause, which also remained valid under the Constitution of 1997[47] (see Sect. 2.1.1). Article 2 of the Constitution and specific principles derived from the rule of law are frequently used by the Constitutional Tribunal, common and administrative courts in exercising judicial review. The constitutional provision in question is treated as *lex generalis*. In most cases the courts invoke more specific provisions aimed at the protection of rights and freedoms. According to the jurisprudence of the Constitutional Tribunal, Art. 2 of the Constitution may not form the sole legal foundation for a constitutional complaint submitted by an individual contesting the validity of a legal norm, if the Constitution provides for more specific provisions guaranteeing the protection of rights and freedoms.

The Constitution of 1952 did not contain guarantees for the protection of rights and freedoms such as the right to a fair trial. After the amendment of 1989, the Constitutional Tribunal inferred the right to access to a court from the principle of the rule of law.[48] The Constitution of 1997 contains a special provision in Art. 45(1) which stipulates that 'everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court'. The Constitutional Tribunal has indicated in its jurisprudence that the right to a fair trial enshrined in this provision comprises the following: (1) the right of access to a court (the right to institute proceedings before a court – an impartial and independent organ of the state); (2) the right to proper court proceedings which comply with the requirements of a fair and public hearing; (3) the right to a court ruling (the right to have a given case determined in a legally effective way by a court); and (4) the right to have cases examined by a court with an adequate organisational structure and position. In recent case law, the

[47] Garlicki 2010b, p. 61.

[48] Judgments of the Constitutional Tribunal ref. No. K. 3/91, ref. No. K. 8/91, ref. No. K. 4/94, ref. No. K. 11/95 and ref. No K 14/96.

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Constitutional Tribunal has also emphasised the right to the effective enforcement of a final court ruling.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 To date, no cases of direct conflict between EU economic freedoms and fundamental rights have been brought before the Constitutional Tribunal. Such issues arise more frequently before common and administrative courts. A recent case concerned a conflict between the free movement of goods and protection of the life and health of individuals. The case related to the prohibition on registering passenger vehicles having their steering equipment on the right-hand side. In a series of judgments the Supreme Administrative Court upheld the decisions of the Minister of Transportation refusing registration of such vehicles taking into consideration the protection of road safety and protection of the health and lives of people.[49] The ECJ found that such restriction constituted a measure having equivalent effect to a quantitative restriction on imports within the meaning of Art. 34 TFEU.[50] In the opinion of the Polish Council of Ministers, the ban imposed on the registration of vehicles was justified by an imperative requirement in the public interest for the purpose of protecting the lives and health of road users. The ECJ accepted this reasoning but stated that the measure at issue was not compatible with the principle of proportionality. In the view of the Court, according to the present state of technology, measures exist that are less restrictive of the free movement of goods and which are capable of significantly reducing the risk which could be created by the use of vehicles with the steering wheel placed on the same side as the direction of traffic.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 According to Art. 42(3) of the Constitution '[e]veryone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court'. A restatement of this principle is found in Art. 5 of the Code of the Criminal

[49] See for instance the Judgments of the Supreme Administrative Court of 26 January 2009 ref. No. I OSK 63/08, of 21 September 2010 ref. No. I OSK 1550/09, of 27 July 2011 ref. No. I OSK 1336/10, of 24 July 2012 ref. No. I OSK 1031/11.

[50] Case C-639/11 *European Commission v. Republic of Poland* [2014] ECLI:EU:C:2014:173.

Procedure, which additionally stipulates that 'unresolvable doubts shall be resolved in favour of the accused'.

As mentioned in Sect. 1.2.3, the Constitutional Tribunal in the EAW case decided that Art. 607t§1 of the Code of Criminal Procedure that allowed the surrender of a Polish national under the EAW was inconsistent with Art. 55(1) of the Constitution. Article 55 of the Constitution was amended in September 2006 in order to give effect to Framework Decision 2002/584. Three additional reasons for mandatory refusal of the execution of an EAW that are not provided for in Framework Decision 2002/584 but are aimed at the protection of Polish citizens were introduced in paras. 2 and 4 of Art. 55 Constitution. These are: the principle of territoriality, the requirement of double criminality and the principle of protection of rights and freedoms of persons and citizens. Accordingly, the Polish Constitution and Art. 607p(1)–(5) of the Code of Criminal Procedure provide grounds for refusal to execute an EAW if this would 'violate rights and freedoms of persons and citizens'. The dominant scholarly view is that the provision should be interpreted broadly and ought to comprise the rights which are guaranteed by the provisions of acts of international law that bind Poland, as well as the rights and freedoms protected by the Constitution.[51]

The issues of presumption of innocence, the right to defence and the right to a fair trial arose before the Constitutional Tribunal in a case concerning a Polish citizen accused of rape and assault in the city of Exeter in the UK in July 2006.[52] The Polish court decided to surrender the accused on the basis of an EAW issued by the British court under the condition that he would be transferred to Poland to serve his sentence. In June 2007, the accused filed a constitutional complaint, challenging the constitutionality of certain provisions of the Code of Criminal Procedure, insofar as they allow for the surrender of a person, even if it has not been determined that it is probable that the alleged offences have been committed by the person who is the subject of the EAW.

The Constitutional Tribunal stated that, on the basis of Art. 607p(1)(5) of the Code of Criminal Procedure, it should be possible to refuse to execute an EAW in cases where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on which the warrant is based. Such a decision may arise from findings made on the initiative of the person who is the subject of the EAW, his defence counsel, the prosecutor as a party to the proceedings, as well as findings made on the initiative of the court adjudicating on the execution of the warrant, or from findings arising from the facts which are known the court. At the same time, the Constitutional Tribunal emphasised that this position should not be regarded as tantamount to allowing the court adjudicating on the execution of the EAW to carry out detailed proceedings to receive evidence with regard to the guilt of the person who is the subject of the warrant. In the case of surrender to another EU Member State on the basis of an

[51] Nita 2008, p. 93.

[52] Judgment of 5 October 2010, ref. No. SK 26/08.

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EAW, the level of confidence in the legitimacy of the request for surrender should be higher than in the case of surrender on the basis of a 'classic' extradition request to another state which is not necessarily bound by at least the minimum level of guarantees provided by the ECHR.

2.3.1.2 A court that receives an EAW-based request for surrender 'shall decide on the surrender and provisional detention at a hearing in which both a public prosecutor and defence counsel may participate' (Art. 607l§1 Code of Criminal Procedure). This provision does not mention the person indicated in the EAW. However, the dominant view in the legal literature is that exclusion of the person concerned from the hearing where the court decides on surrender or provisional detention would violate the right to a fair trial contained in Art. 45(1) of the Constitution and Art. 6 of the ECHR.[53] In practice, the courts grant the person indicated in the EAW a right to be heard even if the warrant is not accompanied by a request to interrogate the prosecuted person.

Polish courts present a somewhat restrained approach towards arrest warrants concerning Polish citizens. They consider the requirements specified in Art. 607p and Art. 607r of the Code of Criminal Procedure concerning grounds for mandatory or optional refusal to execute an EAW. According to the jurisprudence of the Supreme Court, they may also consider whether the warrant has been issued by a competent judicial authority and whether it contains the elements which are essential for declaring it to be in compliance with the formal requirements. A review may not, however, lead to substantive adjudication of whether there exist sufficient grounds for the execution of the warrant.[54] In some cases the courts decide to surrender the accused under the condition that he/she will be transferred to Poland to serve his/her sentence (see Sect. 2.3.5.1).

In 2014, the Ombudsman formulated an official request to the Supreme Court to adjudicate if the issuance of an EAW may in itself form a sufficient basis for a domestic court to decide on the provisional detention of an accused person without analysing any further evidence. The Ombudsman had received a significant number of complaints from citizens alleging that in such cases Polish courts apply provisional detention automatically without examining any evidence. One of the major arguments against this practice was the presumption of innocence of a person indicated in an EAW. In its order of 26 June 2014, the Supreme Court responded that domestic courts must not examine evidence forming the basis for the issuance of an EAW.[55] However, a refusal to decide on provisional detention may be based on the statutory grounds for refusal to execute the warrant, e.g. violation of the rights and freedoms of persons specified in Art. 607p§1(5) of the Code of Criminal Procedure. The Supreme Court rejected the view of the Ombudsman that a decision on the provisional detention of a person indicated in an EAW violates the presumption of innocence guaranteed by Art. 42(3) of the Constitution. According to

[53] Nita 2014; Jaworski and Sołtysińska 2010, p. 329.

[54] Judgment of the Supreme Court of 8 December 2008, ref. No. V KK 332/08.

[55] Order of the Supreme Court decided by a panel of 7 judges of 26 June 2014, ref. No. I KZP 9/14.

the Supreme Court, provisional detention is only a preventive measure, and the accused shall be presumed innocent until his guilt is determined by the final judgment of a court.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 According to Art. 42(1) of the Constitution

> [o]nly a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

As specified in Sect. 2.3.1.1, the amendment to the Constitution of 2006 introduced an additional requirement of double criminality in Art. 55(2) that was not provided for in Framework Decision 2002/584. Consequently, the extradition of a Polish citizen may be granted provided that

> the act covered by a request for extradition constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

Article 607w of the Code of Criminal Procedure abolishes the rule of double criminality for 32 offences only in respect to non-Polish nationals. Therefore, if an arrest warrant concerns a foreigner, the fact that an act is not a criminal offence according to Polish law does not prevent the warrant from being executed, if it concerns an act punishable in the issuing state by a penalty of at least 3 years of imprisonment and constitutes one of the 32 types of offences. The requirement of the rule of double criminality for acts committed by Polish citizens constitutes an incorrect implementation of Framework Decision 2002/584. This issue has been pointed out by legal experts in the course of legislative work on the amendment of Art. 55 of the Constitution as well as in the legal commentary on the subject.[56] The European Commission has also indicated that this contradicts the Framework Decision.[57]

It has also been pointed out that Art. 607w of the Code of Criminal Procedure merely enumerates types of offences and contains imprecise and even ambiguous phrases. The crimes are not defined either in Art. 2(2) of Framework Decision 2002/584 or in the Code of Criminal Procedure, and thus the qualification of certain criminal acts may be seriously impeded.[58]

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[56] Steinborn 2013.

[57] Second evaluation report on the state of transposition of the Framework Decision on the European arrest warrant and the surrender procedures between Member States, MEMO/07/288, Brussels, 11 July 2007, p. 7.

[58] Steinborn 2013.

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2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Article 45(1) of the Constitution stipulates the right to a fair trial that covers the right to a proper court proceeding which complies with the requirements of a fair and public hearing. It must be emphasised that the right to a fair trial may be subject to the limitations provided by Art. 31(3) of the Constitution (see Sect. 2.1.2).

According to Art. 479§1 of the Code of Criminal Procedure, 'if an accused person upon whom a summons has been served, fails to appear at the main trial, the court may conduct the proceedings in the absence of the accused and, if his defence counsel also fails to appear, the court may render a judgment by default'. A judgment by default shall be served upon the accused. Within seven days, the accused may file an objection to the judgment by default, in which he should provide a statement of the reason for his failure to appear at the trial (Art. 482). With the transposition of Framework Decision 2009/299[59] into the Code of Criminal Procedure, the accused obtained two more procedural guarantees concerning judgments *in absentia*: a new basis for the re-opening of the proceedings (Art. 540b) and an additional ground for optional refusal to execute an EAW (Art. 607r§3).

The Constitutional Tribunal has considered trials *in absentia* in criminal and civil proceedings (see Sect. 2.3.5), as well as trials *in absentia* under the provisions of the Fiscal Penal Code.[60] Such proceedings may be conducted against a person who has committed a fiscal offence and who permanently resides abroad or whose place of residence in Poland is unknown. The Constitutional Tribunal has stated that Arts. 173–177 of the Fiscal Penal Code provide for sufficient guarantees for persons accused of a fiscal offence in view of the right to a fair trial (Art. 45(1) of the Constitution) and the right of defence (Art. 42(2) of the Constitution). The Tribunal added that these rights may be limited under the conditions specified in Art. 31(3) Constitution. In this case, the constitutional value which was considered to legitimise the limitation was the principle of legality in criminal law, understood as the obligation to prosecute crimes.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Poland does not provide the assistance of interpreters or legal aid to its extradited citizens or residents who are involved in trials abroad since this lies within the jurisdiction of the foreign courts. Assistance to extradited persons may be provided by Polish diplomatic and consular offices. The Ombudsman safeguards

[59] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

[60] Judgment of 9 July 2002, ref. No. P 4/01.

the liberties and rights of citizens as set forth in the Constitution and in other legal acts. His competence is limited to the territory of Poland, but he may conduct an inquiry concerning the performance of duties by Polish diplomatic and consular missions in providing assistance to extradited citizens.

2.3.4.2 The Polish Ministry of Justice does not provide any statistical data on persons who have been surrendered by a Polish court and have subsequently been found innocent.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The issue of the enforceability of judgments in civil and commercial matters in view of the right to a fair and public hearing guaranteed by Art. 45(1) of the Constitution was the subject of a constitutional complaint in the Brussels I case (see Sect. 1.3.4). The applicant questioned the second sentence of Art. 41 of the Brussels I Regulation, according to which a debtor against whom enforcement is sought should not at the stage of first instance proceedings be entitled to make any submissions on the application. The Constitutional Tribunal stated that the legal construct of *ex parte* proceedings (i.e. where the defendant has not received notice and, therefore, is neither present nor represented) is justified by the special character, subject or function of such proceedings. In particular, it reflects the need to grant, even temporarily, legal protection quickly or to preserve the element of surprise. Without such proceedings, it would be impossible in many cases to fulfil the function of civil proceedings, namely to grant legal protection. This means that the interests of the two parties to the proceedings may justify postponing the exercise of the right to a hearing of one party to the proceedings at a later stage. The Tribunal concluded that such procedural solution implements the principle of the free movement of judgments within the EU (as part of cooperation in judicial matters among the Member States) and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts.

The amendment to the Code of Civil Procedure abolishing the declaration of enforceability for judgments and protection measures originating in another Member State entered into force on 10 January 2015. It is in line with Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[61] and Regulation 606/2013 on mutual recognition of protection measures in civil matters[62].

[61] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1.

[62] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L 181/4.

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The issue of mutual recognition of criminal judgments where the penalty imposed by the court of another Member State is excessively lengthy arose in the aftermath of the case referred to in Sect. 2.3.1.1. In January 2008, a British court sentenced a Polish citizen to double life imprisonment. Due to the reservation made in the EAW, he was transferred to Poland to serve his sentence. According to the Polish Criminal Code, the maximum penalty for rape is 12 years of imprisonment with a maximum penalty of 10 years for assault. Consequently, he requested that the court executing the judgment adjust the penalty to the conditions set forth in Polish law. In March 2009, the Polish Supreme Court refused his claim. In January 2011, Art. 607s§4 of the Code of Criminal Procedure was amended to allow domestic courts to amend a penalty in line with the maximum punishment available for the offence in question under Polish law, if the sentence imposed by a foreign court exceeds the upper limits of the potential sanction for the offence in question. In November 2011, the court of appeal adjudicated that in Poland, he must serve a 12-year prison sentence.

2.3.5.2 In Poland there was no debate about the suitability of transposing mutual recognition from internal market matters to criminal law and civil and commercial disputes. In the view of the experts, the rules concerning mutual recognition pertaining to the free movement of goods cannot be easily transposed to criminal law, since criminal law involves vital rights and freedoms of the utmost importance to individuals, which must be safeguarded by very restrictive procedural guarantees.

2.3.5.3 The experts share the view that the national courts maintain both roles. They provide judicial protection as well as perform the tasks imposed by EU law concerning mutual recognition and judicial cooperation in criminal, civil and commercial matters.

2.3.5.4 The issue of proportionality with regard to the EAW has been raised in the legal literature and case law. The report of the European Commission of April 2011 indicated that Poland issued the greatest amount of arrest warrants between 2005–2009 (17,015).[63] A Centre for European Policy Studies report (cf. the Questionnaire) indicates that in 2005–2011, Poland issued 31% (24,577) of the total number of warrants in the European Union (78,785).[64] In legal writings it has been pointed out that the courts of Ireland, Great Britain and Germany are faced with a vast amount of Polish warrants in trivial cases such as 'stealing a mobile phone or two chickens'.[65] In 2012, the High Court of Ireland relied on the principle of proportionality and refused to surrender a Polish national accused of possession of a small amount of marihuana.[66] Moreover, Polish circuit courts have postulated that it

[63] Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11.4.2011, COM(2011) 175 final, p. 12.

[64] Carrera, Guild and Hernanz 2013, p. 38.

[65] Górski 2010.

[66] Judgment of the High Court of Ireland of 8 February 2102 in case MJLR v. Ostrowski, (2012) IEHC 57.

should be possible, due to the principle of proportionality, to assess the seriousness of a crime and the possible penalty before issuing or executing an arrest warrant.[67] For instance, in 2010 the Circuit Court in Łódź relied on the principle of proportionality and Art. 49 of the Charter and refused to issue an arrest warrant for a person accused of non-payment of alimony. In 2011, the Circuit Court in Białystok based its refusal to issue an arrest warrant against a person accused of extortion of child benefits on the same argument.[68]

According to Art. 607b(1) of the Polish Code of Penal Procedure a warrant may not be issued in connection with criminal proceedings against a person prosecuted for an offence punishable by imprisonment for up to one year. A statute of 27 September 2013 that entered into force on 1 July 2015 introduced an additional obligation to refuse to issue an EAW 'if it is not required in view of the interests of justice'.

2.4 *The Annulment of the Data Retention Directive by the ECJ*

2.4.1 Article 47 of the Constitution stipulates that '[e]veryone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life'. According to Art. 49 of the Constitution, '[t]he freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute'. The constitutional right to privacy may be limited under the conditions specified in Art. 31(3) of the Constitution (see Sect. 2.1.2) e.g. for the protection of the security of the state or public order. According to Art. 51(2) of the Constitution, '[p]ublic authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law'.

The Data Retention Directive[69] was transposed by a statute of 24 April 2009 into Arts. 180a–180g of the Telecommunications Law. In legal commentary it has been pointed out that such provisions may significantly affect the right to privacy of ordinary citizens and allows for the conduct of full surveillance of society under the guise of combatting terrorism.[70] The provisions of the Telecommunications Law

[67] Order of the Circuit Court in Tarnów of 26 October 2004, ref. No. II KOP 17/04, Order of the Circuit Court in Łódź of 2 February 2011, ref. No. XVIII Kop 4/11, Order of the Circuit Court in Gdańsk of 17 March 2011, ref. No. XIV Kop 12/11. See in more detail Ostropolski 2013, pp. 22–23.

[68] See in more detail Gardocka 2011, pp. 47–50.

[69] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[70] Suchorzewska 2010, p. 206.

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implementing the Directive will hopefully be rescinded by Parliament; however, the relevant bill has not yet been submitted.

In April 2013 the Court of Appeal in Warsaw adjudicated the case of a Polish journalist who had been placed under surveillance by the Central Anti-Corruption Bureau (CBA) after a series of articles concerning the operational activities of this authority.[71] The CBA obtained the phone records of 10 journalists retained by the telecommunication companies. In the view of the Court, the operations of the CBA were unfounded, disproportionate and violated the journalists' right to private and family life as well as the freedom and privacy of communication.

On 30 July 2014, the Constitutional Tribunal issued a judgment with regard to seven joined applications submitted by the Ombudsman and the Prosecutor General.[72] These applications concerned provisions on the conduct of operational surveillance activities and the disclosure of communications data to the Police, the Border Guard, the Military Police, authorities responsible for tax audits, the Internal Security Agency, the Military Counter-Intelligence Service, the Central Anti-Corruption Bureau and the Customs Service. The Constitutional Tribunal stated that the data were obtained confidentially and without any knowledge or involvement of the persons on whom the information was gathered. Further, the lack of independent supervision over that process posed a risk of abuse. The lack of such supervision may not only contribute to unjustified interference in the rights and freedoms of persons, but it may also pose a threat to the democratic mechanisms of the exercise of state authority. Therefore, the Constitutional Tribunal decided that certain provisions of the contested statutes were inconsistent with Art. 47 and Art. 49 in conjunction with Art. 31(3) of the Constitution.

2.5 Unpublished or Secret Legislation

2.5.1 The constitutional principles of legality (Art. 7) and legal certainty derived from the rule of law (Art. 2) require that acts of universally binding law shall be promulgated in a proper manner.[73] According to Art. 88 of the Constitution, '[t]he condition precedent for the coming into force of statutes, governmental regulations and enactments of local law shall be the promulgation thereof'. Further, international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of, and procedures for, promulgation of normative acts shall be specified by statute. According to Art. 2 of the Act on Publishing Normative Acts of 2000, 'promulgation of a normative act in a legal journal is obligatory'. The sources of universally binding law of the Republic of Poland are published in the Journal of Laws of the Republic of

[71] Judgment of the Court of Appeal in Warsaw of 26 April 2013, ref. No. I ACa 1002/12.

[72] Judgment of 30 July 2014, ref. No. K 23/11.

[73] See further Biernat and Niedźwiedź 2012, pp. 112–113.

Poland (*Dziennik Ustaw*). According to the case law of the Constitutional Tribunal, in order to satisfy the requirements laid down in Art. 88(1) of the Constitution, the Journal of Laws shall not only be published but also shall be made available to the public by means of distribution. It is not relevant whether the individual has actually used the opportunity to acquaint himself with the normative act.[74]

On 1 May 2004 Poland acceded to the European Union, but the process of translation of EU legislation continued until 2006. Before the ruling in *Skoma-Lux,*[75] the case law of the Polish administrative courts was divergent. Some courts decided that legal acts published in one of the official languages of the EU may be enforceable against Polish citizens from 1 May 2004,[76] whereas other courts held this to violate the principle of certainty of law guaranteed in Art. 2 of the Constitution.[77] The current position of the Supreme Administrative Court is that acts of EU secondary law, in order to be enforceable against Polish citizens, must be formulated in the Polish language and published in the Official Journal.

On 12 May 2011, the ECJ issued its judgment in case C-410/09 in response to a preliminary question from the Polish Supreme Court concerning the enforcement of certain regulatory obligations envisaged in Commission Guidelines of 2002 that had not been published in Polish.[78] The ECJ stated that Art. 58 of the Accession Treaty does not preclude a national regulatory authority from referring to the Commission Guidelines imposing certain regulatory obligations on an operator of electronic communications services, notwithstanding the fact that those guidelines have not been published in the Official Journal in Polish, even though that language is an official language of the Union.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-Retroactivity and Proportionality*

2.6.1 The standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity and proportionality in the field of market regulation

[74] Judgment of the Constitutional Tribunal of 21 December 1999, ref. No. K 4/99. The case related to the statute that entered into force on 1 January 1999 and was published in the Journal of Laws on 30 December 1998. The Journal of Laws was not distributed before the statute entered into force and thus individuals did not have the opportunity to acquaint themselves with the normative act. The Tribunal invalidated the provisions of the statute on a different constitutional basis and decided not to adjudicate upon conformity with Art. 88(1) of the Constitution.

[75] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

[76] Judgment of the Provincial Administrative Court in Łódź of 27 April 2007, ref. No. III SA/Łd 564/06.

[77] Judgment of the Provincial Administrative Court in Bydgoszcz of 20 July 2005, ref. No. III I SA/Bd 275/05.

[78] Case C-410/09 *Polska Telefonia Cyfrowa* [2011] ECR I-03853.

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is the same in Polish law irrespective of whether the obligations imposed on individuals arise from national legislation, measures implementing EU law or directly from EU acts.

For instance, the Constitutional Tribunal has declared that certain provisions of an executive regulation concerning the amount of fines for infringements of rules relating to fishing are inconsistent with the principle of legal certainty guaranteed by Art. 2 of the Constitution.[79] The fines were the consequence of Commission Regulation No 804/2007 of 9 July 2007 establishing a prohibition of fishing for cod in the Baltic Sea by vessels flying the flag of Poland.[80] As a result of the judgment, the Ministry of Agriculture annulled the fines imposed on Polish fishermen for illegal cod fishing that were based on the repealed act.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 In the ESM case, the Constitutional Tribunal considered an application, submitted by a group of *Sejm* Deputies, which challenged a procedure for the enactment of the Act on the ratification of European Council Decision of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU).[81] The Tribunal stated that the amendment to Art. 136 of the TFEU did not concern competences vested in the organs of state authority, and therefore the ratification did not entail the transfer of such competences upon an international organisation or an international authority; therefore the Act was not inconsistent with Art. 90 of the Constitution (see Sect. 1.3.2).

Moreover, the Tribunal indicated that the provisions of the Treaty Establishing the European Stability Mechanism (ESM Treaty) did not bind Poland as a Member State which does not belong to the eurozone. The decision whether to adopt the ESM Treaty – and in accordance with what ratification procedure – would be taken by Poland upon accession to the eurozone. Also, the potential evaluation of the constitutionality of the ESM Treaty might occur only at the moment of accepting the binding force of this international agreement. Currently, Poland is not a party to the Treaty, as it has neither signed it nor commenced the ratification process. The issue of the ratification of the ESM Treaty will become one of the essential elements of any future political decision concerning accession to the eurozone, provided that the Treaty is still in force at that time. At the time of the judgment, the ESM Treaty did not impose any obligations on Poland and did not cause any changes in the way the Polish organs of public authority exercise their competence in financial matters.

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[79] Judgment of 7 July 2009, ref. No. K 13/08.

[80] [2007] OJ L 180/3.

[81] Judgment of 26 June 2013, ref. No. K 33/12.

2.7.2 In March 2013, a group of Deputies and Senators challenged the constitutionality of the procedure for the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact). In the view of the applicants, the Fiscal Compact confers the competences of national authorities upon an international organisation, which means that the ratification statute should have been adopted in accordance with the Art. 90(1) procedure, rather than the Art. 89 procedure.[82] The proceedings before the Constitutional Tribunal were discontinued since after the parliamentary elections in 2015 the Members of the new Parliament did not uphold their motion.

2.7.3 Poland has not been subject to a bailout or austerity programme. According to the well-established case law of the Constitutional Tribunal, the financial equilibrium of the state is a constitutional value taken into consideration in assessing the constitutionality of law.[83]

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Between 2006 and September 2015, Polish courts submitted 81 requests for a preliminary ruling.[84] The most requests were submitted by Polish administrative courts, with 28 by the Supreme Administrative Court and 22 by provincial administrative courts.[85] The Supreme Court issued 10 requests, and the common courts 21 requests.[86] Poland is one of the largest EU countries, yet it is a Member State from which the ECJ receives one of the lowest number of requests for a preliminary ruling.[87] During this period, Polish courts only submitted questions with regard to the interpretation of EU primary and secondary law (mainly regulations and directives), but not with regard to the validity of EU measures. Problems with the application of EU law occur primarily in the field of customs, indirect taxes, social security, road transportation, veterinary matters, EU citizenship, agricultural law and intellectual property law.[88]

[82] Case ref. No. K 11/13.

[83] Judgment of 19 December 2012, ref. No. K 9/12.

[84] Until 2006, Polish courts submitted only one request for a preliminary ruling; see Case C-313/05 *Brzeziński* [2007] ECR I-00519.

[85] List of cases available at: http://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php.

[86] List of cases available at: http://www.iws.org.pl/analizy-i-raporty/pytania-prejudycjalne-polskich-sadow-powszechnych.

[87] According to the Annual Report of the Court of Justice, Polish courts submitted 14 requests in 2014, 11 in 2013, 6 in 2012, 11 in 2011 and 8 in 2010. Court of Justice of the European Union, Annual report 2014, Luxembourg 2015, p. 122.

[88] Biernat 2009, p. 29.

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In July 2015 the Constitutional Tribunal decided to submit its first reference for a preliminary ruling concerning the validity of the provisions of Directive 2006/112 on the common system of value added tax (VAT Directive).[89] The questions formulated by the Tribunal concern the rate of VAT on books published in digital form and other electronic publications.[90] In its judgement of 7 March 2017 the Court of Justice stated that despite different VAT rates on electronic and printed publications, the contested provisions were valid.

2.8.2 In Poland a declaration of invalidity of a statute or legal provision issued by a central organ of the state lies solely within the competence of the Constitutional Tribunal. As opposed to other constitutional courts, the Polish Constitutional Tribunal does not review rulings or decisions issued in individual cases, rather controls normative acts serving as legal grounds for a given ruling or decision. According to statistical data, in 2014 the Tribunal issued 69 judgments and in 36 cases (52%) declared at least one provision questioned by the claimants to be unconstitutional. The Tribunal declared legal provisions to be invalid in 39 cases (55%) in 2013, in 35 cases (52%) in 2012, in 25 cases (42%) in 2011 and in 37 cases (54%) in 2010.[91] The most common ground for a declaration of unconstitutionality of a legal norm was violation of the rule of law and legal principles derived from Art. 2 of the Constitution (see Sect. 2.1.1), the right to a fair trial, the principle of proportionality and the transgression of the authorisation contained in a statute in issuing a regulation by the executive. The Supreme Administrative Court and provincial administrative courts exercise control over the performance of public administration. According to statistical data, in 2013 provincial administrative courts examined 75,372 claims, which led to the annulment of administrative action in 17,149 cases. The success rate was approximately 24.36% in 2013, 22.3% in 2012, 22.5% in 2011 and 23% in 2010.[92] Based on these statistics, it must be concluded that the review of legality of national legislation, executive regulations and administrative action is more successful than the review of legality of EU measures in the EU courts.

The experts share the view that the EU courts represent a protective approach towards EU institutions and organs in actions for annulment and failure to act. The underlying motive is to ensure the effectiveness of EU decision-making. A very restrictive approach is also demonstrated in claims for damages against EU institutions submitted on the basis of Art. 340(2) TFEU, since in the view of the ECJ such claims may hinder the ability of the institutions to fully exercise their competences in the general interest. In the last 60 years, the EU courts have awarded damages in only 43 cases. However, in recent years, the ECJ has put more emphasis

[89] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

[90] Case C-390/15 *RPO* [2017] ECLI:EU:C:2017:174.

[91] Statistical data available at: http://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003/.

[92] Statistical data available at: http://www.nsa.gov.pl/statystyki-wsa.php.

on the protection of fundamental rights specified in the Charter.[93] Also in deciding actions for damages the EU courts underline that individuals may not bear the consequences of flagrant and inexcusable misconduct by the EU institutions.[94]

2.8.3 The Polish Constitutional Tribunal does not take an overly active approach to review of the constitutionality of normative acts. In adjudicating a case, the Tribunal is bound by the limits of the application, question of law or complaint. The result of such constitutional review of the law is that the obligation to identify the grounds for the alleged unconstitutionality of a challenged provision is imposed on the participants in the proceedings (parties). Such a concept of constitutional judiciary is a derivative of the presumption of constitutionality of the law and the principle of stability of the legal order.

The administrative courts decide within the limits of a particular case, however without being bound by the claims and legal bases indicated in the complaint. The court is able to examine the content of a contested act or action of an administrative authority in terms of its compliance with substantive and procedural law. The Supreme Court and administrative and common courts may review the legality of regulations issued by the executive and may refuse to apply such a regulation in a particular case. However, they can not decide on the validity of a regulation since this lies solely within the competence of the Constitutional Tribunal. For statistical data on the proportion of validity challenges concerning domestic acts that have led to annulment and the main grounds for annulment, see Sect. 2.8.2.

2.8.4 The Polish Constitutional Tribunal reviews domestic statutes implementing EU legislation in the same manner as other parliamentary statutes or legal acts issued by central organs of the state.[95] In its Brussels I judgment, the Constitutional Court recognised its competence to directly review EU secondary law in the constitutional complaint procedure (see Sect. 1.3.4). The Tribunal indicated that it would examine the conformity of norms of EU law with the Constitution in future constitutional complaints in a special way and adopted an approach similar to that of the German Constitutional Court in *Solange II*[96] or the European Court of Human Rights (ECtHR) in *Bosphorus*,[97] recognising a presumption of legality with

[93] Joined cases C-402/05 and C-415/05 *Kadi* [2008] ECR I-06351; Joined cases C-92/09 and C-93/09 *Volker und Marcus Schecke and Eifert* [2010] ECR I-11063; Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[94] Case T-351/03 *Schneider Electric* [2007] ECR II-02237; Case T-47/03 *Sison v. Council* [2007] ECR II-00073; Case T-429/05 *Artegodan v. Commission* [2010] ECR II-00491; Case T-333/10 *Animal Trading Company* [2013] ECLI:EU:T:2013:451.

[95] See for example the Judgments of 27 April 2005 ref. No. P 1/05 (see Sect. 1.2.3) and of 5 October 2010 ref. No. SK 26/08 (see Sect. 2.3.1) concerning the constitutionality of certain provisions of the Code of Criminal Procedure implementing Council Framework Decision 2002/584 on the European Arrest Warrant.

[96] 19 BVerfGE 73, 339 [1986] (Solange II).

[97] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

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regard to EU law. An individual submitting a constitutional complaint which challenges the conformity of an act of EU law with the Constitution is required to demonstrate that that the legal act undermines the level of protection of rights and freedoms, in comparison with the level of protection guaranteed by the Constitution. It follows that the Polish constitutional court placed emphasis on examining whether a particular EU legal act offers an adequate level of protection of rights and freedoms, rather than taking the EU legal system in general into consideration.

2.8.5 The Constitutional Tribunal in its jurisprudence has expressed the view that a level of protection of an individual's rights that arises from EU law that is lower than the level of protection guaranteed by the Constitution would be inacceptable.[98] The constitutional norms on the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the implementation of EU legal acts. At the same time, the Tribunal has underlined that the Charter, the ECHR and the constitutional traditions of the Member States set a high level of protection of fundamental rights in the EU. These circumstances prove a significant axiological similarity between Polish law and EU law. Therefore, the risk of a potential gap between the levels of protection of fundamental rights guaranteed in these legal systems is not high.

2.8.6 The issue of equal treatment of individuals falling within the scope of EU law and national law has arisen in a few cases before the Constitutional Tribunal. For instance, in the Brussels I case the legal situation of the complainant (the debtor) was regulated by Council Regulation 44/2001 (see Sect. 1.3.4). Article 41 of this Regulation excludes a debtor from proceedings before a court of first instance in cases concerning the enforceability of a ruling issued by a court of another EU Member State. If the case had concerned the enforceability of a judgment from a non-EU Member State, the Polish Code of Civil Procedure would have applied. According to Art. 1151^1§2 of the Code, a debtor, upon being served a motion for enforcement of a judgment, is allowed to present his or her position before the court of first instance.

2.9 Other Constitutional Rights and Principles

2.9.1 Similar issues concerning the implementation of EU law as reported in the Questionnaire arose in Poland in relation to the regional operational programmes within the European Regional Development Fund. The implementation systems for regional operational programmes were usually adopted in the form of a resolution issued by the governing bodies of a *voivodeship* (province) and regulated certain rights and freedoms of individuals in relation to the procedure for the selection of

[98] Judgment ref. No. K 18/04 and ref. No. SK 45/09.

projects and the related appellate procedure. Such resolutions do not fulfil the constitutional requirements for determining the rights and obligations of individuals within the meaning of Art. 87 of the Constitution (enumerating the acts of universally binding law: statutes, executive regulations or enactments of local law). The Constitutional Tribunal declared that certain provisions of the Act of 6 December 2006 on rules for carrying out development policy were inconsistent with Art. 87 of the Constitution.[99]

2.10 Common Constitutional Traditions

2.10.1 Analysis of the jurisprudence reveals that the ECJ, in assessing the common constitutional traditions[100] and legal principles common to the laws of the Member States specified in Art. 340(2) TFEU,[101] uses the method of evaluative comparative law ('*wertende Rechtsvergleichung*'). Therefore, even a legal principle that is recognised in a minority of national legal systems may be identified as forming part of EU law, if it best meets the requirements of the EU legal system. In the view of the experts, the following rights and values may be regarded as part of the common constitutional traditions of the Member States as set out in Art. 6(3) TEU and Art. 52(4) of the Charter: the principle of equality, the principle of proportionality, legal certainty and protection of legitimate expectations, the right to a fair trial, the protection of property, the freedom to express opinions, the right of defence, non-retroactivity of law and *nulla poena sine lege*.

2.10.2 Recognising the general principles of Union law, the ECJ does not rely on the interpretation of the constitutional provisions of the Member States, but rather refers to the principles resulting from the constitutional traditions of the Member States. This way of formulating the general principles of Union law avoids the allegation that the domestic provisions or standards of certain Member States will determine the content of EU law, which would be tantamount to a reversal of the primacy of EU law over the law of the Member States.[102] In view of the protection of the rights of individuals, it would be suitable for the ECJ to refer to the 'common constitutional traditions' as a more direct source of EU law or even long-standing rights and values prescribed in the constitution of a given Member State, as long as this would not violate the primacy and autonomy of Union law.

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[99] Judgment of the Constitutional Tribunal of 12 December 2011, ref. No. P 1/11.

[100] Opinion of Advocate General Kokott of 29 April 2010 in Case C-550/07 *Akzo Nobel Chemicals* [2010] ECR I-08301, para. 94.

[101] Opinion of Advocate General Poiares Maduro of 20 February 2008 in Joined cases C-120/06 P and C-121/06 *FIAMM and Fedon* [2008] ECR I-06513, para. 55.

[102] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125, para. 3; Wróbel 2010, p. 50.

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2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 The Constitutional Tribunal represents the view that a lower level of protection of an individual's rights arising from Union law compared to the level of protection guaranteed by the Polish Constitution would be unacceptable (see Sect. 2.8.5). Further, in its jurisprudence the Supreme Court invokes the provisions of the Polish Constitution over the provisions of the ECHR, if the former offer a higher standard of protection for the individual.[103] Analysis of the jurisprudence of the Polish courts reveals that the Charter is invoked in exceptional cases and only as additional justification to the outcome determined on the basis of Polish law. The Charter is relatively frequently invoked by the parties to the proceedings; however, it is referred to without adequate justification or as additional argumentation in support of statements based on national law.[104]

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 At the time of the adoption of the European Arrest Warrant Framework Decision in 2002 there was no public deliberation in Poland since the country did not accede to the EU until May 2004. During the process of implementing the Decision through the Code of Penal Procedure by virtue of the Act of 18 March 2004,[105] there was academic and political debate, which led to the constitutional amendment discussed in Sects. 1.2.3 and 2.3.

At the time of adoption and implementation of the Data Retention Directive through the Telecommunications Law by virtue of the Act of 24 April 2009 there was no public deliberation concerning the defence of citizens' rights. However, on 13 May 2014 the Committee on Human Rights of the Senate organised an expert debate on the legal consequences of the judgment in the case *Digital Rights Ireland* and its impact on the use of telecommunications data by police and other public authorities for the purpose of preventing and combating crime.

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[103] In its Order of 9 September 1998, ref No. III RN 73/98, the Supreme Court held that a foreigner who does not have a valid passport, valid visa or permanent residence card but who has a valid certificate of registration of an application instituting proceedings for refugee status, resides lawfully within the territory of Poland and is entitled to a fair and public hearing within a reasonable time guaranteed by Art. 45(1) of the Constitution. The Supreme Court stated that this constitutional provision offers a wider scope of protection than Art. 6(1) of the ECHR that is limited to civil rights and obligations or criminal charges.

[104] Biernat 2012, pp. 74–78; Półtorak 2014, p. 17.

[105] Act of 18 March 2004 on the amendment of the Law – on the Criminal Code, the Law – on the Code of Penal Procedure and the Law – on the Code of Petty Offences (Journal of Laws No. 69, Item 626).

It is worth mentioning that one of the largest public debates in Poland, as well as public manifestations, took place in February 2012 and concerned the right to privacy of Internet users in view of the adoption of the Anti-Counterfeiting Trade Agreement (ACTA).

2.12.2 Statutes implementing EU law are subject to preventive and subsequent control by the Constitutional Tribunal. At the stage of implementation of EU law, a statute may be subject to preventive control (i.e. before the statute enters into force). This can only be initiated by the President who may, before signing a statute, refer it to the Constitutional Tribunal for adjudication of its conformity to the Constitution (Art. 122(3) of the Constitution). For example, the President initiated control of the Act of 5 December 2008 concerning the organisation of the fish market implementing Council Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.[106,107] He successfully challenged the conformity of the requirement that all fisheries products must first be marketed or registered with an auction centre, registered buyer or producer organisations with Art. 22 of the Constitution guaranteeing the freedom of economic activity. In the view of the Experts, the present system allows sufficient space for constitutional review at the stage of implementing EU law. However, if serious constitutional problems are identified, a Member State is still obliged to respect and ensure the full effectiveness of EU law in the domestic legal system. Otherwise, infringement proceedings as defined in Art. 258–260 TFEU may be initiated.

2.12.3 The Experts support the recommendation to suspend the application of EU measures and carry out a review if important constitutional issues are identified by a number of constitutional courts. Moreover, if such unconstitutionality has been identified, it should be recognised as a defence on the part of the Member State in an infringement proceeding.

In the Brussels I case the Constitutional Tribunal considered the effects of a potential judgment that would find norms of EU secondary legislation inconsistent with the Constitution (see Sect. 1.3.4). In the context of acts of Polish law, inconsistency with the Constitution results in a declaration that the unconstitutional norms are no longer legally binding (Arts. 190(1) and (3) of the Constitution). With regard to acts of EU secondary legislation, such a result would be impossible, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. The consequence of such judgment would be to rule out the possibility that the act of EU secondary legislation would be applied by the organs of the state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in a suspension of the application of the unconstitutional norms of EU law in the territory of the Republic of Poland. The Constitutional

[106] [2009] OJ L 343/1.

[107] Judgment of the Constitutional Tribunal of 13 October 2010 ref. No. Kp 1/09, OTK No. 8A/2010, item 74.

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Tribunal also noted that such situation may lead to proceedings against Poland by the European Commission and an action before the ECJ for the infringement of obligations under the Treaties.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 The Experts do not share the concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law.

2.13.2 Not applicable.

2.13.3 The Experts submit the view that the ECJ should have broader recourse to the referring court or tribunal and request clarification where the circumstances of the case are imprecise or the formulation of a preliminary question raises considerable doubts. All constitutional courts of EU Member States should have the right to submit observations to the ECJ in a preliminary ruling procedure initiated by one of the national courts, if the case involves issues of fundamental constitutional importance. The lack of such provision prevented the Czech Constitutional Court from submitting its observations in *Landtová*.[108]

The participation of constitutional courts in the preliminary ruling procedure would be advisable in the following situations:

(1) the threat of substantive differences between EU law and the constitutional law of the Member States (as in the case of *Landtová*);

(2) a conflict of the duty of a national court to file a legal question with the constitutional court of that Member State and its duty to submit a preliminary question to the ECJ.

2.13.4 In the view of the Experts, it would be desirable if Poland were to withdraw from Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom, because the Protocol has more political than legal character.[109] The Experts would also recommend an amendment to the Constitution aimed at simplifying the procedure for implementing EU law into the national legal system and alleviating the strict standards governing the system of the sources of law (e.g. by using government decrees). The problem especially arises in relation to measures adopted in relation to the European Structural Funds (see Sect. 2.9.1).

[108] Case C-399/09 *Landtová* [2011] ECR I-05573.

[109] Biernat 2012, p. 86. Cf. OJ C 115, 9.5.2008, pp. 313–314.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The rules regarding the transfer of competences of the organs of state authority to an international organisation or international organ are specified in Art. 90 of the Constitution (see Sect. 1.2.1). While Art. 90(1) of the Constitution does not use the word 'European Union', it was originally seen as the provision that provided the basis for Polish accession to the European Union. To date, it has not been applied to any international organisation other than the European Union, although such a possibility was considered with regard to Poland's ratification of the Statute of the International Criminal Court, as well as in the context of an agreement with the United States of America concerning a missile defence system.[110]

The Council of Ministers is authorised to conclude international agreements requiring ratification and to accept and renounce other international agreements (Arts. 146(4)10) of the Constitution). The President, as a representative of the state in foreign affairs, ratifies and renounces international agreements (Art. 133(1)1) of the Constitution). The Constitution provides for three procedures for ratification of international agreements.

In the first procedure the Council of Ministers submits an international agreement which does not require consent granted by a statute (Art. 89(2)) to the President for ratification. The second procedure involves the Parliament and requires granting consent to ratification by statute. The *Sejm* and the Senate must pass bills by a simple majority vote, in the presence of at least one-half of the statutory number of their members. The choice of one of the above procedures is determined by the subject matter of the particular international agreement. Prior consent by statute is required for: (1) peace, alliances, political or military treaties; (2) freedoms, rights or obligations of citizens, as specified in the Constitution; (3) Poland's membership in an international organisation; (4) considerable financial responsibilities imposed on the state; (5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute (Art. 89(1)).

The third procedure applies to international agreements transferring competences of the organs of state authority. Consent can only be granted by a statute or nationwide referendum (Art. 90(2) and (3)). The consent for ratification of an international agreement specified in Art. 90 of the Constitution has higher requirements and involves a greater degree of democratic control (see Sect. 1.2.1).

3.1.2 Before the Constitution of 1997 there were no constitutional provisions determining the status of international agreements in the domestic legal order or the ratification procedures. The rules concerning the ratification of treaties and transfer

[110] Wyrozumska and Kranz 2001, pp. 15–35; Wyrozumska and Płachta 2001, pp. 87 et seq.

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of competences to international organisations were developed in the course of preparatory work for the Polish Constitution of 1997 (as to Art. 90, see Sect. 1.2.1). The purpose of these provisions was to determine the role of the Council of Ministers, the President and the Parliament in the ratification procedures and to strengthen democratic control upon the conclusion of international agreements. Article 89 is contained in Chapter III of the Constitution entitled 'Sources of Law'. The intention of the drafters was to adopt a wide catalogue of international agreements which must be ratified through consent granted by statute as a general rule for the conclusion of agreements.[111] In legal commentary, it has been stated that the criteria formulated in Art. 89(1)(1)–(5) of the Constitution are far from clear and leave the Parliament a large margin of discretion in deciding whether an international agreement requires consent granted by statute.[112] However, it is impossible to identify the general guidelines indicating precisely which categories of international agreements shall be subject to ratification in accordance with Art. 89(1) of the Constitution, based on constitutional provisions. Each international agreement should be considered individually, as to its nature, subject matter and the circumstances surrounding its conclusion.[113]

3.1.3 In the legal literature the view has been expressed that the rule that a nationwide referendum expressing consent for ratification of an international agreement by which competences are transferred to an international organisation is binding only if at least 50% of citizens eligible to vote participate, is too strict.[114] In 2010, the Parliament unsuccessfully considered proposals concerning the transfer of competences and other provisions with regard to Poland's membership in the European Union (see Sect. 1.2.4).

3.1.4 See Sects. 1.5.3 and 2.13.4.

3.2 The Position of International Law in National Law

3.2.1 The Constitution of 1997 is the first basic law in Poland defining the position of international law in the domestic legal order. The general principle is expressed in Art. 9 of the Constitution and states that '[t]he Republic of Poland shall respect international law binding upon it'. It is the expression of the classic rule of *pacta sunt servanda.* In legal commentary and domestic case law the prevailing view is that the term 'international law' covers international treaties, international custom and general principles of international law. Article 9 of the Constitution is not a merely declaratory provision but rather obliges all state authorities to respect

[111] Szymański 2010, pp. 504–505.
[112] Banaszak 2012.
[113] Wyrozumska 2006a, p. 177.
[114] Biernat 2002a, pp. 41–65.

international law in the performance of their duties, and to interpret Polish law in a manner consistent with international law.[115] This indicates the openness of the Polish legal system to international law.[116]

The position of international agreements in the national legal order is determined by Art. 91 of the Constitution. A ratified international agreement, after promulgation in the Journal of Laws, constitutes part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute (Art. 91(1) of the Constitution). Such provision refers to so-called self-executing or directly applicable norms. An international agreement ratified upon prior consent granted by statute has precedence over a statute if the agreement cannot be reconciled with the provisions of the statute. This concerns the primacy of application of international agreements by state authorities and domestic courts and it does not affect the validity of national law (Art. 91(2) of the Constitution). The Constitutional Tribunal has the sole competence to adjudicate on the conformity of a statute with ratified international agreements and to derogate from incompatible national law (Art. 188(2) of the Constitution). In the legal commentary and the jurisprudence of the courts, the dominant view is that an international agreement ratified without consent granted by statute does not have precedence over statutes.[117]

As specified in Sect. 1.2.1, Art. 91(3) of the Constitution determines the position of law enacted by an international organisation, if an agreement, ratified by the Republic of Poland, so provides. Accordingly, the law adopted by the international organisation shall be applied directly and have precedence in the event of a conflict with a statute. The jurisprudence of the Constitutional Tribunal clearly demonstrates that law enacted by an international organisation, in this case EU secondary law, does not have precedence over the Constitution.[118]

3.2.2 Taking into consideration the interaction between international and national law, in legal commentary the prevailing view is that the monist system is predominant in Poland (incorporation doctrine).[119] This statement is based on Art. 91(1) of the Constitution. The jurisprudence of the national courts is not entirely clear on this matter, and there have been rulings based on a dualist approach (transformation doctrine).[120]

[115] Biernat and Niedźwiedź 2012, p. 93.

[116] Wasilkowski 2006, pp. 9 et seq.

[117] Garlicki 2010a, p. 144; Wyrozumska 2006a, pp. 578–579.

[118] In case ref. No. SK 45/09 the Constitutional Tribunal directly adjudicated the conformity of Regulation (EC) No 44/2001 to the Polish Constitution and issued a judgment on the merits.

[119] Biernat and Niedźwiedź 2012, p. 121; Wyrozumska 1996, p. 24; Szafarz 1998, p. 3; Wasilkowski 1998, p. 86.

[120] Wyrozumska 2006a, pp. 592–599; Wyrozumska 2006b, pp. 45–50.

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3.3 Democratic Control

3.3.1 The foreign policy of Poland is conducted by the Council of Ministers (Art. 146(1) of the Constitution), which includes negotiating and signing international agreements. The Act on International Agreements of 2000 specifies that Parliament is involved when ratification of an international agreement requires the form of a statute under the provisions of Arts. 89(1) and 90 of the Constitution. Withdrawal from an international agreement ratified with the consent referred to in Arts. 89(1) and 90 of the Polish Constitution also requires consent granted by statute (Art. 22(2) of the Act on International Agreements). In the case of other international agreements, the involvement of the *Sejm* is limited to receiving information from the Prime Minister on any intention to submit an agreement to the President for ratification (Art. 89(2) of the Constitution; see Sect. 3.1.1).[121] However, according to Art. 15(4) of the Act on International Agreements, if the *Sejm* issues a negative opinion on the choice of such procedure within 30 days after notification, the Council of Ministers must reconsider its position on the matter. The Council of Ministers may decide to change its position and submit the agreement to the *Sejm* for consent granted by statute or decide to submit the agreement directly to the President. The President may ratify the agreement, share the view of the *Sejm* and return it to the Council of Ministers or submit the case to the Constitutional Tribunal for adjudication on the mode of ratification in conformity with the Constitution. Such procedure preserves the institutional balance in the ratification of international agreements.[122]

The Marshal of the *Sejm*, the Marshal of the Senate, 50 Deputies or 30 Senators may submit an application to the Constitutional Tribunal for control of the conformity of an international agreement to the Constitution (Art. 188(1) of the Constitution). This is the so-called subsequent control (*kontrola następcza)* of normative acts and relates only to international agreements that have been ratified and form part of the Polish legal system.[123] In legal commentary, the view has been expressed that both chambers of the Polish Parliament should have competence to initiate preventive control of international agreements.[124] However, this would require the amendment of the Constitution, since such control lies solely within the competence of the President.

The *Sejm* usually holds debates on current matters of foreign policy. On most occasions the debates relate to information submitted by the Council of Ministers

[121] In view of Art. 12(3) of the Act on International Agreements, international agreements that do not require ratification are subject to approval by the Council of Ministers.

[122] Wyrozumska 2006a, p. 194.

[123] In its Order of 21 May 2013, ref. No. K 11/13, the Constitutional Tribunal dismissed the application filed by 50 Deputies concerning the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), since at the time of submitting the application the agreement had not yet been ratified.

[124] Wyrozumska 2006a, p. 74.

on Poland's participation in the activities of the European Union and the ratification of international agreements.[125]

3.3.2 A nationwide referendum is one of the ways for obtaining consent for ratification of an international agreement transferring competences of the organs of state authority to an international organisation or international organ (Art. 90(3) of the Constitution). This provision served as the basis for the referendum on the EU Accession Treaty in 2003. It cannot be excluded that the *Sejm* or the President may order a nationwide referendum as specified in Art. 125 of the Constitution to decide on matters of particular importance to the state.

3.4 Judicial Review

3.4.1 As stated above, Art. 9 of the Constitution stipulates that the Republic of Poland shall respect international law binding upon it (see Sect. 3.2.1). This provision must be reconciled with Art. 8, which provides that the Constitution shall be the supreme law of the Republic of Poland. To this end, the Constitutional Tribunal acquired the competence to adjudicate upon the conformity of international agreements to the Constitution (Art. 188(1) of the Constitution). International agreements are subject to preventive control (*kontrola prewencyjna*) or subsequent control (*kontrola następcza*). The first type of control can be initiated only by the President who may turn to the Constitutional Tribunal before ratification of an agreement with a request to adjudicate upon its conformity to the Constitution (Art. 133(2) of the Constitution). Subsequent control may be initiated by the President, the Marshal of the *Sejm*, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Ombudsman. International agreements may also be questioned by the National Council of the Judiciary in cases related to the independence of the courts and judges (Art. 186(2) of the Constitution), by national courts referring a question of law (Art. 193 of the Constitution) and by individuals in cases of constitutional complaints (Art. 79 of the Constitution). Among the international agreements that have been submitted to the Tribunal for subsequent control are the Accession Treaty, Protocol No. 4 to the Association Treaty, the Lisbon Treaty, the Extradition Treaty between the United States of America and the Republic of Poland and the Fiscal Compact.[126] A judgment of the

[125] See as an example the list of Debates of the *Sejm,* 7th term available in English at: http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14684&Itemid=717.

[126] In cases ref. No. K 18/04 (the Association Treaty), ref. No. SK 54/05 (Protocol No 4 to the Association Treaty), ref. No. K 32/09 (the Lisbon Treaty) and ref. No. SK 6/10 (Extradition Treaty) the Constitutional Tribunal decided that the contested international agreements were in conformity with the Constitution. Case ref. No. K 11/13 concerning the Fiscal Compact has not yet been decided.

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Constitutional Tribunal in which it is held that an international agreement is inconsistent with the Constitution results in a declaration that the unconstitutional norms are no longer legally binding on the territory of Poland (Art. 190(1) of the Constitution). However, the Constitutional Tribunal may specify another date for the end of the binding force of an international agreement and postpone the effects of its judgment for a period not exceeding 12 months (Art. 190(3) of the Constitution). Such decision provides time to bring the agreement into conformity with the Constitution.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 In the period immediately following the political transformation in 1989, the IMF and the World Bank had a great influence on the radical economic reforms undertaken in Poland. The assessment of these reforms differs. On one hand they had a positive impact on the prompt creation of the basis of a market economy. On the other, they created some negative social consequences involving the impoverishment of certain social groups, such as employees of large state agricultural farms. These reforms took place before the adoption of the current Constitution which contains provisions on economic and social rights (Arts. 64–76). In a number of cases, the Constitutional Tribunal has accepted the admissibility of the temporary limitation of social rights during the economic crisis (which in Poland was less severe than in other countries).[127]

3.5.2 See Sect. 2.7.3.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 In its judgment of 21 September 2011, the Constitutional Tribunal decided that Art. 4(1) of the Extradition Treaty of 10 July 1996 between the United States of America and the Republic of Poland is consistent with Arts. 55(1) and (2) in conjunction with Art. 2 of the Constitution (see Sect. 3.4). The complainant, who held both American and Polish citizenship, contested the provision stipulating that '[n]either contracting State shall be bound to extradite its own nationals, but the executive authority of the requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper and possible to do so'. In the opinion of the complainant such provision was inconsistent with Arts. 55(1) and

[127] See as examples the Judgments of 12 December 2012, ref. No. K 1/12 and of 19 December 2012, ref. No. K 9/12.

(2) of the Constitution, as the possibility of extraditing a Polish citizen did not result from the content of an international agreement, which only referred to the system of law and left the determination of the admissibility of extradition of a Polish citizen to the administrative discretion of an official, without any clear guidelines for such discretion. Moreover, it lacked sufficient specificity and was imprecise, and thus failed to comply with the principle of a state ruled by law, expressed in Art. 2 of the Constitution. The Tribunal stated that Art. 4(1) of the Extradition Treaty is an example of an optional clause which provides for the possibility to refrain from extraditing a country's own nationals. However, this provision should be interpreted taking into account Art. 1 of the Extradition Treaty, which gives rise to the obligation to extradite all persons sought for prosecution or found guilty of an extraditable offence, regardless of their nationality. Despite the complainant's claims, the Extradition Treaty implies a possibility to extradite a Polish citizen, and thus the requirement set out in Arts. 55(1) and (2) of the Constitution is met, namely that the extradition of a Polish citizen may be granted 'if such a possibility stems from an international treaty ratified by Poland'. In other words, the extradition of a Polish citizen is admissible not only when a ratified international agreement introduces such an obligation, but also when only such a possibility arises therefrom.

On 24 July 2014 the ECtHR issued judgments in the cases *Husayn (Abu Zubaydah) v. Poland* and *Al Nashiri v. Poland*, concerning allegations of torture, ill-treatment and secret detention of a Saudi Arabian national and a stateless Palestinian, both suspected of terrorist acts.[128] The applicants alleged that they were held at a CIA 'black site' in Poland. In both cases, the Court found that Poland had failed to comply with its obligation to furnish all necessary facilities for the effective conduct of an investigation under Art. 38 of the ECHR. According to the ECtHR, Poland had violated the applicants' rights by enabling the United States to secretly detain and torture the applicants on Polish territory, conducting an inadequate investigation into the acts of torture and ill treatment committed in Poland and allowing the applicants' transfer to Guantánamo despite the real risk they would be tortured and could be subjected to unfair trials and the death penalty by the United States. The Court held that these failures constituted violations of the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to respect for private and family life, the right to an effective remedy and the right to a fair trial. As regards Mr. Al Nashiri, the Court further held that there had been a violation of the right to life and abolition of the death penalty. Poland referred the case to the Grand Chamber of the ECtHR, contesting the judgment on procedural grounds. The appeal was rejected on 17 February 2015.

The Polish Constitution provides the same level of guarantees for the rights and freedoms of foreigners as for those of Polish citizens. According to Art. 37(1) of the Constitution all persons, being under the authority of the Polish State, shall enjoy

[128] *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.

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the freedoms and rights ensured by the Constitution. A criminal investigation into CIA secret prisons is still pending before the Polish Prosecutor's Office. Mr. Abu Zubaydah and Mr. Al Nashiri have been granted the status of victim in the investigation. According to information provided by the Prosecutor's Office, the investigators are still collecting evidence and the investigation is taking longer than expected since US officials have not responded to requests for information. The Polish Government has also asked the US for diplomatic assurances with regard to Mr. Abu Zubaydah and Mr. Al Nashiri, who could face the death penalty in the US.

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The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment *Ultra Vires*

Zdeněk Kühn

Abstract The Czech Constitution of 1992, associated with the revolutionary fervour of the 1989 Velvet Revolution, attempted to annihilate the Communist, totalitarian heritage. According to the judgments of the Constitutional Court (CCC), this meant that the rule of law in a constitutional state has not only a formal but also a substantive side, expressing the fundamental, inviolable values of a democratic society. There was a break from an approach that had seen the judiciary as a submissive and unthinking instrument of enforcement. In relation to EU law, several measures have been subject to constitutional challenges, including domestic acts implementing the European Arrest Warrant, the Data Retention Directive, and EU sugar quotas. The Czech Constitutional Court, which has a strong position, has underlined its EU-friendly approach. At the same time, for exceptional, flagrant cases, the CCC has retained the constitutional limits based on the democratic, rule-of-law-based state (unamendable provision under Art. 9(2) of the Constitution) and the protection of fundamental rights. Notably, in *Landtová*, the CCC declared an ECJ judgment *ultra vires*. In general, the reasoning of the CCC often follows that of the German Constitutional Court. In the practice of the ordinary courts, it emerges from the report that the Czech courts have adopted a rights-protective approach and carry out judicial review, including in European Arrest Warrant cases and other mutual recognition cases. The EU amendments in the Constitution are considered brief but sufficient.

Keywords The Czech Constitution · Constitutional amendments regarding EU and international co-operation · The Czech Constitutional Court Constitutional review statistics · Fundamental rights and the rule of law

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Data Retention Directive and surveillance · European Arrest Warrant, defence rights and judicial review · *Sugar Quotas* cases, property rights and the principles of legal certainty and legitimate expectations · Unamendable constitutional provision on the democratic, rule-of-law-based state · Constitutional limits *Landtová* and *ultra vires* review · *Skoma-Lux* and publication of laws

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Czech Constitution of 1992 was adopted as a response to the totalitarian past of Czechoslovakia. It was enacted three years after the fall of the Czechoslovak Communist regime and must be interpreted against this backdrop.[1] The drafters of the Constitution did not strive for continuity with the old regime; quite the contrary, the Constitution was associated with the revolutionary fervour of the 1989 Velvet Revolution and attempted to annihilate the Communist heritage.

The text of the Constitution is rather brief. The Constitution seems to be less detailed than its Central European counterparts, e.g. the Polish Constitution of 1997 or the Hungarian Constitution of 2011. Let us keep this in mind when analysing the relative brevity of the 2001 Euro-amendment to the Constitution (Sect. 2 below).

The Constitution created a strong Constitutional Court (hereinafter CCC) which soon became its most powerful protector. The CCC started with almost a total absence of constitutional conventions and tradition.[2] Its doctrine is therefore unoriginal, as it mostly copies the German approach (sometimes quite unsystematically and simplistically). The principle of adherence to the letter of the law endorsed via a 'weak' judiciary that is unable to interpret general constitutional clauses (textual positivism) is said to be discredited by the fact that law might sometimes be grossly unjust, as happened during the Communist era. The CCC has stated that:

> The history of the Twentieth Century relating to the existence of totalitarian states proved that mechanical identification of the law with legal texts had become a welcome tool of totalitarian manipulation. It made the judiciary a submissive and unthinking instrument in the enforcement of totalitarian power.[3]

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[1] In order to be accurate, I shall add that the immediate reason for adopting the Constitution in fall 1992 was the break-up of the Czechoslovak federation.

[2] Hungarian legal philosopher and comparatist Csaba Varga has noted that '[i]n want of constitutional precedents, conventions, and customs, in short, of established practice, the field where the political and legal game is played is rather empty. The transition period now is the dramatic high time for Central and Eastern Europe nations to set the style for their future'. Varga 1995, p. 75.

[3] See the judgment of 17 December 1997, file No. Pl. ÚS 33/97 (translation by the author). Translations of some important judgments of the CCC are available at http://www.usoud.cz/en/decisions/. I have used the translations available at this website unless indicated otherwise. All decisions in Czech are available at http://nalus.usoud.cz/Search/Search.aspx.

The CCC made the same point already in its first judgment on the Act on the Lawlessness of the Communist Regime:

> However, the [pre-WW II] positivist tradition … in its later development many times exposed its weakness. … in Germany the National Socialist domination was accepted as legal, even though it gnawed out the substance and in the end destroyed the basic foundations of the Weimar democracy. After the war, this legalistic conception of political legitimacy made it possible for Klement Gottwald [the first Communist Czechoslovak president] to 'fill up old casks with new wine'. Then in 1948 he was able, by the formal observance of constitutional procedures, to 'legitimate' the February Putsch. In the face of injustice, the principle that 'law is law' revealed itself to be powerless.[4]

Although these claims are now generally considered overstated in Europe,[5] a growth in the role of the judiciary, 'the least dangerous branch', was none the less supported as a result of such claims. Therefore, a strong judicial power was no longer viewed as a danger to democracy, but rather as an enhancement of democracy. Weak judges came to be considered dangerous for democracy. Moreover, virtually overnight, Eastern Europe joined the trend in which law replaced 'old' ideologies (especially religion, which was already weak in ex-Socialist countries, save some exceptions).[6]

1.1.2 The Czech Constitution includes only organisational matters and almost completely leaves out the substance of fundamental rights. This was caused, at the time of drafting in fall 1992, by political disagreement over the content of the bill of rights. As a sort of compromise, the federal Czechoslovak Charter of Fundamental Rights was reaffirmed as part of the Czech legal system, and the Constitution referred to it as a part of the 'constitutional order'. Despite some initial doubts about the status of the Charter, the CCC applied it effectively as constitutional law. Fundamental rights dominate much of the workload of the CCC. It is therefore fair to say that even though the Constitution itself deals strictly with organisational matters, fundamental rights protection is a central element in the broader constitutional culture of the Czech Republic.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1, 1.2.3 The Czech Constitution enacted in 1992 did not allow for any transfer of competences. At the same time, it maintained, with the exception of the limited

[4] Judgment of 21 December 1993, file No. Pl. ÚS 19/93.

[5] Müller 1991, pp. 220 et seq., claiming that post-war references to positivism served as an excuse for the entire German legal profession: 'These falsehoods and distortions of history were intended to exculpate an entire profession and to discredit the reputation of the democrats on law school faculties' (pp. 222–223).

[6] Generally on the trend in which law replaces old ideologies including religion cf. Badinter and Breyer 2004.

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area of international human rights treaties, the dualist model of the relation between municipal and international law.[7] The first major article criticising the closed attitude of the Constitution to international law and its inability to give a constitutional basis for EU membership was published by Eric Stein in the United States as early as 1994.[8] However, the domestic debate on the future status of international and EU law did not begin before the second part of the 1990s.[9] This reflects the reality of the legal order which originally did not care about international law or the European Union. Instead, the concept of sovereignty was praised at the moment of regaining independence.

In 2001 the Czech Republic enacted the so-called 'Euro-amendment' to its Constitution.[10] Czech politicians preferred a brief and relatively simple clause about the transfer of competences, which is consistent with the generally brief and succinct style of the Czech Constitution (see Sect. 1.1.1 above). Interestingly, the original bill also included a primacy clause for EU law, but after this issue was debated in Parliament, this part of the amendment was omitted, perhaps because of its controversial nature for some Eurosceptic deputies.

The 2001 amendment served two basic functions. First, it made international law directly enforceable within the domestic legal system. Secondly, the amendment made possible the transfer of powers of the Czech state to the EU. Article 10a now reads as follows:

> (1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.
>
> (2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

In addition to this provision, should a treaty mentioned in Art. 10a be ratified by Parliament, Art. 39(4) provides that Parliament must give its consent by a three-fifths majority of its deputies and three-fifths of the votes of senators present. The President cannot veto parliamentary ratification; however, the CCC, prior to the ratification of a treaty, has jurisdiction to decide on the treaty's conformity with the Constitution (Art. 87(2), see also *infra*) and the President is amongst the bodies empowered to bring such an issue to the CCC.

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[7] For details, see Stein 1994 and Stein 1997, pp. 358 et seq.

[8] See Stein 1994. Eric Stein was a Czech émigré and University of Michigan Law School Professor who took part in preparing the Czechoslovak federal constitution in the early 1990s. At the end of the day his work was not used: due to the break-up of the federation, no federal constitution was needed.

[9] The leading figure to have influenced the Czech internationalist doctrine is Jiří Malenovský, who is currently a judge of the European Court of Justice. He was also the most important thinker behind the 'Euro-amendment' to the Constitution in 2001. At that time he was a judge of the Czech Constitutional Court (appointed in 2000, in 2004 he left for the CJEU).

[10] The Constitutional Act No. 395/2001 Sb. (*Sbírka a zákonů*, the Official Gazette). The English version of the Constitution as amended in 2001 is available at http://www.usoud.cz/en/legal-basis/. All translations of the Constitution are taken from this website unless indicated otherwise.

1.2.2 The amendment procedure is addressed in Sect. 1.5.

1.2.4 The Constitution's EU-related provisions, despite their brevity (or because of it?) are now generally considered sufficient and there are no proposals for their further amendment.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Article 10a, quoted supra Sect. 1.2., means that there were essentially two ways to join the EU or to ratify any other treaty which further transferred powers to the EU (such as the Lisbon Treaty). The first was parliamentary consent by a qualified majority of both chambers of Parliament (three-fifths of votes, the so-called 'constitutional supermajority'). The second was approval by referendum. It must be highlighted that the Czech Republic does not have a general law on referendums.

As I have indicated above (Sect. 1.2), the original provision on the supremacy of EU law was not enacted because of doubts among some deputies in Parliament. It was not until 8 March 2006 that the Constitutional Court explained the relation between national and EU law. The case was the *Sugar Quota Case III*, where the question at stake was whether the EU sugar quotas were contrary to the Constitution.[11] In its reasoning, the CCC summarised that the direct effect of EU law and its primacy over national (although not necessarily constitutional) law has its origins in EU law. The national Constitution and its Art. 10a are just the bridge through which EU law flows into the national legal order:

> Direct applicability in national law and the applicational precedence of a regulation follow from Community law doctrine itself, as it has emerged from the case-law of the CJEU [Court of Justice of the European Union]. If membership in the EC brings with it a certain limitation on the powers of the national organs in favor of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to designate the effect of Community law in their national legal orders. Art. 10a of the Constitution of the Czech Republic thus operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously the provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order.

1.3.2 The CCC has interpreted sovereignty and its transfer in a flexible way. This is best visible in two judgments relating to the constitutionality of the Lisbon Treaty. In the first judgment (*Lisbon I*), the Court rebuffed the argument of Eurosceptic president Václav Klaus that the Lisbon Treaty would be incompatible with the sovereignty of the Czech Republic. The Court ridiculed the President's notion (that

[11] Judgment of 8 March 2006, file No. Pl.ÚS 50/04, *Sugar Quota Case III*.

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had been supported at the time by the mainstream Czech scholarship) that sovereignty implies 'independence of the state power from any other power, both externally (in foreign relations), and in internal matters'. Strictly speaking, the Court remarked, no country, not even the United States of America, would fulfil the elements of sovereignty. Sovereignty, in the Court's view, should not be understood only as a rigid legal concept, but

> also as a concept with a practical, moral, and existential dimension. In practice, national sovereignty is always limited by objective conditions, including the reactions of neighboring states. Under these conditions, national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power. In other words, for a nation-state just as for an individual within a society, practical freedom means being an actor, not an object. For a state that is in a tightly mutually interdependent system, practical sovereignty consists in being understood as a player to whom neighboring states listen, with whom they actively negotiate, and whose national interests are taken into consideration.[12]

The CCC also stated that the European Union had advanced by far the furthest in the concept of shared, 'pooled' sovereignty, and at that time already formed an entity *sui generis*, which is difficult to classify under classical political science categories. A key manifestation of a state's sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently.[13]

The Court added in its second Lisbon judgment that this concept is nothing new in Czech political theory and practice. President Klaus criticised the recent and relatively frequent use, but only in 'non-rigorous debate', of the concept of shared sovereignty, which according to the President is 'a contradiction in terms'. Responding to this argument, the CCC quoted from the 1995 memorandum attached to the Czech Republic's application to join the EU, signed by the then Prime Minister Klaus:

> The government of the Czech Republic has irrevocably reached the same conclusion as that reached in the past by today's Member states, that in modern European evolution, the exchange of part of one's own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unavoidable, both for the prosperity of one's own country, and for all of Europe.

Thus, there was no doubt, in the Court's view, that the concept of shared sovereignty had been familiar to leading Czech politicians since the mid-1990s.[14]

1.3.3 The Constitution in its Art. 10a provides for the transfer of 'certain' powers to the European Union. From the text it is clear that it is not possible to transfer *all* of the powers of the Czech Republic. This cannot not happen in any way, including not by referendum.

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[12] Judgment of 26 November 2008, file No. Pl. ÚS 19/08, *Lisbon Treaty I*, para. 107 (referring to David P. Calleo, Rethinking Europe's Future, Princeton/Oxford, at 141, 2001).

[13] Ibid., para. 104.

[14] Judgment of 3 November 2009, file No. Pl. ÚS 29/09, *Lisbon Treaty II*, paras. 147–148.

The Court has faced repeated attempts by Eurosceptic politicians to demand that the Court delineate the powers which can never be delegated to the Union. The CCC has declined to do so. According to the Court, '[t]hese limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion'.[15] The CCC stressed that responsibility for these political decisions cannot be transferred to the judicial branch; the Court can review them only at the point when they have actually been made on the political level.[16] The Court emphasised its judicial restraint and judicial minimalism,

> which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty. … The attempt to define the term 'sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens' once and for all (as the petitioners, supported by the president, request) would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures.[17]

1.3.4 The CCC has never accepted the supremacy of EU law over the national constitution. Quite the contrary, following its German archetype, the Court from the very beginning has emphasised that the Constitution is the supreme law of the land. The primacy of EU law is thus conditional on the fact that EU law must not be in conflict with the basic requirements of the national constitution:

> There is no doubt that, as a result of the Czech Republic's accession to the EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. [This necessarily must influence the meaning of the entire existing legal order], constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with [the unchangeable core of the Constitution]. The current standard within the European Union for the protection of fundamental rights cannot give rise to the assumption that this standard … is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court.[18]

The CCC emphasised that the national constitution shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union. This EU friendly interpretation maxim (itself a constitutional principle) is limited by the range of interpretations possible under the Constitution. Therefore, it shall not be used to amend any express constitutional provision, since '[i]f the national methodology for the interpretation of constitutional law does not

[15] *Lisbon Treaty I*, supra n. 12, para. 109.

[16] *Lisbon Treaty II*, supra n. 14, para. 111.

[17] Ibid., para. 113.

[18] *Sugar Quotas III*, supra n. 11.

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enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution'.[19]

Therefore, EU friendly interpretation is only a soft metarule. It is to be applied if more than one interpretation is possible, with both or all of them being plausible interpretative outcomes of the constitutional text:

> A constitutional principle can be derived from Article 1 para. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes it.[20]

This line of case law was summarised in the second judgment on the Lisbon Treaty. The Court emphasised that

> – it generally recognises the functionality of the EU institutional framework to ensure review of the scope of exercise of transferred powers; however, its position may change in the future if it appears that this framework is demonstrably non-functional;
> – in terms of the constitutional order of the Czech Republic–and within it especially in view of the essential core of the Constitution–what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application;
>
> and finally, that
>
> – the CCC too will (may) – although in view of the foregoing principles – function as an *ultima ratio* and may review whether any act by Union bodies has exceeded the powers that the Czech Republic transferred to the European Union pursuant to Art. 10a of the Constitution. However, the CCC assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding of the scope of conferred competences.[21]

Ironically, it soon became clear that a situation where the CCC would intervene and proclaim EU law *ultra vires* would not necessarily be 'quite exceptional'. From the very beginning one might have wondered what really limits the application of EU law in the Czech Republic. Is it really only a clash with the super-core of the Constitution, those unalterable basic principles that are beyond the power of the legislature? Or is it also the case where the CCC simply reaches a different opinion than the CJEU? I have consistently warned that the overall rhetoric of the CCC,

[19] Judgment of 3 May 2006, file No. Pl. ÚS 66/04, *European Arrest Warrant*, paras. 79–83 (translation on the Court's website revised by the author).

[20] Ibid., para. 61.

[21] *Lisbon Treaty II*, supra n. 14, para. 150, summarising *Lisbon Treaty I*, supra n. 12, partly quoting its para. 120.

despite having its basis in German case law, tends to the latter solution rather than to the former.[22]

This was dramatically confirmed in early 2012 when the CCC for the first time in European history declared a judgment of the CJEU *ultra vires*.[23] The CCC did not struggle to explain why the CJEU was in conflict with the basic core of the Constitution. Rather, it simply remarked that the CJEU judgment was in conflict with the established case law of the CCC. It then condemned the CJEU for ignoring European history.[24] Thus it seems that, using the wording of the CCC itself, 'a situation in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution' and therefore being beyond the scope of the transferred powers (*ultra vires*) could occur anytime the CCC does not like the result of a CJEU judgment. The noble idea of the CCC protecting the national constitution against undue encroachments by EU law turned into the sad reality of the CCC protecting the 'judicial egos' of the respective national constitutional justices.[25]

1.4 Democratic Control

1.4.1 The Constitution is very brief with regard to the rules that govern the participation of the national parliament in the EU decision-making processes. Article 10b merely provides that the Government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic's membership in an international organisation or institution referred to in Art. 10a para. 1. The chambers of Parliament shall give their views on prepared decisions of such international organisation or institution in the manner laid down in their rules of procedure.

The details of parliamentary participation are included in the rules of proceedings of both chambers of Parliament. Here I will give as an example the rules of proceedings of the lower chamber, the Assembly of Deputies.[26] The rules of proceedings state that the Government shall submit draft acts of the EU to the

[22] See Kühn 2004.

[23] At stake was Case C-399/09 *Landtová* [2011] ECR I-05573.

[24] Judgment of 31 January 2012, file No. Pl. ÚS 5/12, *Slovak Pensions XVII* ('Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.').

[25] The judgment received considerable attention in European scholarship. Cf. e.g. Zbíral 2012; Komárek 2012; Bobek 2014; Kühn 2016 (papers written in English by Czech scholars of EU law who are critical of the CCC's judgment). Conversely, on the Czech national level the judgment and its Europe-wide impact was largely ignored, save by a few EU law scholars.

[26] Law No. 90/1995, as amended by law No. 282/2004.

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Assembly via the Committee for European Affairs. The Government shall submit its preliminary opinion on the draft acts. The Government shall submit legal acts of the EU to the Assembly at the same time they are submitted to the Council of the EU. The Government shall also submit other acts and documents of the EU if it so decides or if requested by the Assembly or its bodies (Art. 109a).

Members of the Government might and, if requested by the Committee, must take part in the Committee's deliberation. With the exception of acts or other documents of considerable urgency, the Government shall not adopt its final opinion in the Council deliberations until the procedure in the Chamber pursuant to the preceding paragraphs has been completed (Art. 109b).

In fact, parliamentary control is mostly formal. The sessions of the parliamentary committee are poorly attended, and the deputies generally prefer to sit in the different committees that deal with domestic issues. To many politicians, EU issues seem too difficult and detached from daily political life.

1.4.2 The Czech Constitution is hostile to referendums. It highlights that the people shall exercise their power through the legislative, executive and judicial branches (Art. 2 para. 1) while it does not provide for any referendums. This notion reflects the rightist and conservative political majority of the 1990s which was very cautious with respect to direct democracy. As a result of compromise, the Constitution just briefly mentions the possibility of enacting a new constitutional law on referendums in Art. 2 para. 2. This effectively means that regulation of the issue of referendums was left for a constitutional law with a required supermajority in both chambers of Parliament. Consequently, within the first twenty years of Czech democracy no general law on referendums has ever been enacted.

Article 10a, already discussed above (see Sect. 1.3.1), provides that the ratification of a treaty which transfers certain powers to an international organisation or an institution requires the consent of Parliament, *unless a constitutional act provides that such ratification requires that the approval be obtained in a referendum*. This effectively means that it would be necessary to enact a special constitutional law even to hold a referendum relating to the transfer of powers to the EU. To put it differently, without a new constitutional act on referendums, no referendum can take place.

So far, the only state-wide referendum that has ever taken place in the Czech Republic was the referendum on EU Accession in 2003, based on a special constitutional act enacted only for this specific purpose.[27] The law required the approval of the majority of the participants in the referendum. The referendum took place on 13 and 14 June 2003, with a turnout of 55% of eligible voters, of whom 77.3% voted in favour of accession, and 22.7% voted against.

There has been some debate concerning referendums on some other EU treaties, most notably on the Lisbon Treaty. However, no agreement on the proper mode of ratification of the treaties amending EU primary law has ever been reached. As early as in May 2004, former Czech President Václav Havel criticised the idea of a

[27] No. 515/2002 Sb.

referendum on such a complex document as the Treaty establishing a Constitution for Europe, which was in his opinion unsuitable for wide public discourse.[28] Yet some politicians preferred a referendum on the Treaty, and there were several unsuccessful bills submitted to Parliament to enact either a law on general referendums or on a special referendum on the Constitutional Treaty.

Legal scholarship mostly opposed this referendum. One of the most influential Czech figures in this field, CJEU judge Jiří Malenovský, reasoned that under the Czech Constitution the only constitutional means of ratifying the Constitutional Treaty would be through parliamentary approval. His argument was that the Treaty was more an authoritative restatement of EU law than a novel document. Taking into account the then recent referendum on EU accession, the proposed referendum was 'highly problematic from the point of view of its constitutionality',[29] while a consultative referendum would be a 'possible way of reconciliation of constitutional requirements with political demand'.[30]

After the failure of the Constitutional Treaty in France and the Netherlands in 2005, the Czech debate on the ratification slowly died away. The Lisbon Treaty was subsequently ratified without a referendum, based on the approval of a constitutional supermajority in Parliament. The former opposition party, the Civic Democrats (ODS), who in the meanwhile became the senior coalition party of a new centre-right Government, were not excited about the Lisbon Treaty. They rather emphasised that it was a result of a rational compromise. Most of the Civic Democrats did not insist on a referendum. They emphasised that unlike the Constitutional Treaty (which they opposed), the most important difference in the Lisbon Treaty was that it lacked any constitutional symbols and, as such, did not aspire to create 'a European superstate'.[31] Upon signing the Lisbon Treaty on behalf of the Czech Republic, Czech Premier Topolanek (ODS) said that he personally would prefer ratification by Parliament. The Treaty, in his opinion, did not interfere with the Constitution, thus no referendum was needed. Some of his party members were more reserved, however, as they emphasised that the issue of constitutionality of the Treaty must be resolved by the Constitutional Court.[32] The only political party that called for a referendum was thus the Czech Communist Party.

To summarise, it is fair to say that the role of referendums with respect to the EU has been close to zero, if we set aside the initial vote on EU accession.

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[28] See Kramer, A. (2004, May 15), *Nahrážkové vlastenectví hospodských fanoušků je mi cizí, říká Václav Havel* (I do not share the fake patriotism of our pub guys, Václav Havel says). Právo. http://www.vaclavhavel.cz/showtrans.php?cat=rozhovory&val=1557_rozhovory.html&typ=HTML).

[29] See Malenovský 2005, p. 350.

[30] Ibid., p. 357 (translation by the author).

[31] Cf. the article by Deputy Premier of the Czech Government responsible for European matters: Vondra, A. (2007, October 19) *Evropský sňatek z rozumu* (European marriage out of reason). Hospodářské noviny. http://archiv.ihned.cz/c1-22254960-evropsky-snatek-z-rozumu.

[32] See the opinion of the leadership of ODS of 20 October 2007, available at www.euroskop.cz.

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1.5 The Reasons for, and the Role of, EU Amendments

As I have already indicated, the Constitution has only one EU amendment from 2003, which is very limited in its scope. EU matters are regulated by only two very short articles (Art. 10a and 10b, already discussed above). The reason for this brevity is above all the Czech constitutional culture. The Constitution of 1992 was written in simple language, and was originally composed of 113 provisions (articles). The brevity of the Constitution is appreciated by many scholars, including this author. The EU amendment thus fits the general image of the Constitution.

In addition, it is hard to amend the Constitution: the approval of three-fifths of all deputies (120 out of 200) and three-fifths of senators present (the number of senators is 81) is required. Thus, amendments to the Constitution are rare. Interestingly, after 2003, no amendments related to EU law have been seriously debated.

Last but not least, the Eurosceptic nature of Czech politicians might have also played a role in the final version of the EU amendment. As I have already noted above, the original draft submitted by the EU-friendly Government in 2003 also included a clause on primacy of EU law. This was eventually dropped during the debate in the Assembly of Deputies, perhaps because of the distaste of many deputies over the fact that EU law has priority over national law and the ambiguity of this relation with respect to the national constitution.

I do not think that the brevity of the Constitution with respect to the EU is necessarily bad or that it would make the Constitution somewhat obsolete. First, the Czech Republic is not unique among the EU Member States. Although both France and Germany do have detailed provisions on the EU and its functioning, many other states have much shorter provisions on the same issue (Spain, Italy, etc.). In the Czech Republic, the scholarly reason for this is that the functioning of the EU is something which is to be dealt with by EU treaties, whereas the Constitution is to deal with domestic issues and procedures. It is useless for the Constitution to regulate issues regarding the functioning of the EU, its effects on national law, etc. This has also repeatedly been emphasised by the CCC.[33] From its case law, it does not appear that the short constitutional text makes the CCC powerless with respect to EU law. The CCC has always described its role as that of the guardian of the

[33] See already *Sugar Quotas III*, supra n. 11. In debating what the basis is for direct effect and primacy of EU law, the CCC remarked that those doctrines must not be fixed in the national constitution because they are flexible on the EU level. Thus the CCC applauded the approach of the national constitution which did not 'permanently fix doctrine as to the effects of Community law in the national legal order'. The competence to control the flexible development of these doctrines is, however, at the end of the day vested in the CCC itself. For the sake of argument, I shall add that in debating this issue, I am not entirely neutral. This has been the thesis I have supported for a long time, and the CCC openly took over my claim in *Sugar Quotas III*, quoting my earlier articles on this issue.

bridge through which the domestic constitution allows EU law to enter the national legal system.[34] Last but not least, concerns about the Constitution's brevity with respect to the EU are almost completely missing from the Czech legal discourse.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Czech Constitution itself deals only with the organisational matters of the state and the separation of powers. While drafting the constitutional text in the summer of 1992, the founding fathers intentionally left fundamental rights out of the Constitution. The reason was a sharp disagreement over social rights in the Constitution. As a sort of compromise, the Czechoslovak Charter of Fundamental Rights of 1991 was separately reaffirmed as being part of the Czech legal system, and the Constitution referred to it as the part of the 'constitutional order'. In reality, this technicality does not really matter, as the Charter has equal force with the Constitution itself.

The text of the Charter has been influenced by a plethora of European and international constitutional texts, most importantly by the European Convention on Human Rights. It includes all traditional fundamental and political rights as well as social rights. The general principles of law which are not expressly codified (e.g. legal certainty and legitimate expectations, non-retroactivity, proportionality) have been interpreted by the CCC as arising from the Constitution and now form an undisputed part of the Czech constitutional system. The Constitution itself declares that fundamental rights are subject to judicial protection (Art. 4) which makes constitutional rights and general principles enforceable through courts. This self-executing nature of fundamental rights seems to be an inviolable part of the Constitution, beyond the reach of the constitution-maker.[35]

2.1.2 The issue of defining the restrictions which can be imposed on rights has been much debated by the framers of the Charter in 1990 and 1991. The result is the mixture of a general provision on limitation combined with specific restrictions included in special provisions on individual rights.

The general provision (Art. 4 of the Czech Charter) provides that limitations may be placed upon fundamental rights and freedoms only by law and under the conditions prescribed in the Charter. Any statutory limitation upon fundamental rights and freedoms must apply in the same way to all cases which meet the

[34] Cf. especially the (in)famous Judgment of 31 January 2012, file No. Pl. ÚS 5/12, *Slovak Pensions XVII,* declaring the CJEU's judgment *ultra vires*.

[35] See especially Judgment of 25 June 2002, file No. Pl. ÚS 36/01 in which this has been associated with centralised review of legislation.

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specified conditions. When employing the provisions concerning limitations upon fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.

Certain specific fundamental rights provisions have separate limitation clauses. For instance, the right to free exercise of religion may be limited by law in the case of measures necessary in a democratic society for the protection of public safety and order, health and morals, or the rights and freedoms of others (Art. 16 of the Czech Charter). Provisions on other rights simply refer to the law as the source of limitations (like the right to confidentiality of correspondence in Art. 13 of the Czech Charter), which are of course subject to the general limitation set out in Art. 4. Some rights are defined as unconditional and subject to no limitations (for instance the ban on torture and cruel, inhuman or degrading punishments).

2.1.3 The Constitution is based on the principle of the rule of law (in Czech *právní stát*, a concept identical to *Rechtsstaat*). Indeed, this is the very first principle of the Constitution, mentioned already in Art. 1. The CCC has been framing this principle from the very beginning. Already in its first, 'foundational' judgment which dealt with transitional issues and the punishment of Communist crimes, the CCC emphasised that the rule of law principle was not only about formalities, but also had an important substantive and value-laden content. The substantive content was based, above all, on the requirements of human rights protection, the impossibility to derogate from fundamental rights provisions and respect for human dignity. This 'substantive rule of law' principle is in stark contrast with the formal conception of the rule of law prior to 1945:

> Our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society. … Positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of 'old laws' there is a discontinuity in values from the 'old regime'. This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state. Whatever the laws of a state are, in a state which is designated as democratic and which proclaims the principle of the sovereignty of the people, no regime other than a democratic regime may be considered as legitimate.[36]

The rule of law principle is justiciable and is often used by the Constitutional Court. In fact, in the argumentation of the Court it often serves (together with the due process clause) as a default maxim, if more concrete provisions are not applicable to the case at hand. Moreover, it also serves as a starting point for the deduction of more concrete requirements. Thus, the CCC has inferred the general ban on retroactivity, the principle of legal certainty and legitimate expectations, etc.,

[36] Judgment of 21 December 1993, file No. Pl. ÚS 19/93, *Lawlessness of the Communist Regime.*

from the rule of law principle. Non-retroactivity is part of the inviolable core of the Constitution (even though there are some limited exceptions to the strict ban on retroactivity in Czech law). According to the Court,

> [t]he basic principles defining a law-based state include the principle of protecting the confidence of citizens in the law, and the related principle of the prohibition on retroactivity of legal norms. … Thus, with true retroactivity, a lex posterior annuls (does not recognize) legal effects at a time when a lex prior was in effect, or calls forth or connects the rights and obligations of subjects with facts that were not legal facts when the lex prior was in effect.[37]

Similarly, the notion that only published laws can be applicable is one requirement of the rule of law. Czech courts seem to be very formalistic in this regard (see for more detail Sect. 2.5 below).

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 According to the CCC's early case law, fundamental rights could be limited without an explicit constitutional provision only because of another conflicting fundamental right. As the CCC declared in its first important judgment on this issue:

> Fundamental rights and basic freedoms may be restricted, despite the fact the constitutional text makes no provision therefor, only in the case that two such rights come into conflict with each other. There is a rudimentary maxim that a fundamental right or basic freedom may be restricted only for the sake of another fundamental right or basic freedom. Should the Court reach the conclusion that it is reasonable to give priority to one of the two conflicting fundamental rights, it is necessary, as a condition of the final decision, to take all possible steps to minimize the impingement of one upon the other. This principle can be inferred from Article 4 para. 4 of the Charter of Fundamental Rights and Basic Freedoms, (1) namely to the effect that fundamental rights and basic freedoms must be preserved not only when applying provisions on the limits of the fundamental rights and basic freedoms, but also analogously in the case that they are bounded as the result of a conflict between two rights.[38]

Later, the CCC accepted that a compelling public interest (public good) might provide another legitimate reason for a limitation of a fundamental right without an explicit constitutional basis.[39]

Generally, the CCC gives priority to classical fundamental rights in its case law. The weight given to conflicting protection of the public good and economic considerations seems to be much weaker. Yet I have not noticed a direct clash with CJEU case law. The closest issue was the saga regarding sugar quotas. In its earlier

[37] See Judgment of 10 September 2009, file No. Pl. ÚS 27/09, *Melčák,* part VI/b. (summarising its earlier case law).

[38] Judgment of 12 October 1994, file No. Pl. ÚS 4/94, *Anonymous Witness*.

[39] Judgment of 21 March 2002, file No. III.ÚS 256/01, *Recognition.*

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case law prior to EU accession, the CCC was generally willing to rule against the constitutionality of sugar quotas as provided by national legislation. After the 2004 accession, this line of case law came into conflict with the CJEU's case law, which generally approved various types of EU quotas, including sugar quotas. The CCC openly acknowledged the force of CJEU case law and overruled its previous jurisprudence:

> After full consideration of the constant jurisprudence of the CJEU and the CCC's own current jurisprudence, the CCC weighed whether this case does not present facts which would justify a departure from the CCC's existing holdings. As was already mentioned above, there is no doubt that, as a result of the Czech Republic's accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. …
>
> In other words, in the case currently before it, as far as concerns measures of an economic nature pursuing an aim that flows directly from the Community policy of the EC, the Constitutional Court cannot avoid the conclusions which flow directly from the case-law of the CJEU and from which a definite principle of constitutional self-restraint can be inferred. For that matter, the Constitutional Court was also aware of this point when it adopted judgment No. Pl. US 39/01, since it stated in its reasoning that, as concerns the extent of its review powers, such a conclusion may not be reached which would afterwards present an obstacle to the Czech Republic's membership in the European Union, albeit by its holding it traversed that self-restraint to a certain extent.[40]

Apart from this case, the balancing of fundamental rights with economic free movement rights has not yet raised any real dilemma in the CCC's jurisprudence.[41] Thus it is difficult to say whether the national courts have adjusted their balancing to match the CJEU's approach. Potentially, however, this balancing represents future potential conflict between the CCC and the CJEU.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

The relevant provisions are contained in Chapter 5 of the Czech Charter of Fundamental Rights entitled 'The Right to Judicial and other Legal Protection'. The main provisions include the following:

> Article 36
>
> (1) Everyone may assert, through the prescribed procedure, her rights before an independent and impartial court or, in specified cases, before another body.

[40] *Sugar Quotas III*, supra n. 11.

[41] I have already discussed the case proclaiming the CJEU's judgment *ultra vires*. See Sect. 1.3.4. But I do not view this case as balancing fundamental rights against economic freedoms. There is nothing like this mentioned in the short judgment of the CCC. Instead, the case seems to be a simple insistence by the CCC of its previous case law without even discussing conflicting economic interests stemming from EU legislation relating to EU-wide pensions.

(2) Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and freedoms listed in this Charter may not be removed from the jurisdiction of courts.

(3) Everybody is entitled to compensation for damage caused her by an unlawful decision of a court, other State bodies, or public administrative authorities, or as the result of an incorrect official procedure.

…

Article 37

…

(2) In proceedings before courts, other State bodies, or public administrative authorities, everyone shall have the right to legal assistance from the very beginning of such proceedings.

…

(4) Anyone who declares that she does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter.

Article 38

(1) No one may be removed from the jurisdiction of her lawful judge. The jurisdiction of courts and the competence of judges shall be provided for by law.

(2) Everyone has the right to have her case considered in public, without unnecessary delay, and in her presence, as well as to express her opinion on all of the admitted evidence. The public may be excluded only in cases specified by law.

Article 39

Only a law may designate which acts constitute a crime and what penalties, or other detriments to rights or property, may be imposed for committing them.

Article 40

(1) Only a court may decide on guilt and on the punishment for criminal offences.

(2) A person against whom a criminal proceeding has been brought shall be considered innocent until her guilt is declared in a court's final judgment of conviction.

(3) The accused has the right to be given the time and opportunity to prepare a defence and to be able to defend herself, either pro se or with the assistance of counsel. If she fails to choose counsel even though the law requires her to have one, she shall be appointed counsel by the court. The law shall set down the cases in which the accused is entitled to counsel free of charge.

…

(5) No one may be criminally prosecuted for an act for which she has already been finally convicted or acquitted. This rule shall not preclude the application, in conformity with law, of extraordinary procedures of legal redress.

(6) The question whether an act is punishable or not shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed. A subsequent law shall be applied if it is more favourable for the offender.

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2.3.1 The Presumption of Innocence

2.3.1.1 Various issues relating to the constitutionality of the European Arrest Warrant (EAW) have been raised in the Czech Republic. However, as far as I know, there have been no concerns with regard to the presumption of innocence. I think this is because persons subject to any criminal proceeding have some disadvantages compared with people who are not under investigation or prosecution. The presumption of innocence does not go so far as to require that nothing uncomfortable can happen to anyone unless there is a guilty verdict. Surrender of a person suspected of a crime to a requesting country can therefore hardly collide with this principle. Moreover, those who would argue otherwise are trapped in a circular argument: a person cannot be treated to his disadvantage unless some formal decision has been made, but in fact a formal decision supported by some hard facts has been made by the requesting country.

2.3.1.2 It is hard to say what the prevailing practice for judges is with respect to the EAW. In some cases they indeed just rubber-stamp extradition requests. On the other hand, a suspect is granted procedural rights to defend himself or herself against surrender. In reality, it depends on the suspect to what extent he or she is willing to fight surrender or whether, in contrast, the person agrees to be surrendered to the requesting state (in which case a shortened procedure according to Art. 413 of the Code of Criminal Procedure follows).

An assessment of how the courts handle specific cases can be made based on the statistics. For instance, in 2006 the Czech Republic received 99 EAW requests and surrendered 49 persons. Of these 49, 34 persons agreed to the surrender and 15 disagreed. In 2007, there were 176 EAW requests and 108 persons were surrendered. Of those surrendered, 81 agreed to the procedure. That the courts do not just rubber-stamp requests is illustrated by the fact that in 2006 and 2007, Czech courts refused to surrender 11 persons.[42]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 Unlike the presumption of innocence, abolition of the rule of double criminality caused a lot of debate in the Czech Republic. Lifting the double criminality rule seems after all to be one of the most controversial novelties introduced by the EAW Framework Decision.[43] When Eurosceptic deputies

[42] See the statistics of the Ministry of Justice available at www.justice.cz.

[43] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1, Art. 2(2), covering a very broad list of vaguely named offences which are not subject to double criminality including 'computer-related crimes' and 'racism and xenophobia'. For instance, Tomuschat calls this a 'list of horrors'. See Tomuschat 2006, p. 218. Personally, I find the explanation of Advocate General Colomer far from satisfactory on this point. See the Opinion of Advocate General Colomer of 12

challenged the national implementation of the EAW Framework Decision, they also criticised the fact that the law derogated from the double criminality rule and thus endangered the *nullum crimen sine lege* principle. The CCC rejected their argument while trying to interpret EU law in a manner which would be consistent with the Constitution. At the same time, the elimination of the double criminality requirement was overcome by ostensible formalism:

> The enumeration of criminal offences which do not require dual criminality is not given due to the fact that it would otherwise be presumed that some of these categories of conduct do not qualify as criminal offences in one or more of the Member States; rather the exact opposite, that *it is conduct which, in view of the values shared by the EU Member States, is criminal in all of them*. The reason for enumerating them in this fashion is to speed up the execution of European Arrest Warrants, as the proceeding for ascertaining the criminality of such acts under Czech law has been dropped. In addition, in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct coming within the categories defined in this way will also be criminally prosecuted.[44]

At first glance, the Czech Constitutional Court's premises relating to the degree of harmonisation of substantive criminal law are plainly wrong[45] and even contrary to the opinion of the Court of Justice.[46] Another reading of that provision might be, however, that this claim is not descriptive but rather normative. This reading is confirmed by the Czech Constitutional Court's concession 'that, under quite exceptional circumstances', the application of the EAW might be in conflict with the Czech Constitution, especially if the offence 'would qualify as a criminal act under the law of the requesting state, but would not qualify as such under Czech criminal law, and perhaps would even enjoy constitutional protection in the Czech Republic (e.g. within the framework of the constitutional protection of free expression)'. Then the arrest warrant would not be executed.[47]

This conclusion, however, raises more questions than it settles. What would happen, for instance, if a person who was arrested for a crime regarding which dual criminality shall not be verified were to argue that the crime did not have a Czech equivalent? The CCC does not explicitly say. I suppose that such a case would force the Czech authorities to check double criminality; its absence would perhaps

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September 2006 in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633, paras. 100–107. The Court in the same case touched upon the issue in its judgment even less satisfactorily.

[44] Czech *European Arrest Warrant* case, supra n. 19, para. 103 (emphasis added).

[45] See for a very different logic the *European Arrest Warrant Act case* of the Federal Constitutional Court of Germany, BVerfG, 2 BvR 2236/04 – vom 18.07.2005, Rn. (1–203), available at http://www.bverfg.de/entscheidungen/rs200507182bvr223604.html, para. 77, emphasising that 'the cooperation that is put into practice in the 'Third Pillar' of the European Union in the shape of limited mutual recognition, which *does not provide for a general harmonisation* of the Member States' systems of criminal law, *is a way of preserving national identity and statehood* in a single European judicial area' (emphasis added).

[46] Cf. C-303/05 *Advocaten voor de Wereld*, supra n. 43, para. 52: 'The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.'

[47] The Czech *European Arrest Warrant* case, supra n. 19, para. 114.

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establish a ground for refusal to surrender because of conflict with the Constitution. Whether this would only be the case vis-à-vis distance offences (i.e. acts committed within Czech territory but investigated abroad), as the Court seems to point at, or also with regard to some offences committed abroad, remains to be seen (e.g. an improbable case where Ireland would seek the surrender of a Czech woman who underwent an abortion in Ireland, for the crime of homicide).

The problem of double criminality was in some countries at least partly solved by the legislature (for instance in Germany as instructed by the German Constitutional Court).[48] In contrast, the CCC attempted to solve this problem but its decision stopped short of any clear statement. However, it seems fair to say that the principle of *nullum crimen sine lege, nulla poena sine lege* is granted the same level of protection as before, at least for actions committed on the territory of the Czech Republic, thanks to the judgment of the CCC. The CCC clearly indicated that in actions committed at home and investigated elsewhere execution of an EAW might be refused on constitutional grounds.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Foreign *in absentia* criminal judgments could hardly raise constitutional issues in the Czech Republic, as the Czech Code of Criminal Procedure recognises this type of judgment as well. Article 302 et seq. of the Code gives prosecutors the power to initiate proceedings against an accused person as a fugitive if he or she avoids criminal proceedings by being abroad or in hiding. In such cases the accused person must be represented by an attorney. If the person appears before the Czech authorities after the final guilty verdict has been made, the person has the right to a new trial (which will take place if the person requests it). A new trial will also be granted if an international treaty so requires.

However, if a person who is about to be surrendered were to argue that he was sentenced *in absentia* in the requesting country and no new trial could be granted there, this would very likely provide a good ground for a constitutional complaint. This is even more likely if one considers the willingness of the CCC to protect (through envisioned judicial review of the constitutionality of individual arrest warrants) both the trust of Czech citizens in Czech law *and* the trust and legal certainty of 'other persons, authorized to stay within the territory of the Czech Republic'.[49]

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[48] The German Federal Constitutional Court addressed the problem of lifting the double criminality rule extensively. The legislature shall ensure that '[c]harges of criminal acts with such a significant domestic connecting factor are, in principle, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens'. The German *European Arrest Warrant case*, supra n. 45, para. 85.

[49] The Czech *European Arrest Warrant*, supra n. 19, para. 113. One cannot but compare this part to a dissenting opinion by Justice Lübbe-Wolff in the corresponding German case, especially part

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The Czech Republic does not provide any assistance beyond standard consular assistance to its surrendered or extradited citizens or residents. On the other hand, Czech law is rather generous towards persons who do not speak Czech in the course of criminal proceedings (the right to an interpreter, the right to receive a translation of the court's reasoning, the right to an attorney for persons of low income, etc.). It is very likely that the Czech legal system simply expects the same to be provided to persons surrendered under an EAW.

I am not aware of any NGOs that provide assistance to persons extradited from the Czech Republic. In fact, the number of nationals surrendered pursuant to an EAW (outside the scope of an EAW, no national can be extradited) is very low.

I do not think that any state assistance to residents who are involved in trials abroad is needed. Instead, I would rather prefer an increase in the common procedural rights for foreigners in EU Member States.

2.3.4.2 Compensation for persons who have been tried and subsequently found innocent has been a sensitive issue in many high-profile domestic criminal proceedings. In contrast, with respect to the EAW, the Czech authorities have indicated that so far no such claims have been made.[50]

Media coverage of EAW application is light. According to what I have read in both the printed and online media, most reports just consist of information about someone surrendered based on an EAW. As such, these surrenders are 'success stories'. I have never read anything about someone who was surrendered and later acquitted.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.3 With regard to mutual recognition of civil judgments, the Czech Constitutional Court has already held that their recognition is not automatic. In fact, fulfilment of the basic constitutional principles of fair trial by a foreign court is indispensable for the recognition of its judgment according to Council Regulation 44/2001.[51] In one case the complainant, a Czech corporation, lost a lawsuit in Italy. The Italian court decided that the Czech corporation must pay 16,686 EUR plus

1.(a) of her dissenting opinion, where the said Justice criticised the majority for protecting German nationals only and ignoring the legitimate expectations of others.

[50] See for instance http://register.consilium.europa.eu/doc/srv?l=CS&f=ST%2015691%202008%20REV%202.

[51] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

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interest. The Italian judgment was recognised by the Czech courts, despite the fact that the complainant argued that the Italian court ignored the corporation's motions, did not order hearings and decided the case without allowing the Czech party to be heard. Although the Czech civil court rebuffed these arguments, the CCC disagreed. It highlighted:

> Insisting on the protection of fundamental rights is without any question one of the very basic principles of the Czech legal order. In other words, recognition of a decision which does not comply with human rights protection would be in conflict with the public order of the Czech Republic and at the end of the day with the constitutional order of the Czech Republic.[52]

The CCC therefore quashed the judgment of the civil court and ordered the civil court to consider the reasons claimed by the complainant for not recognising the Italian judgment. Although the judgment of the CCC might seem to be a principled defence of fundamental rights on the EU level, it opens Pandora's box, in my opinion. It effectively pushes the Czech civil courts into scrutinising the lawfulness of the procedure before the foreign court. I am wondering on what basis and how a Czech court could review the procedural steps of the court of another EU Member State.

In the same way, but much more vigorously, the CCC emphasised the role of law courts in protecting nationals and others against (however it would be *unlikely*, in the view of the CCC) abuse of the EAW. The CCC was in a different position than the German Constitutional Court because the Czech act did not exclude judicial review of the decision to surrender. The CCC founded the ultimate justification of its decision on this fact and held that although the implementation of an EAW is not unconstitutional as such, individual arrest warrants might be unconstitutional in exceptional cases due to conflict with the Constitution,[53] as predicted by Art. 377 of the Code of Criminal Procedure.[54]

Considering the previous examples, and because the CCC reserves the right to have the ultimate word in exceptional (unconstitutional) situations, I do not think that the principle of the rule of law is no longer fully granted the same level of protection as prior to the introduction of the mutual recognition rule in criminal law

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[52] Judgment of 25 April 2006, file No. I. ÚS 709/05.

[53] Paragraph 115 of the Czech *European Arrest Warrant* case, supra n. 19, 'Even though the contested provisions … might be applied in an unconstitutional manner, such a hypothetical and unlikely situation does not provide grounds for their annulment. [The Court's case law says] that "theoretically every provision of a legal enactment can naturally be applied incorrectly, hence even in conflict with constitutional acts, which in and of itself does not constitute grounds for the annulment of a provision which can conceivably be incorrectly applied". [The purpose of this proceeding] is not, however, to resolve every single hypothetical situation which has not as yet come to pass, even though it may occur at some point [because] it would … supplant the protection of fundamental rights which, in the nature of things, the ordinary … courts must also provide.'

[54] According to Art. 377 of the Criminal Procedure Code, the request of a foreign state's organ may not be granted if, inter alia, this would constitute a violation of the Constitution of the Czech Republic.

and the abolition of the exequatur in civil and commercial matters. Moreover, in my view, removing old-fashioned obstacles in criminal co-operation between states serves justice better than did the previous lengthy procedures.

2.3.5.4 I would personally disagree with any legal amendment which would make surrender or recognition of civil judgments more difficult. In my opinion, this very nature of the EU with its free movement of people, goods, services and capital requires that the old notions of state supremacy and difficult cross-border legal arrangements must be abandoned in favour of more efficient and speedy procedures. Moreover, similar ideas have been put forward by the CCC as well. The Court rightly reasoned that if one enjoys EU rights of movement, the exercise of those rights must also entail some responsibilities.[55] This idea is in my view also fully applicable to civil law. If one does not travel or does not engage in business with a foreign partner, one need not worry about the EAW or foreign civil judgments being imposed.

Last but not least, we must not forget the rights of victims. Criminal proceedings are after all not only about the protection of accused persons. The legitimate rights and interests of victims should also be considered.[56]

2.4 The EU Data Retention Directive

2.4.1 The EU Data Retention Directive 2006/24[57] or, to put it better, its national implementation, has seen a constitutional challenge also in the Czech Republic. The

[55] Cf. Czech *European Arrest Warrant* case, supra n. 19, paras. 70–71:

'70. It cannot be overlooked that the current period is connected with an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU, which places new demands on the arrangements for extradition within the framework of the Union. A qualitatively new situation exists in the EU. Citizens of the Member States enjoy, in addition to the rights arising from citizenship in their own state, also rights arising from EU citizenship, which guarantees, among other things, free movement within the province of the entire Union. …

71. If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. …'

[56] Cf. Czech *European Arrest Warrant* case, supra n. 19, para. 96: 'It can generally be said that, in view of the evidence that will be found in the state where the criminal act occurred, a criminal proceeding there will be quicker, more effective and, at the same time, more reliable and just both for the defendant and for any victim of the criminal act.'

[57] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

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action was brought to the Constitutional Court by a group of deputies of the lower chamber. They argued that the retention of data on communication constitutes interference with the private life of persons whose data are stored, and that such data, moreover, are vulnerable to potential abuse or misuse.

The CCC based its lengthy and somewhat chaotic reasoning mostly on the previous judgment of its German counterpart.[58] First, the CCC rejected the option of making a preliminary reference to the Court of Justice. In the CCC's view, the content of the Data Retention Directive provided the Czech Republic with sufficient room to implement it in conformity with the constitutional order, since its individual provisions in fact only define the obligation to retain data. For the purposes of implementation, the objective defined by the Directive must be met, but Czech law must also follow the domestic constitution.[59] To put it differently, the problem of constitutionality lay in the national implementation, not within the Directive itself.

With regard to the merits of the case, the CCC first criticised the domestic implementation for its vagueness[60] including the vaguely defined purpose for which traffic and location data are to be provided to the competent authorities (the limitation of privacy shall not be made through vague and unclear provisions).[61] The Court criticised the vague law for providing incentive to use requests for data even in less serious crimes. For instance, in 2008, the total number of criminal offences recorded on the territory of the Czech Republic amounted to 343,799, while at the same time the number of requests to provide traffic and location data made by the competent public authorities reached 131,560.[62] The CCC concluded:

> The legal regulation contested by the applicant fails to define sufficiently, or fails to define at all, unambiguous and detailed rules containing minimum requirements concerning the security of the retained data, in particular, taking the form of restricting third-party access, the procedure of maintaining data integrity and credibility, or the removal procedure. Furthermore, the contested regulation does not provide individuals with sufficient guarantees against the risk of data abuse and arbitrariness. … the need to have such guarantees available is becoming even more important to the individual owing to the current enormous and fast-moving development and occurrence of new and more complex information technologies, systems and communication tools, which unavoidably results in the borders between private and public space being blurred to the benefit of the public sphere, since in the virtual environment of information technologies and electronic communications (in the so-called cyberspace), every single minute, especially owing to the development of the Internet and mobile communication, thousands or even millions of items of data and information are recorded, collected and virtually made accessible, interfering with the

[58] Judgment of the Federal Constitutional Court of Germany, BVerfG, 1 BvR 256/08 of 02.03.2010, Rn. (1–345), available at http://www.bverfg.de/e/rs20100302_1bvr025608.html.

[59] Judgment of 22 March 2011, file No. Pl. ÚS 24/10, *Data Retention in Telecommunications Services*, para. 25.

[60] Ibid., para. 46.

[61] Ibid., paras. 47–48.

[62] Ibid., para. 49.

private (personality) sphere of the individual, yet if asked, they would probably be reluctant to knowingly let someone else in.[63]

What is more interesting, in an *obiter dictum* the CCC expressed its doubt that the very existence of the instrument of global and preventive retention of location and traffic data on almost all electronic communications is justified. It referred to similar criticism in other European countries. The CCC also doubted whether it could be an effective tool, mainly due to the existence of so-called anonymous SIM cards, which in up to 70% of cases are used to commit a criminal offence. Last but not least, the CCC doubted whether it was at all desirable that private persons (service providers) should be entitled to retain all data on the communications provided by them, as well as on customers to whom services are provided.[64]

This part of the CCC's judgment, being *obiter dictum* only, is not, however, binding. Moreover, it has been met with severe criticism from leading Czech experts on IT law.[65] Furthermore, the public mood, supported by several high profile cases in which the retention of telecommunications data helped to find the perpetrators of violent crimes, seems to be in favour of some sort of data retention. Similarly, the police have lamented their lack of power to obtain data, which could help only criminals. Accordingly, the legislature reacted swiftly, adopting an amendment to the law which made the rules more detailed as required by the CCC. The fact that the Court of Justice later found part of the Directive to be unlawful[66] does not have a direct impact on the Czech law.

2.5 *Unpublished or Secret Legislation*

2.5.1 The insistence on officially published law is one of the primary features of civil law countries.[67] Publication is the ultimate step in making law valid. It is also one of the key principles of the Czech legal order (see also Sect. 2.2 above). It was after all a Czech court which initiated the CJEU's *Skoma-Lux* case.[68]

The CJEU's approach, according to which unpublished law is not invalid (or even null or non-existent) but rather inapplicable, is more pragmatic than the traditionalist approach. The Czech courts live well with this approach. Expanding on *Skoma-Lux* further, the Supreme Administrative Court held that the fact that the act of EU law had not been published at the moment when the customs tax was due had

[63] Ibid., para. 50.

[64] Ibid., paras. 55–57.

[65] See Polčák 2012, p. 363.

[66] Joined cases C-293/12 and Case C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[67] Actually, such an approach would be too formalistic or even shocking for a lawyer coming from a common law tradition. See Damaška 1968.

[68] Case C-339/09 *Skoma-Lux* [2010] ECR I-13251.

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to be taken into account by the courts *ex officio*, even though none of the parties made this argument (and even though it was actually clear that the complainant knew the disputed law very well).[69] This approach, however, following *Skoma-Lux*, shall be used in pending cases only. It is therefore not applied to cases where final decisions have been made.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 The most important cases dealing with the impact of EU law on the national standard of protection of property rights in the adjudication of the validity of EU measures or measures implementing EU law in the field of market regulation are the numerous cases dealing with various quotas imposed by EU law on national producers.

The CCC has dealt with sugar and milk quotas in a series of judgments, with the first dating back long before EU accession. Whereas some of its earlier judgments seemed to be more in favour of property rights and the right to do business unrestrained by any governmental regulation, post-accession case law has changed in direction. In March 2006 the CCC summarised the approach taken by the Court of Justice in relation to quotas, emphasising that

> [i]n the field of the Common Agricultural Policy, and especially as regards the setting of production quotas, there is such an extensive, consistent and long-term settled case-law of the CJEU as to, without any doubt, enable the Constitutional Court to review the key to the allocation of the production quotas from the perspective of national constitutional law interpreted in light of Community law itself, or in light of its conformity with the general principles of Community law. In that process, the Constitutional Court allows the general principles of Community law, expressed in the existing CJEU jurisprudence, to radiate through its interpretation of constitutional law.[70]

The CCC approved the high margin of discretion left by the CJEU to the Union legislature; indeed, as regards the principle of proportionality, it noted that fundamental rights may be subject '*even to significant limitation*'. The Court then referred to its own previous judgments in the field of production quotas. These might be considered '*excessive*' because the Constitutional Court ventured out onto the relatively 'thin ice' of assessing economic quantities, which it later projected onto its constitutional law assessment. Therefore, in the case currently before it, the

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[69] Judgment of the Supreme Administrative Court of 18 June 2008, file No. 1 Afs 21/2008, *TV PRODUCTS CZ, s.r.o.* Therefore the outcome of the case was that the customs tax was imposed on the complainant facing a complete absence of the law. Note that I was the judge-rapporteur of this case.

[70] *Sugar Quotas III*, supra n. 11.

CCC did not consider itself competent to examine the actual key for the allocation of quotas in the abstract. I find this new approach more persuasive than the older approach which guided the CCC to review the complex math formulas for the quota allocation.[71]

The Court's judgment does not, however, mean that unconstitutional situations would not be remedied by the courts. The Court 'does not rule out the possibility that the ordinary courts address, in specific cases of individual producers, the fairness of this key, assuming that specific facts will be established on the basis of which such inequality is alleged'.[72]

This approach has been followed in many subsequent cases, whether governed by EU law or not. It effectively means that in making complex economic policies, the legislature shall have a wide margin of appreciation.[73] This was the case in the past as well. This was after all exactly what the CCC tried to say when it noted that its earlier judgment was in conflict with its own case law. As early as 1997, the CCC was willing to take the interpretation of EU antitrust law by the European bodies into account as a valuable source for the interpretation of national law. That is why the CCC confirmed the constitutionality of the decision of the Ministry of Finance and of the ordinary court.[74] Later, the CCC has deepened this logic. In 2001 in a case dealing with the possibility of the executive power to impose quotas on producers of milk, the senators claimed that this was a breach of the right to free enterprise. The Constitutional Court denied the claim, and argued, *inter alia*, that certain types of regulation are also permitted under EU law and the GATT. Further, the regulation that was subject to constitutional review was a step towards approximation with EU law. The petitioners, however, argued that European law was not applicable, because it was not binding at that time (three years before accession). The CCC rebuffed this idea. It emphasised the existence of general principles of law, common to all EU Member States. The content of these principles is formed by the common European values, and the general principles fill the abstract concept of the rule of law, including human rights. The CCC had to apply such principles, thus to follow European legal culture and its constitutional tradition: 'Primary law of the EU is not foreign law for the Constitutional Court; it

[71] Ibid.

[72] Ibid.

[73] Cf. for instance Judgment of 15 May 2012, file No. Pl. ÚS 17/11, *Photovoltaic Power Plants*. The petitioners argued that the Czech legislative measures imposing new tariffs on photovoltaic power plants harmed the power producers and violated the ban on retroactivity. The CCC rebuffed this argument, emphasising that 'the choice of statutory provisions aimed at limiting state support for the production of solar energy is in the hands of the legislature, provided the guarantees are preserved. The principle of legal certainty cannot be considered to be a requirement for an absolute absence of change in the legislative framework; that is also subject to other social-economic changes and demands on the stability of the state budget' (para. 85). On the other hand, the CCC left open the possibility for finding unconstitutionalities in real life cases based on the facts of the respective producers.

[74] Judgment of 29 May 1997, file No. III. ÚS 31/97, *Škoda Auto*.

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radiates, mainly as the general principles of European law, into the Court's adjudication.'[75]

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

As the Czech Republic has not joined the Treaty Establishing the European Stability Mechanism, this Treaty has been an issue for political clashes rather than a subject of legal debate in the Czech Republic.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 There are no statistics which would indicate the number of cases in the Czech Republic in which a party has requested a preliminary ruling with regard to the validity of an EU measure. Neither the Ministry of Justice nor the judiciary collect data on this. It is my rough estimate, based on my judicial practice, that such requests are very rare. Personally, I have never seen any challenge to an EU measure before the Czech courts. I can also surely say that there have been no preliminary references in this regard either, with the only exception being the challenge to the applicability of EU measures before they have been officially published in the Czech language.[76]

2.8.2 The standard of judicial review by the EU Courts is not often debated in the Czech scholarship. If it is debated, quite often it is discussed by Eurosceptic lawyers who use misleading and basically non-legal arguments (such as xenophobic claims, etc.). I do not view the standards used by EU Courts as substantially lower than the standards used by the CCC in reviewing the Czech Constitution. Moreover, this has generally been approved by the CCC itself.[77] Likewise, the CCC gives more room for political judgments in cases dealing with laws relating to economic policy and taxation.[78]

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[75] Judgment of 16 October 2001, file No. Pl. ÚS 5/01, *Milk Quotas*.

[76] See Sect. 2.5.

[77] See Sect. 2.6.1.

[78] With some haphazard exceptions to this rule: see recently Judgment of 10 July 2014, file No. Pl. ÚS 31/13, *Tax Deductions for Employed Pensioners* (the CCC interfered with a technicality of tax law due to alleged age discrimination; the Court's majority was strongly criticised by the dissenting justices for its flagrant deviation from self-restraint in economic and tax law issues. I concur with the dissenting justices and find this case to be an overt deviation from the established case law.).

2.8.3 There are two basic types of judicial review in the Czech Republic. The first is the judicial review of regulatory acts of the executive branch that is performed by all courts. The second type is constitutional review of legislation by the CCC. There are no statistics on the former. With regards to the latter, the frequency of annulment of legislation varies based on the type of petitioner.

On the one hand, abstract referrals by politicians are successful in about half of the total number of petitions. Such referrals are, however, rare: between 1993 and 2013, they accounted for five cases per year on average. In the middle are referrals made by the general courts in the course of their proceedings. The general courts have initiated over 250 proceedings between 1993 and 2013, and almost half of them were decided by the Court on the merits, while the rest were rejected for procedural reasons or for being manifestly unfounded. The courts were successful in about one-fourth of their referrals. Individual petitioners are the least likely to succeed in having a law annulled for its unconstitutionality. Although individuals make hundreds of petitions to annul legislation annually (among thousands of complaints which just claim the unconstitutionality of a judicial decision), they will succeed with actual annulment very exceptionally (perhaps less than once in five hundred petitions).[79]

The typical reasons for annulment of legislation are general principles and default constitutional rules, like substantive due process, the rule of law (although the latter usually combined with more specific constitutional principles), the ban on discrimination (although applied very broadly, beyond traditional reasons such as gender, race, etc.), the right to a judicial remedy (annulling various exceptions to judicial review), etc.

2.8.4 I have already indicated that if we put aside the applicability of EU measures that have not been published in the Czech language, I have never encountered any challenge to an EU measure in the Czech Republic. What is far more common, however, is disputing the national implementation of EU law. The CCC is not entirely clear as to the limits of its review of national implementation acts. Constitutional review of European laws is in principle excluded in the Czech Republic. The *Sugar Quota III* judgment approved the current standard within the EU for the protection of fundamental rights, which neither is 'of a lower quality than the protection accorded in the Czech Republic', nor does the standard 'markedly diverge from the standard up till now provided in the domestic setting by the Constitutional Court'. The CCC emphasised that the delegation of part of the powers of national organs to the EU is conditional and 'may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic', and should not threaten the basic principles of the Czech Constitution which are not subject to revision (eternal law). If these conditions were threatened, the CCC would be 'called upon to

[79] In more detail see Kühn 2013, pp. 246 et seq.

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protect constitutionalism'[80] and to exercise constitutional review. The CCC thus rephrased the famous German *Solange II*[81] decision.

The crucial question in both the *Sugar Quotas III* and the *EAW* case was whether the Constitutional Court should review domestic laws which implement EU obligations. In *Sugar Quotas III*, the CCC held that if 'the Community delegates powers back to the Member States for the purpose of implementing certain Community law acts, or it leaves certain issues unregulated', the respective rules take the form of national law, and as such they must be in conformity with both EU law *and* the Czech Constitution. The domestic law (whether or not EU law gives the national legislature any discretion) is thus subject to full constitutional review, even though the maxim of European conform interpretation applies.[82]

The *EAW* case does not seem to fit easily into this line of thought. While *Sugar Quotas III* relied on full (though Euro-friendly) constitutional review of domestic acts implementing EU law, a few weeks later in the *EAW* case, the Court said:

> In areas where Community law applies exclusively, it is supreme, so that it cannot be contested by means of national law referential criteria, not even on the constitutional level. *According to this doctrine the Constitutional Court would have no competence to decide on the constitutionality of a European Law norm, not even in the case that they are contained in legal enactments of the Czech Republic. Its competence to adjudicate the constitutionality of Czech norms is, thus, restricted in the same respect.* … [W]here the delegation of authority leaves the member states no room for discretion … the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic, naturally with the exception [of the alleged conflict with the very core of the Constitution] [emphasis added].[83]

Interestingly, this opinion was criticised as an unjustified 'shift' by the Justice-Rapporteur of the *Sugar Quota III* judgment, who dissented in the *EAW* case.[84] This doctrinal difference, however, did not make a significant difference in practice, because the CCC, despite its alleged self-restraint, did engage in a *complete* review of the implementing law. The CCC preached self-restraint (claimed that it would review the domestic implementation only with respect to conflicts with the constitutional core), but in reality reviewed the domestic implementation of EU law completely. In my opinion, the only way to explain the difference between what the CCC said and what it really did is to presume that all arguments made by the petitioners were based on the 'eternal' constitutional core, which is why all of them were used in constitutional review.[85]

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[80] *Sugar Quotas III*, supra n. 11, part VI.B.

[81] 19 BVerfGE 73, 339 [1986] (Solange II).

[82] Ibid., VI.A.

[83] Czech *European Arrest Warrant* case, supra n. 19, paras. 52 and 54 (emphasis added).

[84] See the dissenting opinion of Justice Wagnerová in the Czech *European Arrest Warrant* case, supra n. 19.

[85] See Czech *European Arrest Warrant* case, supra n. 19, para. 53, last sentence: 'In this matter, however, the petitioners asserted that, by adopting the European Arrest Warrant, *just such a*

In any case, notwithstanding some doctrinal inconsistencies in its case law, in practice the CCC has always reviewed the national implementation of EU law. I would therefore not agree that national implementing laws are shielded against review by the CCC only because they are 'European' in nature. What is more troublesome is the question of whether the CCC is obliged to make a preliminary reference in such situations. The CCC is very reluctant to accept its duty to make a reference, even though this might be useful in cases where the CCC indirectly reviews EU law.

2.9 Other Constitutional Rights and Principles

Not applicable.

2.10 Common Constitutional Traditions

When making a preliminary reference, the Czech administrative courts try to take the 'common constitutional traditions' seriously. A typical preliminary reference highlights both the domestic constitutional rights and comparative constitutional case law on the established standards in different Member States (in so doing the courts after all take the *CILFIT* line of case law seriously).

For instance, in a case regarding the scope of the Personal Data Directive,[86] in making a reference requesting the definition of what constitutes processing of personal data 'by a natural person in the course of a purely personal or household activity', in my capacity as a judge, I emphasised the relevant domestic constitutional principles and at the same time made a number of comparisons between several EU states. I then argued that the Directive did not in fact embody any Europe-wide principle, which is why the Court of Justice should leave the residual meaning of that provision for the national courts to decide.[87] If courts wanted to proceed in this way, they would need a comparative law unit that could search and locate comparative materials. If courts were to begin to work with and quote their foreign counterparts, this would be an important step towards bringing common constitutional traditions closer to reality.

conflict with the essential attributes of a democratic law-based state has come about' (emphasis added). In more detail see Kühn 2007.

[86] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

[87] The Court of Justice did not, however, follow this opinion. Case C-212/13 *Ryneš* [2014] ECLI:EU:C:2014:2428.

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2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 It is questionable to what extent the doctrine of margin of appreciation as employed by the European Court of Human Rights is workable at the EU law level. The Court of Justice faces a legal arena with almost half the number of states of its Strasbourg counterpart. Moreover, some of its areas of jurisdiction require more consistency, especially because of the freedoms protected by EU law and the danger that these freedoms might otherwise become illusory. On the other hand, it is not true that the Court of Justice leaves no space whatsoever for heightened national standards. In cases like *Omega*,[88] the Court of Justice has applied a sort of margin of appreciation, effectively leaving the final word to the Member States and their constitutional courts. Likewise, in some other cases, strengthening the fundamental rights of some has at the same times weakened the rights of someone else (cases of *Drittwirkung*, the horizontal application of fundamental rights).[89]

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 No public debate about the European Arrest Warrant Framework Decision took place in the Czech Republic at the time of its adoption. This absence is easy to explain: the Czech Republic was not an EU member state back in 2002. Later, however, the debate became quite extensive. At the moment the EAW Framework Decision was implemented into the national legal order, Eurosceptic deputies and above all the Eurosceptic President Vaclav Klaus started a fierce and manipulative public debate. The picture of the EAW they presented was far from the real EAW. The President and some of his like-minded emulators shared their view of the horrors which the Czech Republic would face if the EAW were to come into effect. For instance, the President argued that the EAW, if applied, would mean criminalisation of all those who criticised the EU. Some authors, including me, tried to argue rationally and to explain what the EAW was really about, including some of its problems. I doubt, though, that the opposing camp was willing to listen to those

[88] Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614.

[89] In this line of argument I cautioned against a country-by-country application of fundamental rights, ignoring or weakening corresponding EU law arguments. See Kühn 2004.

arguments.[90] The debate effectively ended with the decision of the Constitutional Court which rejected all the arguments promoted by the President's camp.[91]

No similar debate took place in relation to the national implementation of the Data Retention Directive. It is hard to say why (perhaps the topic was not that attractive for the Eurosceptics), but save for a few specialists in privacy law, no one debated either this directive or its implementation.[92]

2.12.2 Reference to the domestic debate with regards to the implementation of EU law reminds me of the prolonged debates surrounding the EU anti-discrimination directives in the Czech Republic. It would be too risky to use extensive political debate as an excuse for non-implementation. The Czech debate about anti-discrimination, for instance, was effectively caused by the disagreement among a substantial portion of the population, including the political elite, with the very idea of non-discrimination and equality before the law. At the end of the day, the EU discrimination directives were implemented because of the threat of infringement proceedings. It is true that the disadvantage of this approach is the fact the values surrounding equality and non-discrimination have not really been internalised in the Czech Republic and the respective laws are rarely applied in practice. The alternative, however, would be to have no law at all.

2.12.3 In my opinion, if important constitutional issues have been identified by a constitutional court in an EU-related case, the court should make a preliminary reference to the Court of Justice. I understand that many constitutional tribunals hesitate to openly accept their duty to make a reference, perhaps because they feel that they would thereby recognise a sort of hierarchy between them and the Court of Justice. This might not, however, necessarily be so.

Since constitutional courts cannot identify such problems extrajudicially, there is no danger that they would not be able to make a reference. Therefore, I see no reason to create new institutional mechanisms in addition to those which already exist (especially if informal mechanisms are also considered, like the participation of judges of high courts and the CJEU at scholarly conferences and like events).

As a matter of principle, I would be against a Member State submitting as a defence in an infringement proceeding that the unconstitutionality of an EU measure has been identified in domestic proceedings. If that were the case, the domestic

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[90] For a summary of the arguments of the President's camp and my own arguments, see Drda, A. (2004, September 25) *Týden v České republice* (A week in the Czech Republic). BBC. http://www.bbc.co.uk/czech/domesticnews/story/2004/09/040925_tyden_v_cr.shtml.

[91] Interestingly, the President did not initiate proceedings before the CCC despite the fact that he had the power to do so. This was in line with his conservative approach to constitutional review and his criticism of the so-called 'judgeocracy', a term close to the Western concept of 'juristocracy'.

[92] In particular, several NGOs, and above all, Iuridicum remedium. See the article written by its director, Vobořil, J. (2014, June 3), *Jaké budou dopady zrušení směrnice o data retention*? (What will be the effects of annulment of the data retention directive?). http://www.epravo.cz/top/clanky/jake-budou-dopady-zruseni-smernice-o-data-retention-94415.html. For a summary of the debate, see Polčák 2008.

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court should have made a reference to the Court of Justice with respect to the lawfulness of the EU measure in the first place. If this were an issue relating to the domestic constitution only (so the lawfulness of the EU measure could not be questioned), it would be the duty of the domestic lawmaker to amend the constitution. I am well aware of the possibility of a (systemic) conflict between a constitutional court and the Court of Justice with respect to some particular issue, but in such an unlikely case, the Court of Justice should accept the defence of the Member State, and base its reasoning on the EU Treaty and respect by the EU of the identities of the national legal orders.[93]

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

I do not share concerns about an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. I think that both EU law and activist constitutional courts capable of protecting domestic constitutional identities are able to further enhance the protection of fundamental rights in the EU legal arena.

There is a gradual process in the Central European legal systems towards more discursive and elaborative judicial decisions.[94] Compared to this, the cryptic style of the EU courts' judgments might become more problematic in Central Europe than it used to be just a few years ago. On the other hand, the opinions of Advocates General might serve precisely the purpose of making judicial reasoning more transparent.

The responsiveness of the Court of Justice with regard to Czech national constitutional concerns is a tricky issue. The most prominent case in which this responsiveness could be expressed was the Slovak pension saga. In the *Landtová* case mentioned in Sect. 1.3.4, however, it was difficult for the EU Court to assess the national constitutional concern. Both the Government of the Czech Republic and the Supreme Administrative Court, the court making the reference, argued in the direction eventually followed by the Court of Justice as well. At the same time, the CJEU knew very well that its decision went against the established case law of the CCC. A personal letter from the Chief Justice of the Constitutional Court was after all (in)famously returned by the CJEU's staff to the Chief Justice and excluded from the proceedings. Ironically, the CCC did not hesitate to express its frustration over this, and noted a sort of violation of its right to be heard in the proceedings before the CJEU. Instead of remedying this and giving the CJEU a chance to weigh the CCC's principled arguments, the CCC went on to proclaim the CJEU's

[93] Article 4 para. 2 TEU: 'The Union shall respect [Member States'] national identities, inherent in their fundamental structures, political and constitutional …'.

[94] See Matczak et al. 2015.

judgment to be *ultra vires*. I consider this a major flaw in the CCC's approach, effectively forfeiting the chance to debate the importance of the national case law at EU level.[95]

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The constitutional provisions that regulate the transfer of powers to international organisations or institutions, such as the International Criminal Court, are identical with those which govern the transfer of powers to the EU. The relevant provision is of a very general nature and contains no reference to the objectives sought by international co-operation, to limits to the delegation of powers, etc. Likewise, provisions on the ratification of treaties are very general and just provide that the consent of both chambers of Parliament is needed for selected categories of treaties that are to be ratified by the head of state (generally the most important treaties).

3.1.2 The 2001 'Euro-amendment' to the Constitution[96] changed the original Czechoslovak and then Czech approach to international law from a dualist system into a system closer to the monist ideal. At the beginning of the 1990s, only international human rights treaties were incorporated and became part of the law of the land. The Czechoslovak approach of 1991 was followed by the Czech and Slovak constitution-makers.[97] While the first major article criticising the hostile attitude of both constitutions had been published by Eric Stein in the United States in a prominent law journal already in 1994,[98] the domestic discussion on the future status of international law did not start until 1997.[99]

The amendment was driven by domestic academic criticism, especially from international law circles. This opening of the door to international law was rather a by-product of the constitutional EU clause. The scholars who took part in writing the EU clause were also in favour of opening the Constitution to international treaties. In a way, many domestic politicians 'bought' the change of perspective towards international law because of their (false) belief that this was something which was required by the future EU accession.

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[95] In more detail see Sect. 1.3.4 above.

[96] In more detail see Sect. 1.2 above.

[97] See Art. 10 of the Czech Constitution before 2002.

[98] See Stein 1994.

[99] The leading figure to influence the Czech internationalist doctrine by his doctrinal writings was Jiří Malenovský, current Czech judge at the Court of Justice. See Malenovský 2000 and Malenovský 2002.

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3.2 The Position of International Law in National Law

3.2.1 According to Art. 10 of the Czech Constitution, as amended by the 'Euro-amendment', international treaties, the ratification of which has been approved by Parliament, and which bind the Czech Republic, are part of the legal order. If an international treaty provides something different than a statute, the former shall be applied.[100]

3.2.2 Mainstream Czech scholarship agrees that neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalisation and the current relation between domestic and international law.[101] My opinion is that these concepts are just ideals, through which legal systems can be explained, although they never materialise in practice in their pure forms.

3.3 Democratic Control

3.3.1 The most important treaties, including all that impose duties on individuals, on membership in international organisations, economic treaties of a general nature, etc., require ratification by the legislature (Art. 49 of the Constitution). Unlike normal law-making, in which the position of the Senate is much weaker, the Senate and the Assembly of Deputies have an equal role in giving consent to the ratification of treaties. Consent of the Assembly requires two readings of the treaty, during which deputies are supposed to debate the treaty and its content. The details are regulated in the rules of proceedings of the Assembly. The proceedings start in the committee responsible for the area of government which is most closely related to the substance of the treaty. The committee then makes a recommendation to the Assembly on whether or not ratification is advised.[102] According to what I know from parliamentary debates, issues relating to international obligations are mostly neglected in parliamentary debates, as the deputies and senators prefer discussing domestic laws over international obligations.

3.3.2 As of the time of writing the report, only one nation-wide referendum has been held in the Czech Republic, i.e. the referendum dealing with EU accession. In order to hold a referendum, the Constitution requires that a constitutional act be enacted. While in theory a referendum can be held in any case, in reality politicians are very sceptical about direct democracy. There were some indications in 2014 that

[100] Many less important treaties, signed by the ministries, are not ratified subject to approval by Parliament (Art. 49 of the Czech Constitution). Article 10 is not applicable to these treaties.

[101] See, most importantly, Malenovský 2008.

[102] §108 and §109 of the Rules of Proceedings of the Assembly of Deputies, Law No. 90/1995 Sb.

this political position, which had been firm since 1993, might change in the future because the rightist and conservative parties that were opposed to referendums lost their ground in the early 2010s, and centrist and leftist parties that are more friendly towards direct democracy might want to enact a general constitutional law on referendums.

3.4 Judicial Review

3.4.1 The Constitution is silent on the issue of constitutional review of international treaties. The only exception is *ex ante* review before the ratification of an international treaty by the Constitutional Court (Art. 87 para. 2 of the Constitution). However, it is unclear what would happen if a ratified treaty were in conflict with the Constitution.

Shortly after the opening of the Constitution to international law in 2002, Jan Kysela and I wrote an article in which we argued in favour of the constitutional review of ratified international treaties on a case-by-case basis. We argued that ratified international treaties cannot exclude the application of constitutional rights. In the case of a conflict, the Constitution must set aside conflicting international treaty provisions.[103] This argument was followed in the case law of the CCC. In the never-ending saga of Czecho-Slovak pensions, the CCC repeatedly set aside the provision of the Czecho-Slovak Pension Treaty which in the CCC's view was in conflict with the ban on discrimination of Czech citizens. The CCC reasoned that even if international treaties have precedence over national law based on the maxim *lex specialis derogat legi generali*, a treaty cannot be applied if it is in conflict with higher law, that is, the Constitution.[104]

Opposition to this claim came from the Supreme Administrative Court (SAC), the Constitutional Court's 'arch-enemy' in the Slovak pension saga. The SAC held that no court in the Czech Republic is empowered to review the constitutionality of ratified treaties. Neither the Constitution nor the law gives such power to the CCC. This argument has been repeatedly rebuffed by the CCC.[105]

Apart from the Czecho-Slovak pension saga, there is no other judgment which has set aside an international treaty for its unconstitutionality.

[103] Kysela and Kühn 2002, p. 301.

[104] Judgment of 22 May 2008, file No. I. ÚS 366/05, *Slovak pensions XI*, para. 15. Cf. also *Lisbon Treaty I*, supra n. 12, para. 84.

[105] See Judgment of the SAC of 23 February 2005, file No. 6 Ads 62/2003, quashed by Judgment of the CCC of 13 November 2007, file No. IV. ÚS 301/05, *Slovak pensions VI.*

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3.5 The Social Welfare Dimension of the Constitution

Social rights are constitutionally protected in the Czech Republic. However, their enforcement via judicial process is limited in scope through Art. 41(1) of the Charter which provides that social rights are justiciable only in connection with the laws which implement them. The question of whether a law can be annulled because of conflict with social rights has been explained by the CCC through its doctrine of the hard core of social rights. In 2008, the Court explained that the core or essential content of social rights shall be protected against legislative encroachments. According to the Court, '[i]t follows from the nature of social rights that the legislature cannot deny their existence and implementation, although it otherwise has wide scope for discretion.'[106]

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[106] Judgment of 23 September 2008, file No. Pl. ÚS 1/08, *Health Care Fees*, paras. 103 and 105.

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Slovakia: Between Euro-Optimism and Euro-Concerns

Zuzana Vikarská and Michal Bobek

Abstract In the Slovak constitutional system, the understanding of the concept of the rule of law is closer to the German concept of the *Rechtsstaat* rather than the common law concept. The constitutional elements of the Slovak accession to the EU have been largely settled by a comprehensive and detailed EU Amendment to the Constitution (2001). The accession to the EU was confirmed by a referendum in 2003. Constitutional amendments regarding EU and international law include provisions that enable the implementation of EU law by governmental regulations. The report generally observes a lack of case law and scholarly debate on matters relating to Slovakia's membership in the EU. Some critical voices have considered the Slovak solutions regarding the European Arrest Warrant to be overly enthusiastic and lacking the constitutional guarantees provided elsewhere. However, a constitutional challenge was brought with regard to the Data Retention Directive, together with a request by the claimants to refer a question to the ECJ. The Constitutional Court decided to wait for the ECJ judgment in *Digital Rights Ireland* and subsequently declared that the implementation measures were in breach of

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several provisions of the Slovak Constitution, without addressing the alleged breach of the Charter provisions. The report generally recalls the high value placed on the right to privacy in Central and Eastern Europe, given the historical reality of surveillance by the secret police before 1989. Debate on the ESM Treaty was held at the political level; the report surmises that constitutional challenges might arise if citizens were actually asked to pay. More broadly, the report observes that the ongoing interaction between the national and European legal orders need not be one-directional, requiring only changes in the national legal systems; rather, a cluster of Member States might push towards a constitutional change at the European level.

Keywords The Slovak Constitution · Constitutional amendments regarding EU and international co-operation · The Slovak Constitutional Court
Constitutional review · Fundamental rights and the *Rechtsstaat* approach to the rule of law · Data Retention Directive, surveillance and the right to privacy and secrecy of communications · European Arrest Warrant · Publication of laws
Absence of constitutional limits · Referendum · *Kyrian* and the right to judicial review in EU mutual recognition system in administrative co-operation
ESM Treaty · The right to property

Introductory Note to the Slovak Report

The Slovak Republic (Slovakia) is a smaller jurisdiction. In July 2014, its estimated population was slightly under five and half million inhabitants.[1] Being a smaller EU jurisdiction has two consequences for the purpose of this report. First, in smaller jurisdictions, not that many cases are likely to be litigated. Thus, a number of issues raised by this questionnaire have not yet been addressed judicially in Slovakia. Secondly, in contrast to larger states, there is relatively little legal scholarship being produced on the specific and specialised matters addressed in this questionnaire. For these two reasons, together with the fact that the constitutional elements of the Slovak accession to the EU have been largely settled by a comprehensive and detailed EU Amendment to the Slovak Constitution, with regard to a number of specific questions asked, the authors of this report can provide but an advised estimate on how the issue would likely be tackled if it were to arise in the future, but hardly a reflection of any established national case law or comprehensive scholarly debates.

[1] The CIA World Fact book gives the estimate of 5,443,583 inhabitants. https://www.cia.gov/library/publications/the-world-factbook/geos/lo.html.

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 According to the division suggested by Besselink,[2] the Constitution of the Slovak Republic[3] (hereinafter Constitution or Slovak Constitution) could be said to fall within the first category of constitutions, i.e. those with 'a legal character, with detailed rules and enforceability in courts'.[4] The Constitution is rather detailed, consisting of 156 articles, with most articles further subdivided into a number of detailed paragraphs. Furthermore, the Constitution also includes a full catalogue of fundamental rights (Chap. II, Arts. 12–54 of the Constitution).

The Constitution currently in force in the Slovak Republic was adopted in a specific historical and political context, when, as of 1 January 1993, the Czech and Slovak Federal Republic split into two sovereign countries.[5] The draft of the Slovak Constitution played a strong symbolic role in the Slovak emancipation from the Federation, which had begun already earlier, in the course of 1992. Although the dissolution of the Federation on the international plane was the result of bilateral political arrangements put in place by the Czech and Slovak prime ministers, from the internal legal point of view the split of the Czech and Slovak Federation was the result of a unilateral secession of Slovakia carried out already in summer 1992. On 17 July 1992, the Slovak National Council (i.e. the Parliament of the Slovak part of the Federation, which was, however, not part of the Federal Parliament) adopted the Declaration on the Sovereignty of the Slovak Republic, a document invoking the natural right of states to self-determination and declaring the independence of the Slovak Republic. This declaration served as a stepping-stone to the ulterior adoption of the Constitution of the Slovak Republic, adopted on 1 September 1992 by a constitutional majority,[6] again in the Slovak National Council. This Constitution did not merely regulate the constitutional arrangements in the Slovak part of the Federation, as foreseen by the federal legislation in force.[7] Rather, it had the ambition to serve as a constitution of a sovereign state, the Slovak Republic, which, however, at that time was legally speaking a part of a Federation. From this point of view, the dissolution of the Federation became inevitable. The Slovak Constitution

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[2] See Besselink 2006, pp. 113 et seq.

[3] Constitutional Act No. 460/1992 Coll., Constitution of the Slovak Republic. One of the English translations of the Slovak Constitution can be found at https://www.prezident.sk/upload-files/46422.pdf. In some cases, the authors have slightly changed the wording of the translated provisions in order to express the content of the norm as precisely as possible.

[4] See the Questionnaire for this project.

[5] Generally on this process in English, see e.g. Stein 1997.

[6] The constitutional majority required was three-fifths of all the MPs, i.e. 90 out of 150. Out of the 134 MPs present, 114 voted in favour of the Constitution, 16 voted against and 4 refrained from voting. For a stenographic record of the voting (in Slovak only), see http://www.nrsr.sk/dl/Browser/Document?documentId=71565.

[7] Article 142(2) of Constitutional Act No. 143/1968 Coll., on the Czechoslovak Federation.

entered into force on 1 October 1992 (with the exception of some provisions that entered into force on 1 January 1993), and the Czech and Slovak Federal Republic was formally dissolved on 1 January 1993.

The interpretation of the summer 1992 constitutional events and the *de facto* unilateral secession of Slovakia from the Federation are still far from settled. Also, it is not surprising that their interpretation is very different in the Czech Republic and in Slovakia. Be that as it may, although these circumstances probably did not amount to a *cataclysmic event*, the fact remains that the current Slovak Constitution 'was prepared in a hasty and secretive manner and gave rise to bitter political divisions in the Parliament'.[8]

Lastly, as far as the constitutional tradition and influence are concerned, the Slovak Constitution can be said to be based on the Czechoslovak constitutional tradition, i.e. the constitutional norms and culture that the common state shared from 1918 until 1993, including several joint constitutions (of 1920, 1948 and 1960, respectively, as well as the federalisation legislation of 1969–1970, by which the formerly unitary Czechoslovakia was transformed into a federal state). In contrast to the Czech approach, however, the Slovak texts and constitutional culture appear to avoid explicit references to the Czechoslovak tradition.[9]

Apart from the common Czechoslovak origins, the Slovak constitutional culture finds on-going inspiration in the current Czech constitutional culture: the use of and references to Czech constitutional law textbooks and commentaries are common practice, whether openly acknowledged or somewhat hidden. It would appear that some limited inspiration comes also from Hungarian legal sources and constitutional case law, but this inspiration is even less likely to be openly acknowledged, often for political reasons.[10]

1.1.2 The Slovak Constitution is the foundation of the Slovak legal system, a document at the top of the hierarchy of legal acts. Its role and rationale are comparable to those of the constitutions of most other European states: to govern the main institutional setting of the state (including the separation of powers and due checks and balances) and to provide for a catalogue of the fundamental rights of its citizens. It is difficult, if not impossible, to single out any of the rationales as being key or dominant.

In Art. 1(1), the Constitution establishes the rule of law and the sovereignty of the Slovak Republic (SR), stating that 'the Slovak Republic is a sovereign, democratic state governed by the rule of law'. This sovereignty may be nonetheless

[8] Procházka 2002, p. 68.

[9] See, for example, the Preamble to the Slovak Constitution, which refers all the way back to the 'spiritual heritage of Cyril and Methodius and the historical legacy of Great Moravia' (Saints Cyril and Methodius were 9th century Byzantine Greek missionaries who preached among the Slavic tribes of Great Moravia and Pannonia, i.e. roughly the eastern part of the Czech Republic and western part of Slovakia today), but not to the Czechoslovak constitutional history of the 20th century.

[10] Further see Bobek 2013a, pp. 174–191.

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limited, as follows from Art. 1(2) (respect of international obligations) and Art. 7 (modalities of entry into international obligations).

Limits to state powers are mainly addressed in Art. 2(2), as well as in the institutional provisions further on, in which state powers are specifically fleshed out, while fundamental human rights are provided for in Arts. 12 to 54 (Chap. II: Basic Rights and Freedoms). The separation of powers as a principle is not explicitly mentioned in the Constitution, but the structure of the constitutional text clearly indicates that power is divided into legislative power (Chap. V), executive power (Chap. VI) and judicial power (Chap. VII).

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 In the context of EU accession, the Slovak Constitution was significantly amended by Constitutional Act No. 90/2001 (the so-called 'EU Amendment', adopted on 23 February 2001, in force since 1 July 2001), adopted by 90 Members of Parliament (MPs) (the smallest number possible for a constitutional amendment), with 57 MPs voting against the proposal. This constitutional change paved the way towards accession to the EU, as well as to NATO.

The EU Amendment was a direct amendment of the Constitution. It inserted a number of key articles relevant for Slovak membership in the EU.

Article 1 was amended to include a second subparagraph that reads: 'The Slovak Republic recognizes and honours general rules of international law, international treaties by which it is bound and its other international obligations.'

Article 7, which in its original version only included what is now Art. 7(1), was further elaborated so as to differentiate among the various international organisations and international obligations to which Slovakia might be a party in the future. The amended Art 7 reads:

> (1) The Slovak Republic may enter into a state union with other states upon its free decision. The decision on entering into a state union with other states, or on withdrawal from this union, shall be made by a constitutional law, which must be confirmed by a referendum.
>
> (2) The Slovak Republic may, by an international treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and European Union. Legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic. The transposition of legally binding acts that require implementation shall be executed by law or a government ordinance pursuant to Art. 120, para. 2.
>
> (3) The Slovak Republic may, with the aim of maintaining peace, security and democratic order, under the terms laid down by an international treaty, join an organization of mutual collective security.

> (4) In order for any international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties establishing the membership of the Slovak Republic in international organizations, international economic treaties of general nature, international treaties whose execution requires a law and international treaties which directly constitute rights or obligations of natural persons or legal persons to be valid, an approval of the National Council of the Slovak Republic is required prior to their ratification.
>
> (5) International treaties on human rights and fundamental freedoms, international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws.

The original Art. 11, which had laid down the primacy of international human rights treaties if they provided for a more extensive human rights protection, was repealed in 2001.[11] The same issue is now governed by Art. 7(5) and Art. 154c. Articles 17 and 18, which address personal liberty, were amended and the time limits for detention were prolonged from 24 hours to 48 and 72 hours. Furthermore, Art. 23(4) was amended to abolish the constitutional prohibition on extradition (or surrender) of citizens, and now reads: '(4) Every citizen has the right to freely enter the territory of the Slovak Republic. No citizen may be forced to leave his or her homeland or be expelled.' The last part of the provision which read 'or extradited to another state' was removed from the constitutional provision.[12]

Article 30 on the right to vote was amended to include the following last sentence in its first subparagraph: 'Foreigners with a permanent residence on the territory of the Slovak Republic have the right to vote and be elected in the self-administration bodies of municipalities and self-administration bodies of superior territorial units.' This provision goes further than required by EU law, since it does not limit the right to vote to EU citizens, but extends it to all foreigners who permanently reside in Slovakia.

Article 120 was amended to include a new subparagraph (2) which reads:

> If so laid down by law, the Government is authorised to issue ordinances in order to execute the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, and to execute international treaties stipulated in Art. 7, para. 2.

Article 125 on the powers of the Slovak Constitutional Court (SCC) was amended so that the referential framework for the constitutionality of legal acts includes not only the Constitution and constitutional laws, but also 'international treaties to which the National Council of the Slovak Republic has expressed its assent and which have been ratified and promulgated in the manner laid down by

[11] See Sect. 3.2.1 below for a detailed analysis of the former Art. 11 and its legal effects.

[12] Thus constitutionally pre-empting much of the debate that later ensued in other Member States of the EU (e.g. Germany, Poland and the Czech Republic) about constitutional prohibitions on extraditing (surrendering) own citizens. See e.g. Komárek 2007 and Siegel 2008.

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law'.[13] This has been affirmed by a consistent line of case law of the SCC, which states that 'the competence of the Constitutional Court under Art. 125(1)(a) of the Constitution also includes international treaties that have been consented to by the National Council of the Slovak Republic and that have been ratified and promulgated as required by law'.[14]

However, the SCC has also ruled that if a provision is in breach of the Constitution, there is no need to further examine its alleged breach of any international instruments, since the potential breach of an international instrument would not bring any additional effects.[15]

Further, two new articles were inserted in the chapter on the SCC, of which Art. 125a bears relevance to EU accession and further EU developments:

> (1) The Constitutional Court decides on the compliance of concluded international treaties for which consent of the National Council of the Slovak Republic is required with the Constitution or a constitutional law.
>
> (2) A petition for a decision pursuant to para. 1 may be filed with the Constitutional Court by the President of the Slovak Republic or the Government before submitting the concluded international treaty for deliberation to the National Council of the Slovak Republic.
>
> (3) The Constitutional Court decides on the petition pursuant to para. 2 within the period laid down by law; if the Constitutional Court by its decision expresses that the international treaty is not in compliance with the Constitution or a constitutional law, such international treaty may not be ratified.

Article 144 specifies which legal instruments are binding for judges when they decide cases. In its original version, it stated that judges were bound only by laws, and that in cases where it is so established by the Constitution or by law, judges were also bound by international treaties. After amendment, the article reads as follows:

> (1) Judges are independent in the performance of their functions and bound solely by the Constitution, constitutional laws, international treaties stipulated in Art. 7, paras. 2 and 5 and laws.
>
> (2) If the court is of the opinion that another generally binding legal regulation, its part or a particular provision related to the subject-matter of the proceeding contravenes the Constitution, constitutional laws, international treaties stipulated in Art. 7, paras. 2 and 5 or laws, it will interrupt its deliberations and submit a motion that a proceeding under Art. 125, para. 1 be initiated. The finding of the Constitutional Court of the Slovak Republic is binding for all courts.

[13] However, it is important to note that even before the EU Amendment, the original Art. 125 included in the referential framework 'international treaties promulgated in a manner established for the promulgation of laws'.

[14] Judgment of the SCC, Pl. ÚS 10/14 (*Data retention*) of 29 April 2015, para. 70. Translation by the authors.

[15] See e.g. Judgment of the SCC, Pl. ÚS 3/09 (*Health insurance*) of 26 January 2011 and Pl. ÚS 10/14 (*Data retention*), n. 14.

The last crucial article that was inserted by the EU Amendment in 2001 is Art. 154c, which regulates the position of international treaties in the Slovak legal order and which reads as follows:

> (1) International treaties on human rights and fundamental freedoms that [have been] ratified by the Slovak Republic and promulgated in a manner laid down by law before this constitutional law comes into effect are a part of its legal order and have primacy over [national] law, if they provide a greater scope of constitutional rights and freedoms.
>
> (2) Other international treaties which [have been] ratified by the Slovak republic and promulgated as required by law before this constitutional law comes into effect are a part of its legal order, if so laid down by law.

Thus, the bulk of changes relating to the Slovak accession to the EU were carried out by the EU Amendment in 2001. As for subsequent constitutional changes relating to EU membership, in 2004, the Slovak legislator sought to regulate the relationships between the Government and Parliament in their participation in the EU legislative process, as well as the incompatibility of serving as an MP of the Slovak Parliament (the National Council of the Slovak Republic, hereinafter NCSR) and the European Parliament. Both of these provisions were originally included in the draft of Constitutional Act No. 140/2004. They did not, however, secure sufficient support in the NCSR and were removed from the draft. The incompatibility provision was nonetheless later included in Constitutional Act No. 323/2004 (adopted on 14 May 2004, in effect since 1 June 2004), and the relationship between the Government and Parliament was later provided for expressly by Constitutional Act No. 397/2004 on the cooperation of the National Council of the Slovak Republic and the Government of the Slovak Republic in EU matters (adopted on 24 June 2004, in effect since 1 August 2004). The latter constitutional amendment is different from the ones previously mentioned in that it did not directly alter the constitutional text, but rather exists as a self-standing piece of constitutional legislation.

1.2.2 The National Council of the Slovak Republic, i.e. the Slovak Parliament, is composed of one chamber, consisting of 150 Members of Parliament. For a constitutional amendment to be adopted, at least 90 MPs must support it. Pursuant to Art. 84(4) of the Constitution,

> the agreement of at least a three-fifths majority of all Members of Parliament is required to pass and amend the Constitution and constitutional laws, to adopt an international treaty stipulated in Art. 7, para. 2, adopt [a] resolution on [a] public vote to remove the President of the Slovak Republic, file charges against the President and to declare war on another state.

This procedure, which is the only one for constitutional amendments, has been used for all previous constitutional amendments, including those related to the EU.

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Interestingly, draft constitutional laws cannot be vetoed by the President. The original wording of the Constitution was unclear on this point, but the provision has been amended to make this clear.[16]

1.2.3 After the political turmoil of late 1990s, including the problematic autocratic Mečiar-period, the main interest of the SR was to join the EU together with the other countries of the so-called Visegrad Group (the Czech Republic, Hungary and Poland). The EU was perceived as a club of 'rule of law countries', and joining the EU primarily meant becoming part of the political 'West'. From this point of view, accession in the 2004 wave of enlargement was a clear priority, with the discussion centring perhaps more on the practical form and wording of the constitutional amendments, but not questioning their aims or overall direction. Thus, the amendment process was perceived of as a rather straightforward 'technical' exercise in constitutional drafting. The advice of legal scholars and experts was no doubt present in the process of the legal drafting, since some of them were involved, in one way or another. For the size-related reasons outlined above in the Introductory Note and also due to the speed with which the EU Amendment was approved by the NCSR, no sizeable debate on the actual drafts could be discerned. For further details, see Sects. 1.2.1 and 1.5.

1.2.4 There have been no instances of EU-related proposals which have not materialised in practice. However, there have been two amendment proposals that were deflected in the legislative process. First, there was the proposed Constitutional Act No. 140/2004, discussed above in Sect. 1.2.1. As already explained, the substance of that proposal was subsequently put into different constitutional acts. Secondly, a similar moment occurred in 2011, when a draft constitutional act was being prepared with the aim of amending Constitutional Act No. 397/2004 Coll. (See Sect. 1.4.1 below for a detailed analysis of this act). The aim of the proposed amendment was to regulate the national procedures following an amendment of primary EU law pursuant to the special procedure foreseen by Art. 48(6) TEU. However, the necessary three-fifths majority was not found in the NCSR and the constitutional amendment was not adopted. Eventually, the contemplated change was nevertheless carried out in the form of an ordinary law amending the Rules of Procedure of the NCSR. Thus, the content of the provision made its way into the Slovak legal order, although endowed with lower legal force.[17]

Currently, there are no EU-related amendment proposals being discussed or tabled. The reason for such absence might be the fact that, as outlined above in Sect. 1.2.1, the 2001 EU Amendment was quite detailed and explicit, thus, in contrast to more 'economic' EU amendments in other new Member States, limiting the need for further amendments and constitutional litigation.

[16] Article 87(3) of the Constitution, as amended.

[17] For a more detailed analysis, see Jánošíková 2014.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Within the Constitution the transfer of powers to the European Union is governed by Art. 7(2), which is EU-specific and allows the SR to 'transfer the exercise of a part of its rights to the European Communities and European Union'. The details and limits of this provision are discussed below in Sect. 1.3.3.

As for the legal effects of EU law, the relevant general provision is Art. 1(2), which states that the SR shall respect its international obligations. The legal effects of **primary EU law** are not addressed specifically by the Constitution, but the EU Treaties may be classified as 'international treaties whose execution does not require a law' and 'international treaties which directly establish rights or obligations of natural persons or legal persons', which are the terms used in Art. 7(5). The EU Treaties thus 'shall have primacy over the laws', as expressly laid down in the second sentence of Art. 7(5).

The position of EU primary law in the Slovak legal order has been contested by academic writers, and this issue has been also addressed in quite a confusing way by the SCC. Some authors[18] have argued that primary EU law derives its legal effects from Art. 7(2) of the Constitution, while other authors[19] would rather place primary EU law under the regime of Art. 7(5) of the Constitution. Even the SCC has changed its position in this regard over time. In its decision on health insurance companies (discussed in more detail below in Sect. 1.3.4), the SCC stated that 'although the notion of "legally binding acts" used in the second sentence of Art. 7(2) of the Constitution could give rise to problems when defining its exact scope, it can undoubtedly be concluded that the TFEU is such a legally binding act'.[20] According to the SCC, the TFEU falls into a 'special subcategory of international treaties' through which the SR has transferred competences to the EU and which are thus governed by Art. 7(2).[21] However, treaties falling within this special subcategory still qualify as 'international treaties to which consent [has been] given by the NCSR and which [have been] ratified and promulgated in a manner laid down by law', which means that they still belong to the referential framework of constitutional review, as is set out in Art. 125 of the Constitution. The SCC has, however, departed from this position in its more recent case law (see the data retention judgment discussed below).

[18] See for example Drgonec 2013. Drgonec claims that 'legally binding acts' comprise primary EU law and those acts of secondary EU law that are directly applicable, i.e. regulations and decisions.

[19] See for example Jánošíková 2014, according to whom the notion of 'legally binding acts of the EC/EU' only refers to legal acts that have been 'made by the EC/EU', while primary EU law derives its effects from Art. 7(5), rather than Art. 7(2).

[20] Judgment of the SCC, Pl. ÚS 3/09 (*Health insurance*), part V.3.4.

[21] Ibid.

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Yet, despite all these disagreements, other authors note that this taxonomic dispute is quite pointless,[22] since the effects of primary EU law are nevertheless determined by EU law itself and are not dependent on a constitutional recognition in one provision or another. These authors believe that primary EU law is more likely to fall within the regime of Art. 7(5) of the Constitution, but it is in fact not excluded that it can also be covered by the provision in Art. 7(2). These two subsections are not necessarily mutually exclusive. The preference for categorisation under Art. 7(5) follows from the fact that the NCSR, upon giving consent to both the Accession Treaty and the Lisbon Treaty, also declared that these treaties are international treaties in the sense of Art. 7(5) of the Constitution.[23]

This latter position has also been confirmed in a recent case concerning the constitutionality of the data retention provisions, in which the SCC stated the following:

> The position of the founding EU Treaties (TEU and TFEU) in the Slovak legal order is governed by Art. 1(2) and Art. 7(5) of the Constitution. Article 7(5) lists the categories of international treaties that have primacy over laws. The founding EU Treaties can undoubtedly be included in these categories. Even the Charter, which has the same legal force as the founding Treaties, must thus have the same position in the Slovak legal order as is given by Art. 7(5) of the Constitution to the listed categories of international Treaties. More precisely, the Charter must be assigned such legal position in the Slovak legal order as is assigned to international treaties on human rights and fundamental freedoms under Art. 7(5) of the Constitution.[24]

The SCC derives this conclusion also from Art. 6(1) TEU.[25]

The situation is slightly different with regard to **secondary EU law**. It also explicitly has primacy over Slovak laws, but the constitutional basis for this is different, and is provided for in the second sentence of Art. 7(2), which states that 'legally binding acts of the EC/EU shall have primacy over the laws of the Slovak Republic'. The notion of 'legally binding acts' is a concept of Slovak constitutional law that does not correspond to any established concept of EU law, which has caused considerable confusion.[26] One thing that is clear is that from the point of view of the Constitution, all these provisions establish the explicit primacy of EU

[22] See Bröstl 2013, p. 97.

[23] See Decision of the NCSR No. 365 of 1 July 2003 in the case of the Accession Treaty, and Decision of the NCSR No. 809 of 10 April 2008 in the case of the Lisbon Treaty.

[24] See Judgment of the SCC, Pl. ÚS 10/14 (*Data retention*), n. 14, para. 69. The position of the EU Charter is then further developed in paras. 70–72 of the judgment, and the SCC concludes quite strongly in para. 73 that EU Treaties clearly fall within Art. 7(5) of the Constitution. The SCC also refers to the two decisions of the NCSR, which have categorised EU primary law as falling under Art. 7(5) of the Constitution. Translation by the authors.

[25] See para. 73 of the Judgment: 'On the basis of Art. 6(1) TEU, which assigns to the Charter the same legal power as to the founding Treaties, the Charter is to be given the same legal position in the Slovak legal order as is given to international treaties under Art. 7(5) of the Constitution. These are undoubtedly also treaties that fulfil the criteria of Art. 125(1) of the Constitution.' Translation by the authors.

[26] See Drgonec 2013 and Jánošíková 2014, who have presented two differing points of view.

law only over the sub-constitutional norms of the domestic legal order, while the Constitution (and the SCC) remains silent on the hierarchy between EU norms and domestic norms of constitutional nature.[27]

1.3.2 The question of absolute versus relative sovereignty has not yet been addressed by the SCC. It remains a matter of (future?) interpretation whether Art. 7 has transformed the notion of sovereignty from an absolute into a relative one.

It may be only added that such an (inherently political) assessment of the nature of constitutional sovereignty can hardly be inferred from any national constitutional provisions, but will always be dependent first on the particular case and, secondly, on the overall political and legal climate in the Member State in question and within the Union itself at a given moment. To provide an extreme example: in its *Lisbon II* decision,[28] the Czech Constitutional Court announced its 'shared' or 'pooled' sovereignty vision of Czech constitutionality, for which it was greatly praised in (constitutional pluralist) academic circles Europe-wide. Three years later in *Holubec*,[29] the very same court announced something quite different, in effect reaffirming a *de facto* absolute (and quite isolationist) view of sovereignty. Needless to say that the text of the Czech Constitution itself did not change in the course of those three years. Presently, not only legal scholarship may harbour some doubts as to how to 'interpret' and 'conceptualise' such an approach in general terms.[30]

1.3.3 As to the limits to the delegation of powers, the wording of Art. 7(2) suggests that Slovakia may only transfer 'the exercise of a part of its rights' to the EC/EU. The provision raises two interesting questions. First, it speaks not about transfer of powers, but rather about transfer of the *exercise* of rights. (This wording is similar to that of the Belgian or Luxembourgish constitutional texts.) Secondly, it follows from the wording that any transfer must not entail *all* the rights, but be limited to *a part* thereof. These seem to be the two most obvious and textual limits of Art. 7(2).

The preceding paragraph, Art. 7(1), deals with a more significant change in sovereignty, namely *entering into* and *withdrawing from* a 'state union' with other states. Such a decision would have to be made in the form of a constitutional law, confirmed by a referendum.

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[27] Drgonec 2013 has argued that 'European law has primacy over laws, but not over the Constitution. This conclusion can be derived from the legal opinions of the SCC, although these did not concern Art. 7(2) directly, but were aimed more generally at the relationship of the Slovak Constitution and international treaties, where the SCC attributed to the international treaties merely the role of an interpretation tool'. The unanswered question remains, however, how far the legal effects of EU law may be derived from the legal effects of international treaties in general. On the other hand, this may reflect the endless and ongoing controversy between 'internationalist' and 'Europeanist' views on EU law and its nature – contrast e.g. the opposing views relating to the EU-law-character-narrative of De Witte 2012 and Walker 2012.

[28] Judgment of the Czech Constitutional Court of 3 November 2009, Pl. ÚS 26/06, in English online at www.usoud.cz. Further see Komárek 2009.

[29] Judgment of the Czech Constitutional Court of 31 January 2012, Pl. ÚS 5/12, online at www.usoud.cz. Further e.g. Zbíral 2012 or Bobek 2014.

[30] Recently e.g. Přibáň 2015, pp. 323–348.

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The SCC dealt with this issue in its decision II. ÚS 171/05 (*EU Constitutional Treaty*), in which the Court considered whether the Slovak membership in the EU could fall within the scope of Art. 7(1) rather than Art. 7(2). This case arose from a constitutional complaint of a number of natural persons (associated with the Conservative Institute of Milan Rastislav Štefánik), who claimed that the EU Constitutional Treaty transformed the Union into a federation and thus a 'state union'. The ratification of the Constitutional Treaty by the SR should therefore have been subjected to an obligatory referendum, as required by Art. 7(1). The claimants argued that by not organising a referendum, the NCSR had breached their constitutional right to participate in the governance of public affairs.

The SCC disagreed with such claims, stating that even after the changes brought about by the EU Constitutional Treaty, the Union is not a 'state' in the sense of Art. 7(1) of the Slovak Constitution, and that the EU Treaties, including the Constitutional Treaty, were correctly subjected to the regime of Art. 7(2). The SCC further added that

> …the developments in the EU undoubtedly proceed in the direction of a future state, i.e. a state union, but the Constitutional Court believes that at present, it is impossible to predict, at which concrete moment this transformation will take place. The evidence in these proceedings revealed that the EU shows already at present a whole range of features and functions, which can be seen … as features of a state union.

Having said that, the SCC concluded that

> all the future acts and steps that the SR will take in the framework of its relationship with the … European Union, must be governed by the provision of Art. 7(2) of the Constitution. This would not be different even if the act were such as to change the qualitative parameters of the cooperation between the members of the given organisation, which is the case of the [Constitutional] Treaty. Therefore, irrespective of the character of the EU, neither the accession of the SR to the EU nor any other act initiated either by the EU or by the SR, could lead to a situation that would coincide with the aim or the content of Art. 7(1) of the Constitution.[31]

This conclusion is rather surprising, since it postulates either that the EU can never in the future become a 'state union' in the meaning of Art. 7(1) of the Slovak Constitution, or that even if it one day were to become such 'state union', the Slovak Constitution would nevertheless treat it, irrespective of its change in quality, as a mere 'international organisation' within the meaning of Art. 7(2) and without the need for a referendum. Both statements appear to be highly speculative and ought to be treated as a mere obiter, hardly apt for fixing the situation immutably for the future.

1.3.4 The Constitution does not address the relationship between EU law and Slovak constitutional law. It only recognises the primacy of EU law over (*sub-constitutional*) domestic legal norms. So far, there has not been any direct

[31] Judgment of the SCC, II. ÚS 171/05 (*EU Constitutional Treaty*) of 27 February 2008.

conflict between an EU law norm and a norm of Slovak constitutional law, so the question of the supremacy of the Constitution remains open.

Interestingly, however, a practical example of the presence of such a conflict can be found already in the Constitution itself. Pursuant to Art. 144(2) thereof, a judge who thinks that a provision of Slovak law is in conflict with an international treaty in the sense of Art. 7(5) of the Constitution (which includes the EU Treaties), shall suspend proceedings and refer the case to the SCC. This requirement seems to be in direct conflict with the *Simmenthal*[32] ruling of the Court of Justice, and potentially also with the more recent *Melki and Abdeli*[33] judgment.

Even the SCC has acknowledged that in a situation like this, the ordinary court facing a conflict of a Slovak norm and a European norm should not refer the case to the SCC, but should rather follow the doctrine of *Simmenthal*. In its decision in case Pl. ÚS 3/09 (*Health insurance*), the SCC first quoted from the Court of Justice's rulings in *Costa* and *Simmenthal*, explaining the principle of primacy of EU law over domestic law and its practical effects for ordinary courts. It then noted that if an ordinary court is confronted with a conflict between a domestic legal norm and a provision of EU law, the judge is

> under a duty to give full effect to [the provision of EU law], if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.[34]

In a similar vein, the last sentence of Art. 144(2) provides that '[t]he finding of the Constitutional Court of the Slovak Republic is binding for all courts'. In its decision in *Križan*,[35] the Grand Chamber of the Court of Justice indirectly negated this provision by stating that

> a national court, such as the referring court [the Supreme Court of the Slovak Republic – authors] is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.[36]

These remain, however, points of potential conflict, so far limited to the pronouncements of the Court of Justice, but left 'unanswered' in any way by the SCC.

On a general note, however, it could be said that the SCC is an 'EU-friendly' court, as far as any generalisation of similar type may be made. Sometimes its judgments seem to be even overly optimistic towards EU law (e.g. the above-mentioned ruling in the case Pl. ÚS 3/09 (*health insurance*) or Pl. ÚS 10/14 (*data retention*), which both show willingness to include EU law and even

[32] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 00629.

[33] Joined cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli* [2010] ECR I-05667.

[34] Judgment of the SCC, Pl. ÚS 3/09 (*Health insurance*) of 26 January 2011.

[35] Case C-416/10 *Križan and Others* [2013] ECLI:EU:C:2013:8, paras. 62–73.

[36] Ibid., para 73.

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international law in the referential framework for the SCC), but it is too early to deduce any general conclusions from the case law.

1.4 Democratic Control

1.4.1 The role of the Slovak Parliament in EU matters is defined by the Constitution, by Constitutional Act No. 397/2004 Coll. on the cooperation of the NCSR and the Government of the SR in EU matters, and by Act No. 350/1996 Coll. on the rules of procedure of the NCSR.[37]

At the moment of accession, the involvement of the NCSR and the cooperation between the NCSR and the Government in EU matters had not been settled in any way. This gap was filled shortly after accession, in June 2004, by the adoption of Constitutional Act No. 397/2004 Coll. It is a very short act, consisting of only four articles, aimed primarily at defining the respective powers of the NCSR and the Government in EU matters.

Pursuant to Art. 1, the Government has an obligation to inform the NCSR about the current EU agenda, about any draft legislation debated at the EU level, and about any draft opinions (draft EU legislation) or positions that are to be presented in the name of the SR. Pursuant to Art. 2, the NCSR may endorse any such draft opinions, and any other opinions in EU matters. If the NCSR does not issue an opinion within two weeks, it is presumed that it has endorsed the Government's opinion. Furthermore, Art. 2(4) states that a parliamentary decision shall be legally binding for any member of the Government, and Art. 2(5) allows for an exception from this principle in pressing cases, in which case the member of the Government must act in the interest of the SR without delay, but is subsequently obliged to inform the NCSR of the action. The Constitutional Act also requires a regular parliamentary deliberation on EU matters that is to take place at least once a year, on the basis of a report proposed by the Government. This discussion should result in a set of recommendations given by the NCSR to the Government for the following year.

Although the above-mentioned Constitutional Act undoubtedly strengthened the position of the NCSR in EU matters, it should be pointed out that the Government played a major role in the approximation of the Slovak legal system to the EU legal system before accession, and continued to play a major role in the transposition of certain EU legal acts after accession. Pursuant to Art. 7(2), third sentence, and Art. 120(2) of the Constitution, the Government has 'the power to issue regulations to implement laws'. This power is fleshed out further by Act No. 19/2002 on the conditions of issuing governmental regulations, which defines in its Art. 2(1) the specific areas in which a governmental regulation may substitute a legislative

[37] For a detailed study of the respective roles of the Parliament and the Government in EU matters, see Bartovič 2010.

transposition of EU law measures. These are custom duties; banking legislation; corporate accountancy and taxation; intellectual property; protection of workers; financial services; consumer protection; technical regulations and norms; use of nuclear power; transportation; agriculture; environment; and free movement of labour. In practice, this brings about a major decrease in the parliamentary workload, and it shifts the burden of transposition from the legislative to the executive branch. It also proves that transposition of EU norms is seen as a technical issue, rather than a politically sensitive one. However, pursuant to Art. 2(2) of the Act, such governmental regulations cannot regulate fundamental rights and freedoms, the state budget or other matters where the Constitution requires a law, and also cannot create new state institutions.

As for the practical organisation of the EU agenda in the NCSR, Art. 45 of the Rules of Procedure of the NCSR allows the NCSR to create specialised committees. On the basis of this provision, the NCSR created the Committee for European Affairs (CEA) in April 2004. Before the creation of the CEA, EU matters had been dealt with by the Foreign Committee, the Constitutional and Legal Affairs Committee, and the Committee for European Integration.[38] The Rules of Procedure of the NCSR were then amended to include a separate provision on the CEA, namely Art. 58a, which provides for the composition of the committee (proportionate representation of all the parliamentary political parties), its competences and various procedural matters. The CEA currently consists of 15 members and 15 substitute members, it functions continuously (unlike other committees) and it is one of the busiest parliamentary committees. However, there is quite a difference between the formally strong position of the CEA and its actual weight. The main problems are: lack of interest in the EU agenda, low administrative and expert capacity to handle the EU agenda, late involvement of the Parliament in the creation of positions and the fact that the CEA members are simultaneously members of other parliamentary committees, which leaves them with little time to focus on the CEA agenda.[39]

1.4.2 In 2003, the SR held a referendum on accession to the European Union. The question was worded as follows: 'Do you agree to the Slovak Republic becoming a Member State of the European Union?' In total, 52.15% of registered voters participated in this referendum, 92.46% of whom voted in favour of the accession and 6.2% against. It is noteworthy that out of the eight referendums that have been organised in the history of the independent Slovak Republic, this was the only one where the required turnout threshold (higher than 50%) was reached.

Since the accession to the EU is governed by Art. 7(2) of the Constitution rather than by Art. 7(1), a referendum was actually not constitutionally required. Therefore, even if the required turnout had not been reached, the accession would have been possible. However, if a majority of voters had voted no (and if the

[38] Ibid.

[39] Ibid. The name of this expert report ('Giant in Theory, Dwarf in Practice') gives a clear indication of this.

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turnout had been high enough), the Parliament would have been able to change the outcome of the referendum only after the lapse of a three-year time limit.

In the case of the EU Constitutional Treaty and the Lisbon Treaty, no referendum was held. An analysis of the constitutional complaint in relation to the failure to hold a referendum in the case of the EU Constitutional Treaty was provided in Sect. 1.3.3 above.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 There was some academic discussion concerning the need for a constitutional amendment in relation to the Slovak accession to the EU. Although some authors argued that an amendment was not absolutely necessary, the prevailing opinion seemed to be that the Constitution should be amended in order to prepare the Slovak legal order for membership in the EU.

Again, as already explained above, due to the overwhelming political support for the SR to emerge from the Mečiar-period and accede to the EU in the 'first wave' (see Sect. 1.2.3 above), the 2001 EU Amendment was seen as a constitutional necessity, an exercise in quick constitutional drafting, and did not spur much of any of the indicated types of debates.

1.5.2 Since the Slovak Constitution was amended significantly prior to the Slovak accession to the EU, this question is not relevant in the Slovak context.

1.5.3 Perhaps as in any federated structure, within which the individual units have their own rules, the role of national constitutions remains the same as it has always been: in the bottom-up direction, it is one of initiative and inspiration; in the top-down direction, it is largely one of control and checks and balances. Intriguingly, in its horizontal dimension, it may be both. Thus, looking at the European constitutional reality empirically rather than normatively, the Member States, driven by their constitutional ideas and backgrounds, have been operating as both the initiators and the inspiration for change at the European level. Conversely, national constitutions, their provisions and the values enshrined therein have always been the guiding principles for both national interpretation of EU law and a potential resistance to it on the national level.

Such ongoing interaction between the layers in Europe, in the recent two decades enlarged by its horizontal dimension (the Member States being obliged by the EU to recognise and to enforce decisions of other Member States in various fields and areas) does not perhaps necessitate explicit constitutional amendments. These are of course possible, on both levels, but not, strictly speaking, necessary. They are also not necessarily one-directional, as the question would imply, i.e. that the Member States would have to alter their values and convictions under the impact of the EU and other international organisations. Member States, or a number of them,

acceded in 'clusters', which might possibly lead to a 'qualified revolt' whereby the Member States might push the European or international level towards a constitutional change, not necessarily vice-versa.[40]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Slovak Constitution includes a full catalogue of fundamental rights in its Chap. II (Arts. 11–54). This chapter is divided into eight sub-chapters (general provisions; fundamental human rights and freedoms; political rights; rights of national minorities and ethnic groups; economic, social and cultural rights; environmental and cultural heritage rights; the right to judicial protection; concluding provisions). The Slovak human rights catalogue is thus rather comprehensive, spelling out in detail the individual rights that are guaranteed on the constitutional level.

General principles of law (in the more traditional, narrower sense, i.e. excluding human rights but including a range of principles such as legal certainty, non-retroactivity, protection of good faith, etc.) are not explicitly listed in the Slovak Constitution. They are, however, universally understood as components or elements of the rule of law principle (or, rather, in the continental context, of the *Rechtsstaat* principle), as established in Art. 1(1) of the Constitution (see Sect. 2.1.3 below), and as such applied by the courts.

As for the enforceability of fundamental human rights, Art. 12(2) of the Constitution lays down that fundamental rights and freedoms 'are guaranteed to everyone'. The most robust way of enforcing one's rights is through judicial protection, both in ordinary courts and before the SCC. Pursuant to Art. 127(1) of the Constitution, the SCC 'shall decide on complaints by natural persons or legal persons objecting to violation of their basic rights and freedoms … unless another court shall make decisions on the protection of such rights and freedoms'. Furthermore, fundamental rights and freedoms also enjoy constitutional protection by the Prosecutor's Office of the SR (by virtue of Arts. 149–151) and by the Ombudsperson (by virtue of Art. 151a).

Moreover, since the SCC understands fundamental rights to impose positive obligations on the state, these in turn bind (and ought to be upheld) by all state bodies and authorities. As the SCC stated in its decision in II. ÚS 8/96 (*abduction of Michal Kováč Jr*),

[40] For examples, see e.g. Bobek 2017.

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> [t]he rights and freedoms embedded in the Constitution of the Slovak Republic are protected by a positive obligation. The content of this positive obligation of the state in relation to rights and freedoms of a citizen is the duty to take measures to protect the rights that have been guaranteed to citizens in the Constitution.[41]

2.1.2 The general constitutional provisions on limiting rights and imposing duties are set out in Art. 13 of the Constitution. It reads as follows:

> (1) Duties may be imposed
>
> (a) by statute or on the basis of a statute, within its limits, and while complying with basic rights and freedoms,
>
> (b) by international treaty pursuant to Art. 7, par. 4 which directly establishes rights and obligations of natural persons or legal persons, or
>
> (c) by government ordinance pursuant to Art. 120, para. 2.
>
> (2) Limits to basic rights and freedoms may be set only by a statute under conditions laid down in this Constitution.
>
> (3) Legal restrictions of basic rights and freedoms must apply equally to all cases which meet prescribed conditions.
>
> (4) When restricting basic rights and freedoms, attention must be paid to their essence and meaning. These restrictions may only be used for the prescribed purpose.

The general rights limitation clause is thus quite robust. It contains all the limitations one normally associates with the (largely German-styled) rights-limitation clause. Most importantly, Art. 13(1)(a) and 13(2) provide for '*Gesetzesvorbehalt*' – limits to rights and the imposition of duties are generally permissible only by a statute, i.e. an Act of Parliament, not by an executive decree – although letters (b) and (c) do water down this original limitation somewhat. Furthermore, Art. 13(4) protects the essence of the rights and prevents their 'hollowing out'.

In addition to these general rights-limitation provisions, there are also specific (or sectoral) limitations of rights. In addition to Art. 7(4) and Art. 120(2), which are mentioned explicitly in the first paragraph of Art. 13, there are other constitutional provisions that limit rights, such as Art. 17 on the conditions of detention, Art. 25(1) on compulsory military service, Art. 42(1) on compulsory school attendance and Art. 54 on restrictions on the entrepreneurial activities of certain professions and restrictions on the right to strike.

As a 'limit to the limit', there is Art. 2(2), which establishes that 'state bodies may act only on the basis of the Constitution, within its limits, and to the extent and in a manner which shall be laid down by law'. Therefore, the state cannot limit fundamental rights and freedoms without an express entitlement by the Constitution or by a law.

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[41] Judgment of the SCC, II. ÚS 8/96 (*Abduction of Michal Kováč Jr*) of 4 September 1996.

Finally, the Constitution also includes a specific 'procedural limit' as to changes to the constitutional system: pursuant to Art. 93(3), fundamental rights and freedoms cannot form the subject matter of a referendum.

2.1.3 The rule of law Article 1(1) of the Constitution states that the SR 'is a sovereign, democratic state governed by the rule of law'. This principle is perhaps closer, both in its wording and in its content, to the German concept of *Rechtsstaat*, rather than the common law concept of *the rule of law*. The elements of this principle are not spelled out in the Constitution, but courts (especially the SCC) often refer to the 'rule of law principle' in their reasoning. They treat the principle as an umbrella concept that includes various general principles of law (e.g. legal certainty, legitimate expectations, the prohibition of (true) retroactivity, etc.).

Over the years, the SCC has expanded the rule of law into one of the robust constitutional principles. For example in PL. ÚS 3/00, the SCC opined that:

> The rule of law principle also includes the citizens' trust in the legal order. In principle, it is necessary to protect the trust that the legal consequences that follow from unchanging factual circumstances are recognised (and remain recognised). However, the protection of such trust does not apply in cases where trust in a certain legal state would not be substantively justified, i.e. the rule of law principle does not protect a citizen from every subjectively perceived loss of trust or from every disappointment.[42]

Moreover, in its decision in PL. ÚS 17/08, the SCC subscribed to a material notion of the rule of law:

> The material rule of law concept includes a requirement of substantive quality and value quality of a legal norm, which is to ensure that the legal instrument, as implemented in the chosen legislative regulation, is adequate in relation to the legitimate aim pursued by the legislator, and that the chosen legislative measure is compatible with constitutional principles and democratic values.[43]

Thus, the rule of law is in practice both frequently invoked by applicants and also frequently employed by the courts in their reasoning. Its specific components tend, however, to be quite rich and variable.

Judicial protection The right to access to a court is embedded in Art. 46 of the Constitution. It reads as follows:

> (1) Everyone may claim his right in a manner laid down by law in an independent and impartial court and, in cases laid down by law, at another body of the Slovak Republic.
>
> (2) Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision re-examined, unless laid down otherwise by law. The re-examination of decisions concerning basic rights and freedoms may not, however, be excluded from the court's authority.

[42] Judgment of the SCC, Pl. ÚS 3/00 (*Land ownership*) of 24 April 2001.

[43] Judgment of the SCC, Pl. ÚS 17/08 (*Rule of law*) of 20 May 2009.

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(3) Everyone is entitled to compensation for damage incurred as a result of an unlawful decision by a court, or another state or public administration body, or as a result of an incorrect official procedure.

(4) Conditions and details concerning judicial and other legal protection shall be laid down by law.

This right has been given a rich and wide interpretation from the very beginning. Its connection with the rule of law principle is obvious for example from the decision of the SCC in case I. ÚS 4/94, in which the Court stated: 'the right to judicial protection is not exhausted by a victory in a civil dispute; the right to judicial protection also means that the courts are bound by law, both procedurally and substantively.'[44] The flipside of this argument has been expressed by the SCC in case I. ÚS 6/97: '[t]he practice of a judicial institution, which acts in accordance with substantive and procedural provisions of law, cannot establish a breach of a fundamental right embedded in Art. 46(1) of the Constitution'.[45]

Publication of legislation As a general rule, in order to become valid law, legal acts must be duly published in the Collection of Laws. With regard to Slovak laws (statutes), this principle is provided for in Art. 1 of Act No. 1/1993 Coll., on the Collection of Laws of the Slovak Republic. Moreover, the duty to make statutes accessible to the public may be seen, on the constitutional level, as an emanation of the principle of the rule of law, provided for in Art. 1(1) of the Constitution.[46] For a more detailed examination of the issue of unpublished legislation, refer to Sect. 2.5 below.

Limitation of rights Finally, as already outlined in Sect. 2.1.2 above, Art. 13 of the Constitution expressly provides, in the form of a provision on limitation of rights, that duties and obligations (which naturally also include sanctions and penalties) may be provided for only by a statute, i.e. an Act of Parliament. However, this previously categorical limitation has been watered down by the EU Amendment, which put international treaties into a similar category under Art. 7(4), but most importantly did the same for government ordinances, pursuant to Art. 120(2). The latter category includes government ordinances that are adopted for the implementation of EU measures in given areas (further above in Sects. 1.2.1 and 1.4.1).

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 As to the balancing of fundamental rights with economic free movement rights, the question cannot be usefully answered if it is framed in this way. First, as

[44] Judgment of the SCC, I. ÚS 4/94 (*Judicial protection*) of 27 October 1994.

[45] Judgment of the SCC, I. ÚS 6/97 (*Judicial review*) of 23 January 1997.

[46] See e.g. Hodás 2008, p. 527.

a general matter, courts are typically not allowed to frame the answer in the way they please, but have to frame it according to the structure of the case that is brought before them. The role of the given court and the type of cases it receives also pre-determine what will be the 'basic rule' and what will be its 'limitation' or 'exception'. Thus, since the Court of Justice of the European Union (CJEU) is not a general human rights court, the cases brought before it come as 'economic' cases – free movement is the basic rule and other values and interests are the limitations. That is logical and relates to the competence and the field of application of EU law: there must first be an EU law (economic) element and only then can any human rights considerations be triggered, at least certainly as far as Member States' measures are concerned, which was also the case in both *Omega*[47] and *Schmidberger*.[48] Conversely, national constitutional courts are human rights courts. Thus, cases brought before them are pleaded primarily on human rights grounds, with other values and interests providing the permissible limitations or exceptions.

From this point of view, the 'structure' of the case is given by the nature of the court. The idea presented by some of the critiques of the Court's decision in *Viking*[49] and *Laval*,[50] namely that the Court of Justice 'prioritised' the economic freedom over social rights *because* the economic free movement was the rule and fundamental rights the exception, demonstrates considerable disregard for the competence of the CJEU. A case may fall into the competence of the CJEU only if it is presented as an 'economic' case. The (primary) freedom invoked is bound to be 'economic', i.e. one of the four freedoms, in order for the case to fall within the scope of application of EU law. Reversing the rule with the exception could amount to asserting a general human rights competence by the CJEU, so dreaded by all the Member States and a substantial number of legal scholars.

Conversely, a national constitutional court will always approach a case submitted to it with the primary vantage point of the fundamental right in question, to which EU law and economic freedoms might provide legitimate exceptions. The SCC has not yet ruled on the specific balance between fundamental rights and EU economic freedoms, but balancing human rights with economic interests generally is a common exercise performed by the Court. Thus, for example, in a case dealing with the alleged unconstitutionality of expropriation due to the construction of highways, the SCC reasoned by a typical proportionality test, presented in four consecutive steps: (1) is there a fundamental right at stake? (2) is there an interference with such fundamental right? (3) is the interference lawful? (4) does the interference satisfy the test of proportionality, i.e. the conditions of legitimate aim,

[47] Case C-36/02 *Omega* [2004] ECR I-09609.

[48] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[49] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

[50] Case C-341/05 *Laval un Partneri* [2007] ECR I-11767. For a summary of this traditional 'labour law' or 'human rights' critique of both decisions, see Introduction in Freedland and Prassl 2014.

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suitability, necessity and proportionality in the strict sense?[51] The Act on Highway Construction that provided for the possibility of exploitation for the purpose of highway construction was eventually struck down by the SCC on the grounds of the necessity condition. The SCC observed in para. 74 of the judgment that the adopted measures were certainly not the least restrictive way to reach the desired aim.

From the above, follows the second point: since the two courts have differently defined jurisdiction, the 'adjustment' potential is rather limited. The CJEU will not receive primarily human rights cases (since these are outside its competence, unless they have some other link with EU law), and national constitutional courts will not deal with free movement or other economic cases if they have no primary fundamental rights element (they will declare these to be devoid of a constitutional dimension and for the ordinary courts to deal with). This does not preclude, however, that each of the actors might be more ready to take the interests and concerns from the other 'box' into account in its balancing exercise. However, no such distinct change can be traced in the case law of the SCC and, on a general level, would be difficult to expect.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

Constitutional framework The Slovak Constitution offers an extensive and detailed framework for principles of criminal law, including issues such as personal freedom and limits to deprivation of liberty (Art. 17), access to courts (Art. 46), defence rights (Arts. 47–48), *nulla poena sine lege* (Art. 49) or the presumption of innocence and the *ne bis in idem* principle (Art. 50).

Implementation of the European Arrest Warrant (EAW) in Slovakia European criminal law has brought a number of major changes into the Slovak legal order. As has been explained in Sect. 1.2.1 above, the Slovak Constitution was amended in 2001 so that the prohibition of surrendering a citizen to another state was removed from the provision of Art. 23(4) of the Constitution, without any further guarantees or limits. This solution may seem overly enthusiastic and it has been criticised as lacking the necessary constitutional guarantees, such as are provided for example in Art. 16(2) of the German Constitution.[52] On the other hand, it might be added that the EU amendment was adopted in 2001, i.e. before the adoption of the EAW Framework Decision 2002/584/JHA.[53] The reason for the Slovak amendment at that time was the pending ratification of the Statute of the International Criminal

[51] See Judgment of the SCC, No. Pl. ÚS 19/09 (*Highways*) of 26 January 2011, para. 69; see also para. 74.

[52] See Hodás 2011, pp. 68–69.

[53] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

Court and not the EU EAW Framework Decision, which, at the time, had been contemplated but not yet adopted.

On the national sub-constitutional level, the EAW Framework Decision was first transposed into the Slovak legal order by Act No. 403/2004 Coll., on the European Arrest Warrant. The practice subsequently showed that this implementation was insufficient in various regards – it failed to transpose some of the EAW provisions comprehensively, it was not systematic enough and it was too rigorous in matters of detention for some types of crimes.[54] This act was therefore repealed and replaced by Act No. 154/2010 Coll., on the European Arrest Warrant (currently in force), which corrected these insufficiencies. The new Act built on the existing terminology introduced in the original Act, but it introduced a new systematic structure that should be more in line with the practical experience in the field.[55] The most important change, from a procedural point of view, was the introduction of preliminary detention (Art. 15 of Act No. 154/2010 Coll.), inspired by the provisions of the criminal code that regulate extradition. Substantively, the crucial change was the inclusion of a proportionality clause in Art. 5(3) of the Act, which states: 'A court shall not issue a European arrest warrant if it is clear before such issuance that the requesting of the person from a foreign country would cause a degree of harm disproportionate to the significance of the criminal proceedings or to the consequences of the criminal act.'

The SCC has not yet had a chance to (fully) assess the compatibility of the EAW provisions with fundamental human rights. However, in a recent case Pl. ÚS 12/2012 (*Hungarian car accident*),[56] two judges expressed doubt about the constitutionality of the current constitutional framework in their dissenting opinions. The facts of the case were as follows: in 2002, a Slovak citizen (Mr. J.B.) caused a car accident in Hungary. In 2004, Hungarian courts declared that Mr. J.B. was guilty of having caused a car accident that resulted in the death of a person, and requested that Mr. J.B. be surrendered to the Hungarian authorities in order to serve his sentence of imprisonment on Hungarian territory. The Slovak authorities complied with this request and surrendered Mr. J.B. to Hungary. After having served his custodial sentence in Hungary, Mr. J.B. sued the SR for damages, arguing that the legal framework that had allowed his surrender to Hungary was unconstitutional. The Slovak regional court seized of the question referred the case to the SCC, requesting constitutional review on the basis of Art. 23 of the Constitution ('freedom of movement and right of abode'). However, the SCC rejected this request on procedural grounds, since the subject matter of the pending case (i.e. Mr. J.B.'s claim for damages) was too remote from the question of constitutionality of Art. 23.

The two dissenting judges, Justice Macejková and Justice Mészáros, nonetheless expressed concerns about the constitutionality of the current legal framework, not due to the requirements flowing from the EAW itself, but rather due to the way it

[54] See the Explanatory Report to Act No. 154/2010 Coll., Part A (General Part).

[55] Ibid.

[56] Judgment of the SCC, Pl. ÚS 12/2012 (*Hungarian car accident*) of 11 July 2012.

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was transposed by the Slovak legislator. In the words of Justice Mészáros, 'the Slovak legislator has not used and is not using the leeway offered by the Framework Decision, which allows for a higher constitutional protection of citizens'.[57] Justice Macejková furthermore stated that the legal framework would only be in conformity with constitutional requirements if the legislator decided to broaden the protection of citizens' fundamental rights and to guarantee the right to the widest extent allowed by the Framework Decision on the EAW, namely by Art. 4(6) and 5(3) thereof. This change was indeed introduced into the law, not in reaction to the dissenting opinion of Justice Macejková, but in reaction to Framework Decision 2008/909/JHA of 27 November 2008, on the application of the principle of mutual recognition to judgments in criminal matters.[58] Following this EU legislative act, the NCSR adopted Act No. 549/2011 Coll., on recognition and execution of criminal decisions, and Act No. 344/2012 Coll., on changes to Acts No. 154/2010 and 549/2011 Coll.

2.3.1 The Presumption of Innocence

2.3.1.1 To our knowledge, no concerns have been voiced or discussed with regard to the lack of the presumption of innocence under the EAW mechanism in Slovakia. At an early stage of the *Hungarian car accident* case, the regional court that decided on the surrender of Mr. J.B. to Hungary merely stated that 'the judicial authority of the executing state is not entitled to examine the guilt or innocence of the person requested by the EAW, but merely to decide whether the EAW will or will not be executed'.[59] The courts thus comply with the provisions of the EAW Framework Decision, as transposed into Slovak law, which states that the executing judicial authorities are not competent to examine the question of guilt.

Moreover, it is not quite clear in the Experts' view how the presumption of innocence would specifically be undermined by a national court surrendering a person under the EAW mechanism, unless of course there is an unspoken assumption that the requesting court in another Member State is not able to conduct a fair trial. If that were the case, the key problem would rather be posed in terms of absence of fair trial or trial in a reasonable time, but not necessarily in terms of the presumption of innocence. Moreover, the fact that some persons might be deprived of their liberty for a limited time before the question of their guilt is finally determined before a judge is a general feature of any domestic legal system,

[57] Ibid.

[58] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008] OJ L 327/27.

[59] See the decision of the Regional Court in Košice, Ntc 2/04-124 (22 February 2005), as paraphrased in the Judgment of the SCC (*Hungarian car accident*), n. 56 above, para. 21.

inherent to the institution of pre-trial custody. Also in similar, purely domestic cases, persons might be deprived of their liberty by a court order, without being immediately allowed to rebut all of the charges raised against them, which is possible only at the later full trial.

2.3.1.2 When Slovak courts are asked to surrender a person to another Member State, they do not examine the question of guilt *per se*. Pursuant to Act No. 154/2010 Coll., courts merely examine whether there are any reasons (obligatory or facultative) not to execute the EAW at stake, but they do not go beyond this analysis, since they do not have such power. The executing court is not in a position to examine the question of guilt, since that question will be examined by the foreign court that has issued the EAW. Therefore, to our knowledge, extradition has never been refused on the ground of a claim of innocence.

The procedural guarantees, including the provisions regarding the hearing of the requested person, are regulated in detail by Act No. 154/2010 Coll., which is a very loyal transposition of the EAW Framework Decision. As a result, the Slovak legal framework honours the principle of mutual trust between the EU Member States in their respective systems of criminal law. Again, under the logic of the EAW mechanism, the Slovak courts could hardly do otherwise, unless the EAW system were to revert to a traditional form of extradition proceedings as known in international law where a number of issues would be checked by the extraditing court.

Furthermore, some data have been published regarding the number of persons surrendered (a) from other states to Slovakia, and (b) from Slovakia to other states; this is summarised in Table 1.

Table 1 Data regarding surrender of persons in Slovakia

Year	Number of people handed over from other countries to the SR	Number of people handed over from the SR to other countries
2008	116	36
2009	143	53
2010	152	48
2011	170	65
2012	157	45
2013	140	47
2014	143	58

Source The Slovak Ministry of Interior. [See the statistics of the Slovak Ministry of Interior. http://www.minv.sk/?European_Arrest_Warrant]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The abolition of dual criminality has not been addressed by the Slovak courts. Technically, the principle of *nulla poena sine lege* is not breached, since the legal framework incorporates the EAW as a legal instrument into the legal order,

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and it is thus foreseeable for citizens that in certain cases, they can be prosecuted for crimes that are (only) punishable in Member States other than the SR.

By way of constitutional provisions, Art. 17 of the Constitution states: '(1) Personal freedom is guaranteed. (2) No one may be prosecuted or deprived of freedom other than for reasons and in a manner which shall be laid down by law', and Art. 49 states: 'Only the law establishes which conduct constitutes a criminal act and what punishment or other form of deprivation of rights or property may be inflicted upon those who commit it.' Since the provisions of the EAW Framework Decision have been properly implemented, they have become part of the Slovak legal framework.

Still, concerns have been expressed by academic experts. Jakubčík has claimed that Art. 2(2) of the EAW Framework Decision is 'the most controversial point of the law on the EAW', since it brings about 'severe procedural consequences for Slovak judicial authorities'.[60] He considers the 32 categories to be too vaguely formulated and too broad, which results in the incorrect classification of crimes by the Member States, or even *abuse* of the vagueness by the Member States.[61] However, apart from the occasional academic voices, the issues outlined above have not, to our knowledge, given rise to any (constitutional) litigation.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 In contrast to the Spanish constitutional system but similarly to a number of other legal systems including the Czech legal system, the Slovak legal order does not perceive *in absentia* judgments as a constitutional problem. Articles 358–362 of the Code of Criminal Procedure (Act No 301/2005 Coll.) provide for a specific type of criminal procedure entitled 'proceedings against a fugitive'. This type of procedure will be triggered against an accused person who evades criminal proceedings by escaping abroad or by hiding. The fugitive is assigned an attorney, who will represent the fugitive throughout the entire procedure. Article 361(1) of the Code of Criminal Procedure expressly provides that the announcement of the date and place of the trial will be made public and will be served to the appointed attorney. The trial will, however, take place irrespective of whether or not the accused has obtained knowledge of it. Finally, Art. 362(2) opens the possibility of a retrial once the accused obtains knowledge of either the trial or the final sentence, made subject to two types of time limits: a subjective one, i.e. six months from the moment the accused obtained knowledge of the trial/sentence, and an objective one, referring to the general provisions on prescription for the individual crime provided for in the Code of Criminal Procedure.

Thus, re-trial is conceived as a matter or right, open to the accused, typically if the accused returns to the national territory. It does not, however, appear to be a

[60] See Jakubčík 2009, pp. 1178–1188.

[61] Ibid.

constitutional requirement. As a consequence, *in absentia* judgments and their execution under the EAW mechanism are constitutionally possible. To our knowledge, their constitutionality has not been challenged. Even if it were, it is hard to see how the SCC could find such practice unconstitutional. After all, it is the fugitive who by his absence or hiding obstructs the course of justice, and there is the possibility of a re-trial should the fugitive return to the national territory.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 As to the issue of providing assistance to extradited citizens or residents, there are two different scenarios that arise from this question. First, legal aid provided by the surrendering Member State to the person it is surrendering, but before any trial takes place in the requesting Member State. Second, *ex post facto* help to persons who have been extradited but subsequently acquitted in the requesting Member State or subjected to extensively long proceedings or a miscarriage of justice.

As far as the first scenario is concerned, pursuant to Decree No. 135/1994 Coll., *on the expatriation of persons*, the SR bears some of the costs. Article 8 of this Decree states the following:

> (1) Costs incurred by the surrendering of the sentenced person, who is in detention or who is serving their imprisonment sentence, to the competent body of the Police forces, are borne by the Prison Service of the Slovak Republic.
>
> (2) Personal expenses and travel expenses incurred by the expatriation are borne by the sentenced person alone, unless another natural or legal person decides to bear them.
>
> (3) If the sentenced person does not have their own financial means to cover the costs of the expatriation sentence, these are borne by the Police forces.

There appear, however, to be no dedicated national funds for assisting surrendered persons in other Member States. This is perhaps not entirely surprising, since under the logic of the EAW mechanism, the surrendered individual should be allowed to make use of the local system of legal aid in the state to which he or she is surrendered.

The same logic applies to the second scenario. Under Slovak law, damages can be claimed from the Slovak state for unlawful detention, excessively long proceedings or other miscarriages of justice.[62] However, such damages must be

[62] See Art. 46(3) of the Constitution: 'Everyone is entitled to compensation for damage incurred as a result of an unlawful decision by a court, or another state or public administration body, or as a result of an incorrect official procedure.' This constitutional provision is further implemented in Act No. 514/2003 Coll. on the liability for damage caused by the exercise of public power, which regulates the conditions of compensation in cases of unlawful decisions, unlawful limitations of personal freedom, unlawful sanctions or incorrect administrative proceedings. Although the

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attributable to a failure on the part of the Slovak (judicial) authorities.[63] The rationale behind the right to compensation has been clarified by the Supreme Court of the SR:

> If a state is to be truly rooted in the rule of law principle, it must bear objective liability for the conduct of its authorities that have directly interfered with the fundamental rights of an individual …. On the one hand, prosecuting authorities are obliged to prosecute and sanction criminal activities, but on the other hand, the state cannot avoid liability for the conduct of such authorities if such conduct turns out to be mistaken, interfering with fundamental rights. In such a situation, the important issue is not how the authorities have assessed the original accusation, but whether their presumptions were confirmed in the criminal proceedings.[64]

On the other hand, a person who has been surrendered to Slovakia from another Member State under the EAW mechanism and who has been exposed to any of the above-mentioned miscarriages committed by Slovak authorities could claim damages under this heading.

As for any institutionalised assistance to individuals involved in trials abroad, there is a difference between what would be desired and what would be legally and economically possible. With regard to individual fates and situations, some form of financial support could only be commended. Structurally, however, it would be difficult to put into practice unless the 'publicly funded' assistance were adopted on the European level, with equal support for all European citizens. Only in this way could equality amongst EU citizens be guaranteed; if states were to reserve such aid only for their citizens (or previous residents) abroad, it would be likely that the aid would quickly bring about a 'caste system' in access to justice based on *de facto* nationality, amounting to a textbook example of indirect discrimination on the grounds of nationality. Imagine that a Czech and a Swedish citizen were surrendered under the EAW system to, for example, Greece, but only Sweden provided financial assistance to its citizens standing trial abroad. Both of them would be sent to an 'unknown environment' in which they arguably need assistance. Thus, their situation could be said to be in all material aspects comparable. But since only one Member State provided assistance, both 'European citizens' could be treated very differently. Furthermore, introduction of such state-based measures could also be understood as the re-introduction of traditional public international law features into EU law, whereby states would exercise a sort of 'diplomatic protection' over their citizens on the territory of other Member States, in the form and extent known in general public international law.

2.3.4.2 There are no comprehensive statistics capturing the proportion of unfounded extraditions, but once in a while, the media points out an individual story involving

situation of an acquittal is not explicitly covered by the Act, courts have concluded by means of analogous interpretation that such situations also fall within the scope of the Act (see Judgment of the Supreme Court of the SR, No. 3 Cdo 194/2010).

[63] Cf. Art. 3(1) of Act No. 514/2003 Coll.

[64] See Decision of the Supreme Court of the SR, No. 4 M Cdo 15/2009.

judicial error. One recent case concerned a Slovak national who was extradited to the Netherlands under the provisions of the EAW, but was later acquitted because it became evident that the DNA samples had been mixed up and that the accused was in fact innocent. Mr. Harabin, the former president of the Supreme Court of the SR, has recently suggested that such cases are not rare and that it is necessary to initiate a legislative solution that would help minimise judicial errors and compensate innocent citizens who have suffered damage.[65] However, as already noted, no reliable data in this regard is available.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 After the Slovak accession to the EU, a number of mutual recognition issues arose in civil, administrative and criminal matters. For administrative matters, the cases were similar to those described in the question[66] and were in fact raised in a Czech request for a preliminary ruling in *Kyrian*[67] before the Court of Justice. The *Kyrian* case concerned the enforcement of an order for payment of excise duty owed by Mr. Kyrian, a Czech truck driver, to German customs authorities (*Hauptzollamt Weiden*) for amounts of imported alcohol. After the Czech accession to the EU in 2004, the German authorities served the order for payment on Mr. Kyrian through the Czech tax authorities pursuant to Art. 6 of Directive 76/308.[68] The case gave rise to two important questions of principle: the permissible scope of review of the administrative order for payment by the courts of the executing state and the question of the language in which the order was to be served. The element common to both questions was the problem of effective legal protection for decisions crossing

[65] See the media coverage of this story: (2013, July 10). *Štefan Harabin navrhuje upraviť európsky zatýkací rozkaz* (Štefan Harabin suggests amending the European Arrest Warrant). Webnoviny.sk. http://www.webnoviny.sk/slovensko/clanok/700381-stefan-harabin-navrhuje-upravit-europsky-zatykaci-rozkaz/.

[66] Generally, however, tax and customs decisions from other Member States would be enforced under the heading of cooperation in administrative matters, and not as a civil matter, as would appear to be indicated by the Estonian case. For an exception confirming the rule, see ECJ, Case C-49/12 *Sunico and Others* [2013] ECLI:EU:C:2013:545.

[67] Case C-233/08 *Kyrian* [2010] ECR I-00177.

[68] Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, [1976] OJ L 73/18, in the meantime replaced by Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, [2008] OJ L 150/28, which was itself soon repealed by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L 84/1.

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borders between Member States: how far (if at all) may the executing Member State subject the administrative order coming from a different state to any substantive judicial review, in particular if because of a lack of knowledge, the individual did not seek judicial review in the requesting state? Moreover, in what language must the order for payment be served?

In *Kyrian*, the opposing approaches of the Advocate General and the Court itself are noteworthy. In his Opinion, AG Mazák robustly relied on *effet utile* and a purposive reading of the Directive: full effectiveness of horizontal mutual assistance for the recovery of levies and taxes cannot be called in question and must be asserted, even if the procedural system established by the Directive is rather questionable and leaves the individual without any possibility of judicial review of an administrative decision in the adoption of which he did not participate in the requesting state and which was simply served on him in his home state in a foreign language. Conversely, the Court (first chamber) took a much more critical and rights-protective approach to the interpretation of the Directive: the courts of the executing Member States are entitled to carry out (albeit limited) judicial review and the individual must be served with documents in the language of the executing Member States, i.e. in a vast number of cases, his own language.

In general, however, broader concerns of the sort outlined in the question cannot be detected in either Slovak case law or commentary. It cannot, however, be stated categorically that effective legal protection is no longer guaranteed following the introduction of cooperation in criminal, administrative and civil matters. Such assessment will be very case-dependent and cannot be stated in such categorical terms.

Perhaps the best approach in cases like that of Mr. Kyrian would be to open up the possibility of an administrative court retrial and/or extraordinary administrative review in the requesting Member State within the normally applicable time-limits, conditional upon the fact that the addressee of the original administrative act had no knowledge of the administrative proceedings against him being carried out in the requesting Member State. The burden of proof would be on the authorities of the requesting Member State that would have to establish that at a certain point in time, the addressee of the act was duly served (as would normally be the case with truck drivers involved in smuggling at the moment of the interception of the goods by the customs authorities).

2.3.5.2 In Slovak scholarship, there is no discernible debate about the suitability of transposing mutual recognition from internal market matters to criminal law and civil and commercial disputes. However, to state that the principle of mutual recognition cannot be transposed *per se* from the area of internal market to criminal, civil or administrative matters is again not warranted in such categorical terms. The debate should rather be conducted about the exact procedural modalities, scope and possible exceptions. After all, mutual recognition is not a principle unique to EU law. International cooperation writ large in criminal or civil matters is based on the same principle, albeit in a more limited form.

2.3.5.3 There has been no debate regarding a change in the role of the courts.

2.3.5.4 As already outlined above, Act No. 154/2010 Coll. (implementing the EAW Framework Decision), introduced a proportionality clause in its Art. 5(3) (see Sect. 2.3 above). However, this 'check' applies only if a Slovak court is the requesting court, i.e. for considerations whether or not an EAW shall be issued. It also has no bearing on the issue of guilt.

On a general level, re-introducing judicial review in the surrendering Member State prior to the surrender would essentially amount to returning to traditional extradition proceedings. The same applies to the potential re-insertion (or rather re-evaluation, since it still remains in some residual form in Regulation 44/2001)[69] of exequatur for civil and commercial matters. Should such (essentially political) decision be taken, EU legislation in these areas would become unnecessary.

2.4 The EU Data Retention Directive

2.4.1 The Data Retention Directive[70] was implemented in the Slovak legal order by inserting new provisions into a number of legal acts, most notably Act No. 351/2011 Coll., on electronic communications and Act No. 301/2005 Coll., the Code of Criminal Procedure. The Slovak legislator opted for a rather modest implementation: internet data are to be retained for 6 months and all other data for 12 months.

This implementing legislation was challenged in October 2012 by a group of 31 MPs in a petition for abstract constitutional review pursuant to Art. 125(1)(a) of the Constitution. The claimants argued that the provisions were in breach of a number of provisions of the Slovak Constitution,[71] as well as Arts. 8 and 10 of the European

[69] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1.

[70] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[71] The allegedly violated provisions were the following:
'Article 13: …
(4) When restricting constitutional rights and liberties, attention must be paid to their essence and meaning. These restrictions must not be used for any other than the set purpose.
Article 16: (1) The inviolability of the person and its privacy is guaranteed. It can be limited only in cases defined by law.
…
Article 19: …
(2) Everyone has the right to protection against unwarranted interference in his private and family life. (3) Everyone has the right to protection against the unwarranted collection, publication, or other illicit use of his personal data.
…

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Convention on Human Rights (ECHR), and Arts. 7, 8, 11 and 52(1) of the EU Charter.

According to the claimants, the collection of data amounted to universal surveillance of all citizens, irrespective of their integrity and (lack of) criminal record. The claimants invoked a number of European Court of Human Rights cases, such as *Klaas v. Germany*[72] and *Copland v. UK*,[73] arguing that the data collection and retention amounted to a significant interference in the private life of individuals. They acknowledged that the interference pursued a legitimate aim, namely the protection of national security, national defence and public security, but they disagreed with the appropriateness of the adopted measures and their necessity. Moreover, the claimants argued that the challenged measures denied the very nature of the right to privacy. With regard to the EU dimension of the discussion, the claimants requested the SCC to submit a reference for a preliminary ruling to the Court of Justice.[74]

The SCC was aware of the pending case in *Digital Rights Ireland*, and the judges decided to wait for the outcome of that case, rather than to refer their own question to the Court of Justice. In April 2014, when the judgment in *Digital Rights Ireland* was published,[75] the SCC issued an interim decision[76] suspending the legal effects of the challenged legal provisions until the publication of the final decision in the case.

The decision on merits was delivered one year later, on 29 April 2015. The SCC opened its analysis by discussing the referential framework of constitutional review, acknowledging that

> [e]ven after the accession of the SR to the EU, the referential framework of constitutional review remains limited to the norms of the Slovak constitutional order. However, the Constitutional Court cannot disregard the effects of EU law on the creation, application and interpretation of domestic norms in the fields of regulation that have their origin in EU law.[77]

Article 22: (1) The privacy of correspondence and secrecy of mailed messages and other written documents and the protection of personal data are guaranteed. (2) No one must violate the privacy of correspondence and the secrecy of other written documents and records, whether they are kept in privacy or sent by mail or in another way, with the exception of cases to be set out in a law. Equally guaranteed is the secrecy of messages conveyed by telephone, telegraph, or other similar means.

…

Article 26: (1) The freedom of speech and the right to information are guaranteed.'

[72] *Klaas v. Germany*, 22 September 1993, Series A no. 269.

[73] *Copland v. the United Kingdom,* no. 62617/00, ECHR 2007-I.

[74] See the claimants' submissions in Part I of the SCC judgment in case Pl. ÚS 10/14, n. 14 above, pp. 2–27.

[75] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] EU:C:2014:238.

[76] Decision of the SCC, Pl. ÚS 10/14-29 (*Data retention, interim*) of 23 April 2014.

[77] See Pl. ÚS 10/14 (*Data retention*), n. 14, para. 62.

The SCC then elaborated on the principles of the scope of application of EU law, referring to Art. 51(1) of the EU Charter and the explanatory notes thereto, as well as to the judgments of the Court of Justice in a number of cases (i.e. *Wachauf*,[78] *ERT*,[79] *Fransson*,[80] *Ymeraga*[81] and *Siragusa*[82]). On the basis of this case law, the SCC concluded that even after the annulment of the Data Retention Directive, the domestic implementation thereof is still to be seen as a measure adopted within the scope of application of EU law, since it represents a derogation from the E-Privacy Directive,[83] namely Art. 15(1) thereof.[84] The SCC therefore concluded that 'in the constitutional review of the challenged decisions … the Constitutional Court must also take into consideration the relevant provisions of the Charter, especially Art. 7, 8, and 52(1) thereof and the relevant case law of the Court of Justice of the EU'.[85] However, in its ruling, the SCC declared that the implementation measures were in breach of several provisions of the Slovak Constitution, namely Arts. 13(4), 16(1), 19(2), 19(3) and 22, as well as Art. 8 ECHR, without addressing the alleged breach of the Charter provisions.

The decision of the Court of Justice in *Ireland v. Council*[86] was not addressed at all by the SCC.

It can be only the purest speculation what the decision of the SCC or the SSC might have been if the case had been approached as an issue of national constitutional review only, without the constraints and guidance from the Court of Justice. However, as far as such speculation might be offered, it is more likely that if it were to face a purely national measure of a similar kind, the SCC, similarly to other constitutional courts in the Central European region, would be rather likely to annul such similar measure as unconstitutional.

The reason for such an outcome in balancing these values might be traced back to historical experience. In this regard, a number of new, Central and Eastern European Member States, but also Germany and Austria, highly value the right to privacy, in particular in its dimension as the prohibition of large-scale, systemic governmental 'spying' on a state's own citizens.[87] The robust German constitutional case law

[78] Case 5/88 *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609.

[79] Case C-260/89 *ERT* [1991] ECR I-02925.

[80] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

[81] Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] EU:C:2013:291.

[82] Case C-206/13 *Siragusa* [2014] EU:C:2014:126.

[83] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, [2002] OJ L 201/37.

[84] See Pl. ÚS 10/14 (*Data retention*), n. 14, para. 68.

[85] Ibid.

[86] Case C-301/06 *Ireland v. European Parliament and Council* [2009] ECR I-00593.

[87] As indirectly also confirmed by the list of the Member States that eventually ended up invalidating parts of the national measures implementing the Data Retention Directive, before as well as after the decision of the Court of Justice was rendered.

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concerned with the right to 'informational self-determination'[88] might be seen as providing the intellectual leadership in this area, followed in a number of the new Member States. The historical explanation for such enhanced protection of the private sphere is not difficult to understand. The reality of total surveillance by the secret police in the East before 1989 can perhaps be best explained visually, by simply watching, for instance, the film 'The Lives of Others'.[89]

Thus, if any advised guess might be entered, then the SCC, together with other constitutional courts in the region, would be more likely to react rather sensitively to a blanket, arguably disproportionate surveillance of citizens, and more likely to annul such measures if they originated from the national level only.

2.5 Unpublished or Secret Legislation

2.5.1 Article 1 of the Act No. 416/2004 Coll., on the Official Journal of the EU, provides that only legally binding measures of the Union that have been published in the Official Journal of the EU may *produce effects* on the territory of the SR. Moreover, the SCC has also ruled that as a matter of general principle, laws cannot enter into effect before their publication in the Official Journal of the SR.[90]

The absence of the due publication of secondary EU law after the 2004 accession[91] was recognised as a pressing problem and discussed in the Slovak scholarship.[92] However, the first court cases apparently came only after the decision of the Court of Justice in *Skoma-Lux*.[93] Thus, for example, in a decision of 18 March 2008, case No. 5 Sžf 59/2007, the Slovak Supreme Court applied the holding of the Court of Justice from *Skoma-Lux* to a case concerning the importation of a quantity of industrial salt from Ukraine and Belarus. The Supreme Court observed that at the time at which the contested importation took place, the Commission Regulation implementing the Common Customs Tariff was not available in Slovak, and annulled the decision of the customs authorities.

In contrast, there have been no cases concerning the (total) absence of publication of statutes (legislation), such as those that arose in the *Heinrich* case.[94] Under

[88] Starting already with BVerfGE 65, 1 (*Volkszählung*), judgment of the First Chamber of the Federal Constitutional Court of 15 December 1983, 1 BvR 209/83, resounding in the judgment of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 that declared the German legislation transposing the Data Retention Directive unconstitutional.

[89] Original title '*Das Leben der Anderen*', director Florian Henckel von Donnersmarck, release date 13 April 2007. The film depicts the surveillance measures, phone tapping and flat bugging by the East German secret State Police (*Stasi*) in East Berlin in the 1980s.

[90] See Judgment of the SCC, PL. ÚS 17/96 (*Publicity of laws*) of 4 March 1998.

[91] Further e.g. Bobek 2006–2007.

[92] Hodás 2008 or Procházka 2004, p. 856.

[93] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

[94] Case C-345/06 *Heinrich* [2009] ECR I-01659.

the Slovak constitutional understanding outlined above (Sect. 2.1.3), the due publication of a statute would be seen as a necessary condition for its validity. If a statute has never been published, it has never came into existence as a valid piece of legislation. Thus, under Slovak constitutional rules, the total absence of publication of a legally binding act would entail the nullity of the act in question, i.e. it would be declared to be legally non-existent. That means that secret statutes (Acts of Parliament) cannot exist, because the legislative process would not be complete without a due publication of the statute.

By the way of a conclusion, it might be added that neither the Polish nor the Czech courts were obliged to 'revisit their more stringent' decisions for the simple reason that the result of the case would have been the same. What was typically attacked was the decision of a national administrative authority whereby the latter imposed a sanction or a fine based on EU legislation, which was not available in the official language of the Member State in question at the material time in question. Under Czech, Polish and Slovak law, such an administrative decision had to be annulled, because it was, formally speaking, issued without a legal basis (non-existent legislation). In its *Skoma-Lux* decision, the Court of Justice stated that such EU legislation is valid, but it cannot impose obligation on individuals. Thus, applying *Skoma-Lux* in the pending national cases also meant the compulsory annulment of the national administrative decisions. Therefore, although the underlying theoretical construction was different, the practical effect of both approaches amounted to the annulment of the original national administrative decision. For this reason, and also due to the fact that the Court of Justice expressly limited the temporal effects of the *Skoma-Lux* decision to pending cases,[95] the national courts with the originally more 'stringent' approach have not in fact been obliged to revisit anything.[96]

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-Retroactivity and Proportionality*

2.6.1 There have been no such debates in the Slovak context.

[95] Case C-161/06 *Skoma-Lux,* n. 93 above, para. 72.

[96] Further on the *Skoma-Lux* aftermath, see Bobek 2016.

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2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 The Treaty Establishing the European Stability Mechanism (ESM Treaty) and other proposed measures of financial solidarity across the eurozone have raised considerable discussion in the Slovak media, but have never been dealt with by the Slovak courts. The ESM was introduced into the Slovak legal order by Act No. 296/2012 Coll., on the European Stability Mechanism, which governs some of the rights and obligations of the SR in the ESM. The overall contribution of the SR amounts to 5.768 billion EUR, of which 659 million EUR is the paid-in capital, while the remaining amount of 5.109 billion EUR is the unpaid capital subscription. In 2012, the GDP of the Slovak Republic was 72.185 billion EUR, which means that the amount of the ESM paid-in capital equals 0.91% of the GDP, while the full ESM capital subscription of Slovakia represents about 8% of its GDP.

2.7.2 There has been no separate debate about the other proposed measures; the Slovak media usually treats these systems as one single topic of 'financial solidarity in the eurozone'. In the public debates, the issues of transparency and democratic control were discussed in the context of the potential (Greek) sovereign default and the duty of Slovakia, as a Member of the eurozone, to contribute to yet another bailout programme for Greece. It was generally suggested that Slovakia, as a poorer Member State with nominal income per capita in fact lower than in Greece and as a state that itself was obliged to introduce harsh reform measures in the early 2000s, should not be asked to guarantee the public debts of a country that is in fact better off, but apparently not ready or able to carry out any reforms.

Thus, if Slovakia were really obliged to pay up at a certain stage, constitutional or legal dispute from the other side would be more conceivable than those described with regard to the recipient side, namely citizens or other subjects challenging the uncontrolled and thus undemocratic public spending of the Slovak authorities to pay someone else's debts abroad.

It is also interesting to note that in response to the Slovak participation in the ESM Treaty, the Government of Prime Minister Radičová lost a confidence vote and was brought down.

2.7.3 Not applicable, since Slovakia has not been the subject to a bail-out programme.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Since the pleadings of the parties are not accessible to the public, it is impossible to state in how many cases individuals have requested a Slovak court to submit a request for a preliminary ruling concerning the validity of an EU measure.

What is, however, known is that Slovak courts have not yet submitted any preliminary ruling references with regard to the validity of an EU measure.

2.8.2 There is no representative debate discernible on the standard of judicial review by the CJEU in Slovakia.

2.8.3 As for the approach of the Slovak courts to the review of constitutionality/legality of legislation, no comprehensible statistical data exist in this regard. In general, it could be suggested that the SCC, in particular in the first Constitutional Court (1990s), as well as the early second Court (early 2000s), was quite an assertive court, exercising rigorous constitutional review. This would have led to a higher portion of annulments, both of general legislation as well as executive acts.

However, such findings have to be put into their proper context. First, Central and Eastern European constitutional courts, put in place in early 1990s as the guardians and enforcers of the new constitutional settlement,[97] in general demonstrated a higher rate of reversals than their Western counterparts.[98] This was logical since a substantial part of their work was to weed out the old 'Communist' legislation, practices and acts, which still remained in force but were no longer compatible with a democratic, rule-of-law-based state. Secondly, this already enhanced level of annulments was supplemented by the peculiar context of the Slovak political landscape of the second half of 1990s and early 2000s, in which the SCC played the occasional role of the residual guardian of the democratic legal order against the autocratic tendencies of the Mečiar-led Government.[99]

For these reasons, the perhaps statistically higher rate or reversals/annulments carried out by the constitutional courts in the newly emerged CEE democracies in the 1990s up to perhaps the mid-2000s, cannot really be compared with the reversal rate prevailing in the established systems in the West, or with the EU system. Both of these are established systems, in which one would normally assume the reversal/annulment rate to be rather low, since the normal (non-transitory) political and legal mechanisms ought to operate properly.

2.8.4 As has already been outlined in the replies to the previous questions, the constitutional review carried out by the SCC with regard to EU law has so far been notably 'light touch' and quite deferential. In general terms, the SCC has accepted a variety of the *Solange* construction, and has effectively withdrawn its review from the area of competences transferred to the European level.

The decision of the SCC in case II. ÚS 501/2010[100] might provide an illustration in this regard. The case concerned a decision of the European Commission that declared a previous tax relief granted to a company as state aid incompatible with the internal market. The recipient of the state aid contested the internal binding force of the Commission's decision, suggesting that national courts cannot be

[97] In detail Bobek 2013a, pp. 255–272.

[98] For a Visegrad comparison regarding the 1990s, including some figures, see Procházka 2002.

[99] For a personal retrospective, see Drgonec 2010.

[100] Judgment of the SCC, II. ÚS 501/2010 (*Tax relief*) of 6 April 2011.

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bound by a mere administrative decision of a European institution. If they were, it would amount to the negation of the requirement of an independent judicial review and protection.

In dismissing such suggestions, the SCC noted that on the European level, judicial legal protection is guaranteed by the Union courts, which are entitled to review an administrative decision of the Commission. Expressly referring to the decision of the German Federal Constitutional Court in *Solange II*,[101] the SCC concluded that it also accepts the control exercised by the Union courts with regard to the exercise of the competences transferred to the Union, and has generally no reason to consider it insufficient.

2.8.5 If such lower level standard of protection on the European level were to be ascertained, then a gap in judicial protection might indeed pose a problem. So far, it has not, however, been identified and discussed as such in the Slovak scholarship or case law. The rather sporadic and occasional dissonant voices direct themselves more towards the national legislator who, when transposing EU law and fleshing it out in the Slovak legal order, have not made full use of the leeway and discretion attributed to it by the Union legislator, such as was the case with the first domestic implementation of the EAW Framework Decision (discussed above in Sect. 2.3).

2.8.6 No discussion regarding equality of treatment of individuals within and outside the scope of national/EU law has arisen in Slovakia with regard to this issue.

2.9 Other Constitutional Rights and Principles

2.9.1 With regard to a shift in implementation of EU measures from parliamentary legislation to governmental regulation, see Sects. 1.4.1 and 2.1.3.

2.10 Common Constitutional Traditions

2.10.1 The fact that a question framed in such a way in the FIDE 2012 Congress questionnaire stirred little enthusiasm in terms of national rapporteurs answering it might be explained in two ways. First, national experts and national rapporteurs are normally called to provide information and assessment with regard to the one Member State for which they are providing a report. Thus, if asked, a rapporteur might provide an opinion whether or not, for example, the principle '*nulla poena sine lege*' forms a part of the national legal system. The rapporteur cannot, however, without the knowledge of the state of law of a sizeable number of other Member

[101] 19 BVerfGE 73, 339 [1986] (Solange II).

States, answer the question whether or not the same principle might be a common European constitutional tradition.

Thus, *nulla poena sine lege* or the right to judicial protection may certainly be viewed as general principles of law recognised in the Slovak constitutional system. Whether they might be elevated to the 'European' level in this regard and proclaimed to also be common European constitutional traditions is for the general rapporteur, having an overview of the situation in a number of Member States, to ascertain.

Secondly, however, the identification of general principles of law in the European legal space remains an exercise in 'value comparison'.[102] This means that establishing a new general principle in law is not a matter of mere 'head counting', in which it would be ascertained which is the most common solution with this then automatically accepted. It is an exercise in value congruence and approximation, seeking to find out which of the possible solutions match not only in terms of function, but also in terms of values and convictions. Thus, the fact that a majority of Member States adopts a solution X does not necessarily mean that the EU or the ECHR system must also adopt solution X.[103]

2.10.2 To our knowledge, the 'common constitutional traditions' might play a greater role in EU law already today than visible from the outside. First, a number of national courts, when submitting a request for a preliminary ruling, already in fact make a reference to their national context/legal and constitutional situation and explain why this or that principle of EU law in question is of importance to them. In this way, they draw the attention of the Court of Justice to the existence of their national approach and tradition, often, however, with too much emphasis on the national aspect, rather than what is 'common' across the EU.[104] Secondly, when deciding more important cases, the Court of Justice's Research and Documentation Service draws up comparative reports on issues commissioned by members of the Court, often dozens every year.

The idea that the reference to comparative materials ought to be 'delegated' to the national courts posing the question is both unrealistic and dangerous. It is unrealistic in the sense that it is difficult to expect 'mortal' judges to, in addition to all the work they have already got on their plate, carry out a Comparative Study of the question they are about to ask, drawing also on legislation and case law from other systems in the EU. It is equally dangerous because if such a requirement were

[102] Already in Zweigert 1949, who called it '*wertende Rechtsvergleichung*'.

[103] Further on the various ways of using comparative inspiration in EU law, see e.g. Lenaerts 2003 or Kiikeri 2001.

[104] For example, in the *Heinrich* case discussed above, the submitting *Verwaltungssenat im Lande Niederösterreich* clearly pointed out that under Austrian (and German) law, the absence of due publication is an issue of validity, not mere interpretation. The referring court also in fact posed its question as a request for a preliminary ruling on validity, not on interpretation. It was the Court of Justice which rephrased the question; but it was certainly aware of the German approach and tradition, which was also discussed in quite some detail by AG Sharpston in her Opinion in Case C-345/06 *Heinrich* [2009] ECR I-01659.

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to be set, it is likely that very few national judges would be inclined to send any more references. By way of a parallel, the Court of Justice has famously stated in *CILFIT*[105] that a Comparative Study of the approaches adopted by other Member States' highest courts is to be carried out in order to ascertain that the answer is 'equally obvious' to them and therefore there is no need for a preliminary ruling. It is perhaps also no secret that this requirement of the Court of Justice has remained a dead letter. In sum, if anybody should carry out comparative studies and draw the attention of the legal practice to the existence of or a need for a 'common constitutional tradition', it should be the legal scholarship, but hardly the judges.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As already explained in the Introductory Note to this report and occasionally reiterated with regard to rather specific and advanced doctrinal issues in EU law, such issues are not really the 'daily bread' in small jurisdictions.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Since at the time of the adoption of the EAW FD Slovakia was not yet a Member State of the Union and, at the moment of the adoption of the EU Data Retention Directive, it had just become a Member State, no public debate can be discerned on these issues at the time in question. This might not necessarily mean, however, that information on these pieces of legislation was withheld or kept secret from the public, but rather that in the avalanche of the pre-accession EU *acquis* that had to be transposed, nobody really noticed.

2.12.2 Perhaps a more useful question might be *when* should the 'system' allow sufficient space for democratic deliberation, since the answer to the question *if* there should be more democratic deliberation is bound to always be 'yes'. From the point of view of the EU legislator, the requirement that democratic deliberation and accommodation of important constitutional issues ought to be carried out *before* the adoption of an act of EU law is perhaps not that surprising. In other words and for the purpose of a potential infringement action brought by the European Commission against a defaulting Member State, the suggestion that that state should have either voiced its concerns within the EU legislative process and sought the appropriate blocking minority to prevent the adoption of the measure and/or, if

[105] Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 03415, para. 16.

outvoted, challenged the measure before the Court of Justice, does not seem misplaced if viewed from the EU perspective. The issue of standing does not really come into play here, because a Member State is always a privileged applicant (of course if remaining within the time limits).

What might rather pose a problem, in practical terms, is when there is no one single position on an EU law issue within a Member State: the legislature might have different ideas than the executive, which in turn might think something quite different than the courts and/or the national constitutional court. The recent cases of *Landtová*[106] and *Holubec*[107] demonstrate the unlucky constellation in which the absence of a voice on the European level might prod a national actor into an open revolt.[108]

A different question is whether the EU legislative process allows for a sufficient scope of deliberation *before* a measure is adopted. In general, and in particular since the Treaty of Lisbon, the potential for participation of both the national governments as well as the national parliaments is perhaps not that bad as sometimes portrayed. A separate issue is, rather, to what degree the national players really make use of the space provided to them. The pragmatic record here might not be that optimistic: national governments sometime agree a measure in Brussels but then negate it politically when it is met with a hostile reception in their domestic constituency. As would appear from the frequency of the use of the Protocol on Subsidiarity and the involvement of national parliaments mechanism instituted thereby, the national parliaments are not really able or willing to make use of it.

As for the Data Retention Directive itself, it can hardly be suggested that there was no debate about the measure prior to its adoption: the measure itself was first tabled in 2000, rejected and re-worked several times, but in the end adopted in the aftermath of the 2005 London bombings.[109] The eventual adoption of the Directive could thus be seen not necessarily as an example of the absence of deliberation prior to its adoption, but rather an example of the dangerous impact of one exceptional situation and the (over-)use of emergency rhetoric eventually pushing through a highly problematic measure.

2.12.3 The fact that a Member State has 'suddenly' awakened to find that a measure previously adopted on the EU level happens to be incompatible with its national constitutional rules should not constitute a sufficient ground for suspending/circumventing the execution of its obligation.

However, two measures should be contemplated instead. First, a Member State that believes that an adopted EU measure is incompatible with its constitutional order should be obliged to bring, within the appropriate period, an annulment action before the Court of Justice. Secondly, if it fails to do so, if the problem is only detected later at the stage of the national application of the measure, the national

[106] Case C-399/09 *Landtová* [2011] ECR I-05573.

[107] Judgment in *Holubec*, n. 29 above.

[108] In detail Bobek 2014, pp. 78–84.

[109] In detail see Jones and Hayes 2013, pp. 6–11.

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court addressing the issue should submit a request for a preliminary ruling on validity to the Court of Justice, which is in fact already the requirement following *Melki and Abdeli*.[110] Both of these avenues, taken conjointly or separately, would allow the Court of Justice to be seized with the issue and for the concern of the Member State and other actors to be heard. At the same time, the fact that such an action concerning the validity of a measure was pending before the Court of Justice, irrespective of whether it had been brought as a direct action by the Member State or as a request for a preliminary ruling, would be a sufficient reason for the Court of Justice to suspend the Art. 258 TFEU procedure before the question on validity is decided on merits. However, failure to bring an action before the Court of Justice, a 'defence' in the framework of Art. 258 TFEU, would not be sufficient in itself.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 We do not share entirely the editors' concerns about an overall reduction in the standard of protection of constitutional rights in EU law. The 'reduction of protection' suggestion might be true if viewed through the lenses of the level of protection that was extant before 2004 in some of the new Member States. When viewed diachronically within the EU legal order itself, however, i.e. comparing the level of fundamental rights protection in the EU in the past and today, the same suggestion becomes much more questionable.

We are far from suggesting that 'all is well' with regard to the fundamental rights protection in EU law. To talk of an 'overall reduction' on an EU-wide level (i.e. not just contrasted with the rather abnormal, transformative situation in the new Member States before 2004) would, however, appear to be far-fetched. In addition, the signs coming from the Luxembourg courts since 2009 and the entry into force of the Charter appear to hint at a movement in the other direction: the amount of annulments of EU legislation has increased. This number may not be dramatic, but since previously it was close to zero, any increase counts.

2.13.2 Even though the answer to the previous question was 'no', as a general rule of thumb, it may be only suggested that the way forward for the EU protection of fundamental rights is certainly not in the creation of new institutions, new tribunals or new, complex procedures, including the EU accession to the ECHR. In general, creating new institutions or procedures rather shifts the original responsibility to someone else without reforming the original problem. Moreover, after Opinion 2/13,[111] it is unlikely that the EU accession will happen any time soon.

[110] Joined cases C-188/10 and C-189/10 *Melki and Abdeli*, n. 33, paras. 54–55.

[111] Opinion 2/13 *Opinion pursuant to Art. 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

However, the fact that the Court of Justice will in the foreseeable future not be subject to external scrutiny from Strasbourg means that it should be obliged to take fundamental rights protection within the EU legal order into its own hands and provide it with even greater post-Lisbon vigour, in particular with regards to acts of the EU institutions themselves. Moreover, the absence of accession to the procedural framework in no way means the absence of being bound by the substance of Strasbourg case law. Already today, Art. 52(3) of the Charter connects the Court of Justice internally to the ECHR and the case law of the Strasbourg Court. This provision ought to be taken seriously, applied faithfully and visibly adhered to not only in the Opinions of the Advocates General, but also in the reasoning of the Court of Justice.

2.13.3 In contrast to the academic calls of Anglo-American provenance, one of the authors of this report has repetitively expressed his doubts as to how far the current reasoning style of the Court of Justice can be still called 'cryptic and Cartesian'.[112] If measured against the English or American judicial style, the reasoning of the Court of Justice might indeed appear to be rather condensed. The style may be viewed with much greater understanding if measured against the Germanic Continental tradition, and it might be judged as outright lengthy and too discursive if compared with the Latin Continental tradition. On the other hand, sharing more information on the Court's judicial business, as well as background information, could only be welcome. Equally, everyone is bound to agree that greater responsiveness to the parties would be also appreciated, of course within the limits of the possible, taking into account the length of the decisions and the need for their translation into all the other languages of the Union.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Since the 2001 EU Amendment discussed in detail in Sect. 1.2.1 above, the Slovak Constitution governs the transfer of powers to international organisations predominantly in its Art. 7 (see Sect. 1.2.1 for the full wording). The different sub-sections of Art. 7 have different purposes.

Article 7(1) addresses the possibility of a radical change in the constitutional design, namely an entry into a 'state union' with other states (or withdrawal from such a union). This provision allows the SR to join a federation, requiring the adoption of a constitutional law and a referendum.

Article 7(2) allows for accession to the EU, as has been discussed above.

[112] Further Bobek 2013b, pp. 203–208; or Bobek 2015, pp. 169–172.

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Article 7(3) is another specific provision that was adopted in order to allow for the accession of the SR to NATO. This provision is different from Art. 7(2) in that it explicitly refers to the objectives sought by accession, namely 'maintaining peace, security and democratic order'. Article 7(3) does not refer directly to NATO, but allows accession of the SR to 'an organization of mutual collective security'.[113]

Articles 7(4) and 7(5) determine the applicability of international treaties and their position in the hierarchy of the Slovak legal order.

Interestingly enough, the provisions of Art. 7 do not contain any limits to the delegation of powers to international or supranational organisations (the only limit being that the SR may only transfer *the exercise of a part of its rights*; see Sect. 1.3.3 above for more detail), nor any values or principles that ought to be upheld by the SR when participating in international co-operation. It remains to be seen whether such limits or values will be developed in the case law of the SCC. This could happen either in the framework of fundamental rights protection (where the SCC has consistently held that the standard of protection cannot be weakened) or on the occasion of *ex ante* review of any future international treaty, pursuant to Art. 125a (which has not yet been used).

As for the ratification process itself, the relevant provisions are Arts. 84 and 86 (dealing with the NCSR), Art. 102(a) (concerning the powers of the President) and Art. 119(f) (relating to the Government). Pursuant to Art. 86(d), the power of the NCSR comprises (*inter alia*)

> expressing consent, prior to ratification, to international treaties on human rights and fundamental freedoms, international political treaties, international treaties of military nature, international treaties establishing membership of the SR in international organizations, international economic treaties of a general nature, international treaties whose execution requires the enactment of a law, as well as with international treaties that directly establish rights or obligations of natural persons or legal persons, and at the same time determining if these are international treaties stipulated in Art. 7(5).

Pursuant to Art. 102(1)(a), the President 'represents the SR outwardly and concludes and ratifies international treaties. He may delegate to the Government of the SR or, with the Government's consent, to individual members of the Government of the SR, the conclusion of international treaties'. Finally, pursuant to Art. 119(f), the Government decides on 'international treaties of the SR, the negotiation of which has been transferred by the President of the SR to the Government'.

[113] See Drgonec 2012. Drgonec has argued that the singular form used in Art. 7(3) precludes the possibility to enter into more than just one such organisation, and that the purpose of this subsection has been exhausted by the accession of the SR to NATO. However, the authors believe that this is a rather unpersuasive argument, especially since Drgonec seems to be inconsistent in his approach to textual interpretation: while in his commentary to Art. 7(3) he puts substantial weight on the singular/plural wording of the article, in his commentary to Art. 7(1) he argues that the plural form ('with other states') has to be read so as to also include situations where the SR enters into a 'state union' with just one other state.

The Constitution does not differentiate between international treaties negotiated by the SR and international treaties to which the SR accedes subsequently, without having a say in the negotiation process (such as the NATO Treaty, concluded long before the SR acceded).[114] The objective of ratification by the NCSR is therefore rather limited – the legislator does not influence the content of the treaty (this task remains with the executive branch), but rather confirms the will of the SR to be bound by the given international obligations.[115]

3.1.2 As already discussed in detail in Sects. 1.2 and 1.3 above, the present form of Art. 7 and the various sub-categories of international organisation to which the SR may potentially accede is the result of the 2001 EU Amendment of the Slovak Constitution. According to the position of the NCSR, the adoption of Art. 7(1) was 'a result of a generally known fact that state unions have been unpredictably and unregularly formed and dissolved in history'[116] and the aim of this provision was 'to create a legal basis for future changes, not foreseen at the time when the Constitution was adopted, which lead to the SR entering a state union with another state or states'.[117]

As for the wording of Art. 7(2), one of the contemplated versions of its wording was that the SR may 'transfer a part of the exercise of its **sovereignty**,' but this draft wording was later changed to '**rights**'. Azud has argued that the reference to 'sovereignty' was more appropriate, and that Art. 7(2) should not only refer to the EC/EU, but rather to 'supranational bodies' in general.[118]

3.1.3 To our knowledge, there has not been any discussion about the need to amend the wording of any of the articles concerning international obligations and effects of international and supranational law.

3.2 The Position of International Law in National Law

3.2.1 Prior to the EU Amendment (2001), the only provision relevant to the place of international treaties in the Slovak legal order was Art. 11 (now repealed): 'International treaties on human rights and fundamental freedoms, which have been ratified and promulgated in a manner laid down by law, shall have primacy over the

[114] Drgonec 2012, p. 120.

[115] Ibid., pp. 120–121.

[116] See the parties' argumentation in Judgment of the SCC, II. ÚS 171/05 (*EU Constitutional Treaty*) of 27 February 2008. The submission then goes on to name several examples of such 'state unions', e.g. the Kalmar Union (1397–1523), the Polish-Lithuanian Union (1569–1795), French West Africa (1904–1958), the Soviet Union (1922–1991), the Socialist Federal Republic of Yugoslavia (1945–1992), the Union of African States (1960–1962) and, most importantly, the Czechoslovak Federation (1918–1992).

[117] Ibid., p. 122.

[118] Azud 2003, p. 596.

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laws of the Slovak Republic, if they guarantee a greater scope of constitutional rights and freedoms.'[119] This was the only provision governing the relationship between international law and domestic law, and it only covered those treaties that guaranteed 'a greater scope of constitutional rights' than the Slovak Constitution.[120] Academic writers have named this concept 'the principle of alternative primacy of international law' or 'the conditional primacy of international treaties'.[121]

The SCC had an opportunity to cast more light on the interpretation of Art. 11 in December 1999 when deciding on a constitutional complaint launched by a Belarusian citizen (Mr. A.R.) who had been criminally prosecuted in the SR and who claimed that his rights under Art. 6 of the ECHR and under Art. 4 of Protocol 7 to the ECHR had been violated by the Regional Court in Košice. The claimant did not invoke any of the provisions of the Slovak Constitution, and the SCC therefore had to clarify whether it was competent to hear a constitutional complaint that only raised points under provisions of an international human rights treaty.[122]

The SCC opened its (very brief) reasoning by asserting that the Constitution did not offer an unambiguous solution to the problem of the relationship between international human rights treaties and the domestic legal order. It then proceeded to argue that the problem could be resolved with the help of Art. 11 of the Constitution and Act No. 1/1993 Coll., on the Collection of Laws of the SR, according to which international treaties form part of the legal order of the SR when certain conditions are satisfied (which they were, in the case of the ECHR). The SCC further stated that it is competent to decide constitutional complaints brought by natural or legal persons who claim a violation of their rights (Art. 130(3) of the Constitution), and that the rights allegedly violated must be duly characterised and identified, as required by law.[123] According to the SCC, this legal provision requires a due characterisation and identification of not just any right, but a particular right guaranteed by the Slovak Constitution. To support this argument, the SCC referred to some academic works, and then concluded:

> International human rights treaties have a special place in the hierarchy of legal sources in the SR. Upon fulfilment of the conditions stipulated in Art. 11 of the Constitution, they have primacy over the laws of the SR. Although they have primacy over (ordinary) laws, they do not have primacy over the Constitution. They cannot be considered to be part of constitutional law. The protection of rights and freedoms therein embedded thus does not amount to a protection of constitutionality. The Constitutional Court is an institution protecting constitutionality. Therefore, the Constitutional Court is not competent to deal with the protection of rights and freedoms embedded in international instruments, if the

[119] This construction dates in fact back to the times of the Czechoslovak Federation. Further see Bobek and Kosař 2010.

[120] This formulation has created some uncertainty: how exactly is it to be determined which source of law guarantees 'a greater scope of protection'? See for example Balog 2009, p. 2.

[121] Klučka 1993, p. 295. See also Balog 2009, pp. 2–3.

[122] Judgment of the SCC, II. ÚS 91/99 (*Belarusian citizen*) of 16 December 1999.

[123] Act No. 38/1993 Coll., on the organization of the Constitutional Court of the Slovak Republic; §20.

claimant does not at the same time claim a violation of a right or freedom that is guaranteed by the Slovak Constitution.[124]

The SCC dismissed the constitutional complaint. By this decision, the SCC clearly identified the position of international human rights treaties in the hierarchy of legal norms: they stand above ordinary laws, but below the norms of constitutional legal force.

When Art. 11 was repealed in 2001, its content was relocated to Art. 7(5) and Art. 154c of the Constitution. Article 7(5) now establishes the primacy of three types of international treaties: (1) treaties on human rights and fundamental freedoms; (2) self-executing treaties; and (3) treaties with direct effect; on condition that they have been 'ratified and promulgated in a manner laid down by law'. It follows from Art. 86(d) *in fine* of the Constitution that it is up to the NCSR to decide whether an international treaty falls into one of these three categories.

As for international treaties that were ratified and promulgated before 1 July 2001 (i.e. before the EU Amendment entered into force), these are governed by Art. 154c of the Constitution, pursuant to which they form part of the Slovak legal order and they have primacy over (ordinary) laws on condition that they provide either (a) 'a greater scope of constitutional rights and freedoms' (para. 1), such as the ECHR, or (b) 'if so laid down by law' (para. 2), such as the United Nations Convention on Contracts for the International Sale of Goods (No. 160/1991 Coll.).

To take the example of the ECHR, this international treaty has a very special place in the system of human rights protection in Slovakia, which has also been consistently recognised by the SCC in its case law. In one of its most recent cases, the SCC has held that 'the fundamental rights and freedoms embedded in the Constitution are to be interpreted and applied in the sense and in the spirit of international treaties on human rights and fundamental freedoms and the relevant case law that interprets them'.[125] This principle follows from the legal effect of the ECHR, as well as from the principle of *pacta sunt servanda*.[126]

3.2.2 The original version of the Slovak Constitution adopted in 1992 was predominantly **dualist**, with no general incorporation clause for provisions of international law (see Sect. 3.2.1 above). The only monist element in the original Constitution was the *conditional* inclusion of *some* international treaties. The EU Amendment of 2001 made a significant change to the constitutional architecture and brought the Slovak legal order much closer to monism.[127]

[124] Judgment of the SCC, II. ÚS 91/99, n. 123, translation by the authors; see also the comment by Drgonec 2013.

[125] Judgment of the SCC, Pl. ÚS 10/14 (*Data retention*), n. 14, para. 84, which refers to a well-established line of case law in which the Court has ruled the same. Translation by the authors.

[126] See e.g. Judgment of the SCC, I. ÚS 5/02 (*Publicity of judgments*) of 21 May 2003.

[127] For a more detailed analysis of the monist nature of the Slovak legal order, see Dobrovičová 2007, pp. 55 et seq.

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3.3 Democratic Control

3.3.1 The Parliament's involvement in the initial negotiations of international treaties is close to none, since the negotiations belong to the competences of the executive, rather than the legislative branch. Even the possibility of *ex ante* review of international treaties (see Sect. 3.4 below) excludes the NCSR from initiating the review procedure, since only the President of the Republic and the Government have standing. The NCSR thus remains uninvolved in the negotiations, and its role is limited merely to give consent to ratification, pursuant to Art. 86(d) of the Constitution.

On the other hand, it ought to be added that should the NCSR so wish, it may obtain information and may subject the Government to parliamentary scrutiny via the normal channels of governmental responsibility, such as requesting information as to the status of negotiations or ratification from the relevant minister, subjecting the responsible minister or Prime Minister to questioning on these issues during parliament question time, requesting a committee to address the issues, etc. The pragmatic reasons for these mechanisms not being activated too frequently are twofold: first, as in any form of parliamentary democracy, it is in practical terms rather the Government that controls the Parliament and not always *vice-versa*, and, secondly, international and/or European affairs tend in general not to be in the limelight of parliamentary interest.

3.3.2 The only valid referendum in the history of the SR has been the 2003 referendum on the Slovak accession to the European Union (see Sect. 1.4.2).

In May 1997, the SR held a referendum on a number of issues related to national defence. The first out of four questions was phrased 'Do you agree with the accession of the SR to NATO?' This referendum, however, had the lowest turnout (9.53%) in history, and was therefore not valid.[128]

3.4 Judicial Review

3.4.1 The judicial review of provisions of international law is limited in the SR to the *ex ante* review of international treaties pursuant to Art. 125a of the Constitution, the text of which was provided in Sect. 1.2. This provision was introduced into the Slovak legal system by the EU Amendment in 2001, but has not yet been used, most likely because only the President and the Government have standing to bring such a claim.

[128] See the webpage of the Slovak Statistical Office at http://slovak.statistics.sk/.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 Not applicable to the Slovak report, since Slovakia has never been subject to any bail-out programme.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 No significant further issues have arisen.

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The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law

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Abstract The report informs that due to historical ties to the German legal culture, the most influential model for reconstruction of the Estonian legal order after the restoration of independence was German law, including when drafting the 1992 Constitution. However, with regard to EU law, a different approach was chosen: a

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blanket clause in a self-standing constitutional act that suspends the Constitution, in order to give full supremacy to EU law. The Supreme Court and its Constitutional Review Chamber have adopted an unconditionally EU-friendly approach. However, the report documents the widespread concerns that have emerged amongst Estonian lawyers with regard to setting aside the Constitution, as well as the practical difficulties in constitutional adjudication by the Supreme Court. The tensions peaked in the process of ratification of the ESM Treaty, which was approved by 11 judges against 8, with the latter submitting strongly worded dissenting opinions expressing concerns about the impact of the very large financial liabilities on the rule-of-law-based, democratic and social state. Concerns by lawyers were also raised with regard to the European Arrest Warrant system, which led to review proceedings initiated by the Chancellor of Justice based on defence rights. The report also explores the excess sugar stocks cases concerning the principles of legitimate expectations and non-retroactivity, and issues regarding publication of laws in the context of EU law. The report finds that broadly speaking, any strains on constitutional values have been justified, given the benefits of EU integration. It nevertheless recommends introducing a German *Solange*-style limitation clause into the Constitution.

Keywords The Estonian Constitution · Constitutional amendments regarding EU integration · The Estonian Supreme Court and the Constitutional Review Chamber Fundamental rights and the *Rechtsstaat* approach to the rule of law Influences of the German constitutional tradition · Constitutional review statistics and grounds · ESM Treaty · European Arrest Warrant and defence rights *Balbiino* · *Excess Sugar Stocks* cases and publication of laws · The principles of legal certainty, legitimate expectations and non-retroactivity · Justiciability of social rights · Data Retention Directive · Unconditional supremacy of EU law Referendum · Parliamentary reservation of law

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 At the top of the Estonian norm hierarchy stands the *Põhiseadus*[1] (Constitution), which was adopted by a referendum on 28 June 1992 and came into force on the following day, as prescribed by § 1(1) of the *Eesti Vabariigi põhiseaduse rakendamise seadus*[2] (The Constitution of the Republic of Estonia Implementation Act, hereinafter CREIA). The Estonian Constitution is a typical example of a constitution adopted after the fall of an authoritarian regime – it is fully binding and enforceable in courts. The Estonian constitutional order is determined by five fundamental principles of the Constitution: human dignity,[3] democracy,[4] the rule of law,[5] the social state[6] and the Estonian identity[7].[8] The Estonian legal order is part of the continental legal culture with a strict hierarchy of norms, the principle of reservation of law provided by § 3(1) of the Constitution that requires a specific enactment of a statute for every specific exercise of state power, and the fundamental division of the legal order into public and private law. Historically bound to the German legal culture, old ties awoke from hibernation after the restoration of independence in 1991. The most influential model for reconstruction of vast parts of the Estonian legal order was again German law. In first order this applies to the central parts of private law, but also to criminal law and general administrative law.

1.1.2 The rationale of the Constitution is best defined in its preamble, according to which the Constitution is created to protect the peace and defend the people against aggression from outside, to form a pledge to present and future generations for their social progress and welfare, and to guarantee the preservation of the Estonian

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[1] *Riigi Teataja* [State Gazette] (RT) RT 1992, 26, 349; RT I, 27.04.2011, 2. Estonian legislation in Estonian and English is available at: https://www.riigiteataja.ee/en/. Some revisions have been made to the translations by the editors of this volume.

[2] RT 1992, 26, 350.

[3] E.g. Judgment of the Constitutional Review Chamber of the Supreme Court (CRCSCj) 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49. Selected decisions of the Constitutional Review Chamber and the Administrative Law Chamber are available in English at http://www.riigikohus.ee/?id=823 and http://www.riigikohus.ee/?id=719. Some revisions have been made to the translations by the editors of this volume.

[4] E.g. Judgment of the Supreme Court *en banc* (SCebj) 01.07.2010, 3-4-1-33-09, paras. 52 and 67.

[5] E.g. Order of the Constitutional Review Chamber of the Supreme Court (CRCSCo) 07.11.2014, 3-4-1-32-14, para. 28.

[6] E.g. CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

[7] CRCSCj 04.11.1998, 3-4-1-7-98, para. III.

[8] On the debate about fundamental principles of the Constitution, see Drechsler and Annus 2002, p. 473 et seq.; Ernits 2012, p. 126 et seq.; Maruste 2007, p. 8 et seq.; Maruste 2000, p. 311 et seq.; Laffranque 2007, p. 528 et seq.; Narits 2009, p. 56 et seq. For a compilation of the sources in Estonian and presentation of the debate, see Ernits 2011, p. 5 fn. 9, p. 6 et seq. and p. 23 et seq.

people, the Estonian language and the Estonian culture through the ages. The Constitution is organised as follows. It opens with an introductory chapter of seven sections (§), which includes a rather strict sovereignty clause in § 1. This chapter is followed by a detailed catalogue of constitutional rights with 48 sections (see Sect. 2.1.1). The Constitution also contains fundamental principles in § 10: human dignity, democracy, social state and the rule of law. The rule of law principle has complex elements, which are relatively frequent grounds of adjudication (see Sect. 2.1.3). The organisation of the state is regulated in Chapters III–XIII: The People, The *Riigikogu* (Parliament), The President of the Republic, The Government of the Republic, Legislation, Finance and the State Budget, Foreign Relations and International Treaties, National Defence, The State Audit Office, The Chancellor of Justice and The Courts. The Supreme Court (SC) is the highest court and also has powers of constitutional review.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1–1.2.2 On 1 May 2004, Estonia, together with nine other European countries, joined the European Union. Before accession, the Constitution was amended by the *Eesti Vabariigi põhiseaduse täiendamise seadus* (The Constitution of the Republic of Estonia Amendment Act, hereinafter CREAA),[9] which provides as follows:

> In a referendum held on 14 September 2003 pursuant to section 162 of the Constitution of the Republic of Estonia, the people of Estonia adopted the following Act to amend the Constitution:
>
> § 1. Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected.
>
> § 2. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia shall be applied taking into account the rights and obligations arising from the Accession Treaty.
>
> § 3. This Act may only be amended in a referendum.
>
> § 4. This Act shall enter into force three months after the date of its promulgation.

As noted in the preamble of the Act, the CREAA was adopted by a referendum. It entered into force on 6 January 2004. The draft CREAA was submitted to the *Riigikogu* on 16 May 2002. The draft presented had one important difference compared with the final version of the CREAA: § 1 of the initial version laconically provided that 'Estonia may accede to the European Union'.[10] As a result of

[9] RT I 2003, 64, 429; RT I 2007, 43, 313.

[10] Draft Act No. 1067 SE (16 May 2002). Draft Acts are available in Estonian at http://www.riigikogu.ee//?s=&checked=eelnoud.

www.dbooks.org

parliamentary debates and criticism from legal scholars (see Sect. 1.2.3), § 1 of the draft CREAA was amended on the recommendation of the then Chancellor of Justice Allar Jõks, to provide as follows: 'Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected'.[11] On 18 December 2002, the *Riigikogu* adopted a resolution[12] on holding a referendum on accession to the EU and on amending the Constitution by the CREAA, by a vote of 88 for and 1 against out of 101. The referendum was held on 14 September 2003 and is to date the only referendum that has been held under the Constitution of 1992. The turnout was 64% of all citizens eligible to vote, and 67% of all voters gave their consent to the amendment.

1.2.3 The aims of the amendment and idea behind the amendment On 28 November 1995, Estonia applied for membership of the EU. Becoming a member of the EU was one of the most important aims of the post-Soviet independence period for many reasons. First and foremost, a new isolation and seclusion from western societies which are based on the principle of individual freedom – as had occurred in the 1940s – was feared. Moreover, Estonia wished to guarantee that the principles of democracy, the rule of law and human rights that had once again been enforced would remain the fundamental principles of its legal order, regardless of possible geopolitical challenges that could lie ahead in the future. Bearing those aims in mind, the *Riigikogu* together with the Government began with preparations for joining the EU soon after the restoration of independence in 1991.

Conceptual background to the choice of wording and key factors influencing the decision on the scope and content of the amendment In 1991, the *Põhiseaduse Assamblee* (Constitutional Assembly, hereinafter Assembly) gathered with the task of drafting a new Constitution for Estonia. The members of the Assembly were aware of the wish of the population of Estonia to become a member of the EU in the future; however, at the time this aim was still so far out of reach that the assembly scarcely touched upon the issue. However, one foreign legal expert, Peter Germer, did point out that 'the draft contains no provision concerning the transferral of power to supranational organizations like the European Community', and that even though it may not happen in the near future, some day Estonian may join the European Community and might need a special provision to that effect, as in most other countries.[13]

In March 1995 the Constitutional Committee of the *Riigikogu* proposed that the Government prepare a legal expert analysis on the Constitution; this resulted in a landmark report of 1998 by the Legal Expertise Committee, which aimed to analyse, *inter alia*, whether the Constitution contained any conflicts of norms or

[11] List of amendment proposals to the CREAA Draft Act No. 1067 SE II (12 December 2002).

[12] RT I 2002, 107, 637.

[13] Peep 1997, p. 331; Laffranque 2003, p. 181.

legal gaps and whether the Constitution – also in the light of possible accession to the EU – required amendment.[14]

The present report will now explore the amendment proposals and debates in greater detail, as several issues have resurfaced in result of more recent cases, and have prompted calls to change the EU provisions in the Estonian Constitution. In the above-mentioned 1998 Report, the Expert Committee concluded that in order to become a Member State of the EU, the Constitution had to be amended. The committee first proposed the addition of § 1(3) to the Constitution, according to which Estonia may accede to the European Union by a referendum and on the conditions laid down in a new § 123^1. Secondly, the committee proposed the addition of § 123^1 to the Constitution, with the following wording:

> Estonia may, based on the principles of reciprocity and equality, delegate state powers stemming from the Constitution to the institutions of the European Union for the purposes of joint realisation by the Member States of the European Union to the extent necessary to implement the agreements underlying the union and on the condition that this does not contradict the fundamental principles as established in the preamble of the Constitution.
>
> The Government shall inform the *Riigikogu* as early and comprehensively as possible in matters concerning the European Union and shall take the positions of the *Riigikogu* into account upon participating in the European Union legislative process. Upon membership, a more detailed procedure shall be provided by law.[15]

The report also contemplated on the question of what the EU 'is'. The Expert Committee took the view that the Constitution would theoretically allow Estonia to accede to the EU if it were a confederation, however it also affirmed that the EU is an international organisation *sui generis*.[16]

Sixteen foreign legal experts also participated in the drafting of the expert report. Amongst some of the views, Professor Robert Alexy elaborated in his expert opinion on the fundamental rights catalogue of the Estonian Constitution that § 1 hinders accession to the EU and should be amended by the addition of a third paragraph in the following wording: 'The independence and sovereignty of Estonia do not exclude membership in the European Union'.[17] From the report of McKenna & Co it can be concluded that in order to ensure conformity between Estonia's legal order and the principle of primacy of EU law, amending the Constitution would be inevitable.[18] Several amendments were proposed, for example to complement § 1 (2) with permission to transfer a part of sovereignty to an international organisation

[14] The resulting report is entitled *Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt* (Possible accession to the European Union and its legal meaning from the perspective of Estonian constitutional law), Final Report of the Legal Expertise Committee for the Constitution of the Republic of Estonia (1998), (available in Estonian) http://www.just.ee/et/eesti-vabariigi-pohiseaduse-juriidilise-ekspertiisi-komisjoni-lopparuanne, hereinafter referred to as 'The 1998 Report of the Legal Expertise Committee'. See also Varul 2000.

[15] The 1998 Report of the Legal Expertise Committee, supra n. 14 (translation by the authors).

[16] Ibid.

[17] Alexy 2001, p. 93.

[18] McKenna & Co 1996, p. 17 and para. 3.1.

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in accordance with § 3 of the Constitution, and to amend § 3 such that it would also allow for the exercise of governmental authority pursuant to EU law.[19] Professor Guy Carcassonne proposed the addition of a separate chapter on the EU in the Constitution.[20] This Chapter would have consisted of three paragraphs allowing Estonia to become a member of the EU, every new treaty would have had to be submitted to the SC before ratification by Parliament, and the Government would have been required to introduce a specific procedure for informing Parliament.

In Estonian domestic discussions that followed the conclusions and proposals of the Expert Committee, Anneli Albi suggested an alternative wording for the constitutional amendment. Albi suggested that the two provisions proposed in the report, § 1(3) and § 123^1, be merged and that the amendment be added as a separate paragraph to § 1 of the Constitution.[21] A further contribution to the discussion on whether/how to amend the Constitution was made by Julia Laffranque, who in an article in 2001 listed possible ways to amend the Constitution for the purpose of EU membership; the list also summarised proposals presented by other legal experts, *inter alia* the possibility of introducing a third supplementing act to the Constitution.[22]

In 2002, a working group comprised of experts and members of the political factions in the *Riigikogu* was formed.[23] It should also be stressed that during the time the working group held its sessions, a public opinion survey showed that more than half (51%) of the citizens who had the right to vote were against joining the EU, and only 37% supported accession.[24] The solution later found by the working group was presumably to some extent influenced by this survey.[25]

In January 2002, the Minister of Justice at the time, Märt Rask, asserted that the legal scholars had not reached a conclusion on whether and, if so, how exactly and to what extent the Constitution should be amended. Subsequently, Rask published the preferred form for the amendment – a laconic supplementing act to the Constitution – and its possible content.[26] The reasoning behind this choice was the desire not to amend the base text of the Constitution, since the Constitution itself was considered a 'sacred' text, and the Minister of Justice did not want the

[19] Ibid., pp. 18–19.

[20] Carcassonne 1998, p. 10.

[21] Albi 2000, p. 164.

[22] Laffranque 2001, p. 215 et seq.

[23] According to Mart Nutt, the following experts played a central role in the drafting process of the future CREAA, submitted to the *Riigikogu* on 16 May 2002: Kalle Merusk, Jüri Põld, Ülle Madise, Julia Laffranque and Märt Rask, see minutes of the IX Riigikogu, VII session (11 June 2002), (available in Estonian) http://stenogrammid.riigikogu.ee/et/200206111000#PKP-2000008924.

[24] For the period January 2000 to March 2001, see Mattson, T. (2001, March 28). *Üle poole kodanikest on euroliidu vastu* (More than half of all citizens oppose the EU). Postimees. http://www.postimees.ee/1858647/ule-poole-kodanikest-on-euroliidu-vastu. See also Albi 2005, p. 89.

[25] Albi 2005, p. 89.

[26] Rask, M. (2002, January 15). *Kas muuta põhiseadust või mitte?* (To amend the Constitution or not?) Postimees. http://arvamus.postimees.ee/1914493/kas-muuta-pohiseadust-voi-mitte.

Constitution to become a pile of amendments and insertions, losing its clarity and simplicity.[27]

The critique and advice of legal scholars A wave of criticism from legal scholars followed. Rait Maruste, at the time Judge of the European Court of Human Rights (ECtHR), conceded that the Minister of Justice's proposal was one possible solution – and definitely a politically convenient one; however, he expressed doubt whether the Third Act (as the supplementing act came to be widely known) could maintain the clarity and simplicity of the Constitution.[28] He insisted that the Constitution had to reflect the actual mechanisms of exercising power. The Third Act with its few sentences would not be able to do so. According to Maruste:

> It is as clear as day that upon joining the EU the actual ways in which power is exercised change, and change significantly. They change, in my opinion, to such an extent that this cannot be overcome through simple interpretation, by establishing a general rule or, in the worst case, by tacitly looking past any incompatibilities. It would be a rape of the Constitution and constitutional nihilism.[29]

The criticisms by Maruste were followed by the Chancellor of Justice, Allar Jõks,[30] who also pointed out several shortcomings of the Third Act solution. For example, Jõks stated that without establishing clear rules on changes brought upon by the EU, it would be impossible to foresee problems that might arise from the Third Act.[31] Furthermore, by raising EU law above the Constitution, Estonia would give up too much and, moreover, the Constitution does not permit entry into an international treaty that is not in accordance with the Constitution. Jõks proposed following the German example by adding a clause which would bind membership in the EU with adherence to the fundamental principles of the Constitution. Among further scholars, Lauri Mälksoo, now Professor of International Law at the University of Tartu, argued that amending the Constitution with a separate addendum which, in addition, modifies the contents of the Constitution itself, would

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[27] Ibid.

[28] Maruste, R. (2002, January 29). *Põhiseadust tuleks siiski muuta* (The Constitution should nevertheless be amended). Postimees. http://arvamus.postimees.ee/1917325/pohiseadust-tuleks-siiski-muuta.

[29] Ibid., (translation by the authors).

[30] The monocratic institution of the Chancellor of Justice is unique, with a tripartite division of its functions. The first is to exercise supervision over the constitutionality and legality of the proceedings of the legislative and executive powers. To perform this function, the Chancellor of Justice has the right to speak before the *Riigikogu* (the Estonian Parliament) and during the sessions of the Government, to lodge a complaint against any state organ, to submit a direction to the *Riigikogu* to initiate an Act and also to appeal to the SC, if this request is not fulfilled. The second function is the ombudsman function, which includes the right to receive individual complaints, and to analyse and make suggestions to improve administrative governance. Thirdly, the Chancellor of Justice has the right to decide whether to bring a question of removal of immunity before Parliament.

[31] Jõks, A. (2002, April 16). *Põhiseadus muutuste künnisel* (The Constitution on the brink of change). Postimees. http://arvamus.postimees.ee/1933583/pohiseadus-muutuste-kunnisel.

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be harmful for the clarity of the Constitution.[32] In addition, Mälksoo stated that the 'neutral' route of the CREAA was being used in an attempt to avoid some essential questions on the extent to which the rights and obligations arising from the Accession Treaty will change the Constitution. The irony of this 'legal masquerade' was that the Estonian Constitution provided one of the strictest sovereignty clauses in Europe.[33] Mälksoo insisted that the core of the Constitution should be respected, and the Third Act should not become a Trojan horse which would allow the fundamental principles of the Constitution to be turned upside down; he proposed the addition of reference to the fundamental principles of Estonian statehood and of the Constitution in the text of the CREAA.

In the summer of 2002, six scholars – Anneli Albi, Michael Gallagher, Indrek Koolmeister, Rait Maruste, Lauri Mälksoo and Peeter Roosma – published a joint statement concerning the Third Act.[34] The statement stressed that the Third Act would not describe the actual way power is exercised, and that accession to the EU must be regulated in accordance with constitutional law. By choosing the supplementing act solution, the text of the Constitution would cease to be as clear and easily applicable as it was before the Third Act. Moreover, the Constitution itself does not foresee the possibility to change the Constitution by means of a separate act: Chapter XV of the Constitution only permits amendment of the Constitution by amending its text. The six scholars concluded that the draft CREAA was not in accordance with the principle of a democratic state based on the rule of law, and that the Act might lay a foundation for a risky precedent in future. As an alternative, the scholars proposed that the text of the Constitution be amended by adding Chapter IX^1 on the European Union. The proposed chapter would have included Article § 123^1 ('Estonia may delegate state powers stemming from the Constitution to the European Union according to the conditions laid down in the Treaties of the European Union and to the extent that this does not harm the fundamental principles of Estonian statehood'), and provisions regarding the participation of the *Riigikogu*, application of EU law in cases of conflict, equal treatment of EU citizens, and a revision regarding the Bank of Estonia with a view to participation in the Monetary Union.

In April 2002, the Minister of Justice recognised that many legal scholars wanted to change the Constitution in detail, so that exactly what would change after joining the EU would be clear.[35] The Minister proposed that the changes should be explained and clarified in the explanatory memorandum to the draft CREAA; however the draft itself, he maintained, should remain 'short, simple and clear'.[36]

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[32] Mälksoo, L. (2002, May 13). *Kuidas muuta põhiseadust*? (How should the Constitution be amended?) Postimees. http://arvamus.postimees.ee/1938787/kuidas-muuta-pohiseadust.

[33] Ibid.

[34] Albi et al. 2002, pp. 352–353.

[35] Rask, M. (2002, April 19). *Ühinemise otsustab rahvas* (Accession will be decided by the people). Postimees. http://arvamus.postimees.ee/1936071/uhinemise-otsustab-rahvas.

[36] Ibid. (translation by the authors).

A more comprehensive justification for the Third Act was presented in an academic article by the working group.[37]

Amendment procedure and obstacles The procedure for amending the Constitution is set out in Chapter XV of the Constitution.[38] Notably, § 162 provides that Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) may only be amended by referendum. Since the CREAA would in principle have changed the first chapter of the Constitution (particularly § 1 and § 3), the amendment could only be adopted by a referendum.

1.2.4 With regard to EU-related amendment proposals, two different periods can be distinguished: the first period up to the decision by the *Riigikogu* to hold a referendum on the CREAA, and the second period starting from this decision and continuing to this day.

The question of further amendment of the Constitution was in particular revived by the discussions on the Treaty Establishing a Constitution for Europe, which ultimately never came into force. During the debates on the CREAA, it had been stressed on several occasions (including in the above-mentioned justification article by the working group that initiated the Third Act) that the next time the EU Member States amended the fundamental treaties of the EU, Estonia would need to amend the CREAA accordingly, and therefore a new referendum would have to be held.[39]

In the context of the European Constitutional Treaty, some legal experts proposed a total revision of the Constitution. Märt Rask, who meanwhile in 2004 had been appointed Chief Justice of the SC, asserted that it would be very difficult for the Constitutional Review Chamber of the SC (CRCSC) to interpret the Constitution, considering that both the European Constitutional Treaty and the Estonian Constitution were applicable.[40]

The subsequent developments in the *Riigikogu*, however, took a completely different direction. In December 2004, a working group to analyse the European Constitutional Treaty was formed with the task of, *inter alia*, analysing whether the Constitution and the CREAA allowed for ratification of the European Constitutional Treaty in the *Riigikogu* without amending the Constitution.[41]

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[37] Laffranque et al. 2002, pp. 563–568. Cf. Ginter and Narits 2013, p. 60.

[38] The right to initiate amendments rests with one-fifth of the members of the *Riigikogu* and with the President (§ 161(1) of the Constitution).

[39] E.g. in Laffranque et al. 2002, p. 567.

[40] Piirsalu, J. (2004, 21 September): *Märt Rask: põhiseadus vajab lähiajal kindlasti revideerimist* (Märt Rask: The Constitution must definitely be revised in the near future). Eesti Päevaleht. http://epl.delfi.ee/news/eesti/mart-rask-pohiseadus-vajab-lahiajal-kindlasti-revideerimist?id=50993275.

[41] See *Riigikogu* press release of 14 December 2004 and *Riigikogu* press release of 4 February 2005.

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In March 2005, Chancellor of Justice Allar Jõks warned in a press article that in the interests of at least the formal constitutionality of the changes brought about by the European Constitutional Treaty, the reference to the Accession Treaty in § 2 CREAA should be replaced with 'Treaty Establishing a Constitution for Europe'.[42] For this minimum change, a new referendum should be held, since according to § 3 CREAA, the Act can only be amended by referendum. In the beginning of 2005, Uno Lõhmus, Judge of the European Court of Justice, referred *inter alia* to the standpoints of the legal experts who had drafted the CREAA[43] and stated that a new EU Treaty would have to be adopted by a referendum, since the CREAA only applies to the Accession Treaty explicitly named in the CREAA.[44]

However, the report of the working group of the *Riigikogu* published subsequently concluded that the European Constitutional Treaty should be treated as a normal international treaty and therefore requires no referendum. The report stated:

> The Treaty Establishing a Constitution for Europe … is by its nature in a wider sense a constitutional act, which in the meaning of the Constitution must be considered as an international treaty.[45]

The conclusions were not reached unanimously.[46] Insofar as the European Constitutional Treaty never came into force, the report did not have any significant impact on the decisions relating to amendment of the Constitution in 2005. However, some years later, the Lisbon Treaty was approached in a similar way as the European Constitutional Treaty: no amendments were introduced in either the Constitution or the CREAA.

In September 2010 the issue of amending the Constitution was once again brought to the forefront. Rait Maruste proposed a revision of the Constitution in the light of the changes that had taken place during the previous years.[47]

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[42] Jõks, A. (2005, March 7). *Põhiseaduse leping ja põhiseadus õiguslikke küsimusi* (Legal Questions regarding the Constitutional Treaty and the Constitution). Postimees. http://www.postimees.ee/1460167/allar-joks-pohiseaduse-leping-ja-pohiseadus-oiguslikke-kusimusi.

[43] Laffranque et al. 2002, p. 566.

[44] Lõhmus 2005, p. 78.

[45] *Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad lepingu ratifitseerimise küsimuses* (Report of the working group on the European Constitutional Treaty) 2005, para. II 1. (translation by the authors). http://www.riigikogu.ee/v/failide_arhiiv/Riigikogu/epsl_20051211_ee.pdf.

[46] Ibid.

[47] Although Maruste's proposal was no different from his earlier statements, his proposal caused a passionate debate (possibly also because he had embarked on a political career). See Maruste, R. (2010, September 17). *(Päris) vaba Eesti põhiseadus* (The (truly) free Estonian Constitution). Postimees. http://pluss.postimees.ee/314169/rait-maruste-paris-vaba-eesti-pohiseadus.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The delegation of powers to the EU is regulated in § 2 CREAA (for the text, see Sect. 1.2.1). There are no clear limits to the transfer or delegation of powers to the EU. The brief wording of the CREAA has left several major questions open, e.g. the effect of EU law, for interpretation by the judiciary.

The SC ruled on this issue in 2012. Although in this case concerning the constitutionality of the Treaty Establishing the European Stability Mechanism (ESM Treaty) the SC held that the ESM Treaty is not part of EU law, it included an *obiter dictum* on the potential limits to transfer of competences to the EU.[48] The Court referred to the CREAA and stated that in the view of the Court, 'the CREAA is not an authorisation to legitimise the integration process of the European Union or to delegate the competence of Estonia to the European Union to an unlimited extent'.[49] It can be derived from the reasoning of the SC that any further amendment which leads to deeper integration of the EU and any additional delegation of competences, would need additional approval by referendum. According to the SC:

> If it becomes evident that a new founding treaty of the European Union or amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it will be necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably to amend the Constitution once again.[50]

1.3.2 The SC has not given much attention in its case law to the concept of sovereignty. The SC has addressed this concept directly only in the case concerning the constitutionality of the ESM Treaty in 2012:[51]

> [T]he Constitution does not require, despite the strict wording of the sovereignty clause, observation of absolute sovereignty. … [M]embership of the EU and in international organisations has become a natural part of sovereignty in this day and age.[52]

In the reasoning that followed, the SC treated sovereignty as a principle that can be weighed against other principles. In fact, Estonian doctrine has never known a prevailing theory of absolute sovereignty. Instead, already in 1936 the leading professor of international law, Ants Piip, observed that the contemporary concept of sovereignty had changed significantly; it was only understood as a leeway within

[48] SCebj 12.07.2012, 3-4-1-6-12, paras. 217–233.

[49] Ibid., para. 223.

[50] Ibid., para. 223. See also Sect. 2.7. for a discussion regarding potential limits arising out of principles such as the budgetary autonomy of Parliament.

[51] SCebj 12.07.2012, 3-4-1-6-12.

[52] Ibid., paras. 128 and 130. See on this judgment: Ginter 2013, p. 335 et seq.

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the limits deriving from international law. Sovereignty, according to Piip, was at that time already used in this sense in interstate relations.[53] In contemporary writings, sovereignty was no longer considered an absolute concept.[54] On the other hand, the SC also stated in the ESM case: 'The core essence of sovereignty is the right of discretion in all matters, irrespective of external influences'.[55] This can be considered as an expression of the classic concept of sovereignty.

In Estonian constitutional doctrine, the classic Kelsenian distinction between internal and external sovereignty is deep-rooted.[56] The former refers to the state's power competences; the latter bears the connotation of independent statehood in the international arena.[57] Kelsen's disciple Artur-Tõeleid Kliimann introduced this distinction to Estonian doctrine, re-naming internal sovereignty as independence (*sõltumatus*) and external sovereignty as self-determination (*iseseisvus*).[58] However, according to the Government's translation of the Constitution (and as used in the work of e.g. Albi[59]), '*iseseisvus*' equals independence and '*sõltumatus*' equals sovereignty. In this way the translators have put sovereignty on an equal footing with independence and the similarity of this distinction with the Kelsenian approach is no longer recognisable.

These two concepts can be found again in the wording of § 1(1) of the Constitution, and e.g. the Legal Expertise Committee for the Constitution of the Republic of Estonia adopted this dualistic definition of sovereignty in its expert report.[60] However, the significance of the two elements is not entirely clear. The author suggests that internal sovereignty ought to be considered as identical with democracy because it refers to the unimpeded exercise, by the people, of the highest inner-state decision-making competence that lies in a democratic state. The SC proclaimed in 2012: 'The sovereignty of the people gives rise to the sovereignty of the state and thereby all state institutions obtain their legitimation from the people.'[61] External sovereignty, on the other hand, concerns rather the commitment of the state in international relations and means simply the right of the state to govern itself.

Thus, the concept of sovereignty remains classic but the approach to the concept has been influenced by modern legal theory – the SC considers sovereignty to be open to restrictions and weighing. Therefore, not every infringement of sovereignty necessarily constitutes a violation, and an infringement may be justified by

[53] Piip 2007, p. 415 et seq. Cf. Kalmo and Luts-Sootak 2010, p. 14.

[54] See also two Estonian edited volumes: Kalmo, Luts-Sootak 2010; Loone et al. 2004.

[55] SCebj 12.07.2012, 3-4-1-6-12, para. 127.

[56] Kelsen 1925, p. 110.

[57] Ibid.

[58] Kliimann 1935, p. 49 et seq.

[59] Albi 2005, pp. 25, 30 et seq., 126.

[60] The 1998 Report of the Legal Expertise Committee, supra n. 14.

[61] SCebj 12.07.2012, 3-4-1-6-12, para. 127.

weightier reasons, e.g. by the financial stability of the euro area, including of Estonia, like in the case concerning the ESM Treaty.

1.3.3 Whilst there is no clear articulation of any limits on EU law, the fundamental principles of the Constitution have been articulated in the case law of the SC and are listed in Sect. 1.1.1. The current interpretation of the Constitution implies that potential limits could indeed be surpassed by referendum. It could be argued that the fundamental values of the Constitution, such as the right to national self-determination, preservation of the Estonian nation and culture, etc., are inalienable and therefore cannot be forsaken.

1.3.4 The Constitution does not directly proclaim the supremacy of the Estonian Constitution, although § 3(1) provides that state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Currently, the Constitution is interpreted in a Europe-friendly manner, and Estonia, with a liberal approach to the economy and law, has shown a remarkable willingness to adapt to EU principles, led by its SC, with the suspension of Constitutional provisions in the event of a conflict with EU law.[62] According to the SC:

> Proceeding from of § 2 of the Constitution of the Republic of Estonia Amendment Act …, pursuant to which when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia shall be applied taking into account the rights and obligations arising from the Accession Treaty, the result of the adoption of this Act is that only that part of the Constitution which is in conformity with European Union law or which regulates the relationships not regulated by European Union law can be applied. The effect of those provisions of the Constitution that are not compatible with European Union law and are thus inapplicable, is suspended.[63]

On 11 May 2006 the SC, this time performing constitutional review, adopted an opinion regarding the interpretation of the Constitution (the *Transition to the Euro* case).[64] According to the opinion:

> In the substantive sense this [i.e. § 2 CREAA] amounted to a material amendment of the entirety of the Constitution to the extent that it is not compatible with European Union law. … only that part of the constitution is applicable, which is in conformity with European Union law or which regulates relationships that are not regulated by the European Union law. The effect of those provisions of the constitution that are not compatible with the European Union law and are thus inapplicable, is suspended.[65]

The decisions of the SC have been criticised in the dissenting opinions of two justices. Primarily the existence of limitations to this interpretation as well as to the binding nature of the opinion on further practice have been questioned. In a dissenting opinion, Justice Kõve expressly stated that when analysing the implications

[62] Ginter 2008. The process of accepting the supremacy and direct effect of EU law in Estonia has been analysed in detail in Ginter 2007, pp. 337–345.

[63] CRCSCo 26.06.2008, 3-4-1-5-08, para. 30.

[64] CRCSC Opinion 11.05.2006, 3-4-1-3-06.

[65] Ibid., para. 16.

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of § 2 CREAA, the Court should have also clarified the meaning of § 1 as well as the meaning of Chapter I of the Constitution in its entirety.[66] Dissenting Justice Kergandberg equally pointed to the need for an analysis of the nature and impact of § 1 CREAA.[67]

In the absence of a decision by the SC, it is currently not clear whether § 1 CREAA should be seen as what it says grammatically – a limitation to Estonia's membership in the EU – or as an interpretative tool, to the benefit of the fundamental principles of the Estonian Constitution in the case of a conflict with EU law. The grammatical text of the CREAA seems to favour the first interpretation. On the other hand, the practice of the supreme courts of 'old' Member States, including but not limited to the famous *Solange* saga,[68] would rather support the second alternative. Indeed the court may even find that both solutions can be applied simultaneously.

1.4 Democratic Control

1.4.1 There are no specific rules in the Constitution concerning the participation of the Estonian Parliament in the EU decision-making processes. In 2004 the *Riigikogu* Rules of Procedure Act (RRPA)[69] was amended and a new standing committee, the European Union Affairs Committee (EUAC), was introduced.[70] The EUAC is unique since it is comprised of members who at the same time are members of other committees of the *Riigikogu*. The EUAC has the right to compose, in the name of the entire *Riigikogu*, opinions concerning draft EU acts. This position of the *Riigikogu* is in general binding for the Government. However, the Government has also been left a certain amount of discretion in negotiations: the Government is allowed to deviate from this position, but only on exceptional grounds.[71] One exceptional ground would be for example a change of situation during the discussions at the EU level. If the Government does not follow the official position of the *Riigikogu*, it is bound to appear before the EUAC or the Foreign Affairs Committee to provide an explanation.

1.4.2 On the EU accession and constitutional amendment referendum of 2003, see Sect. 1.2.

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[66] Dissenting Opinion of Justice Kõve to CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 2.

[67] Dissenting Opinion of Justice Kergandberg to CRCSC Opinion 11.05.2006, 3-4-1-3-06.

[68] *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 37, 271 (*Solange* I); BVerfGE 73, 339 (*Solange* II).

[69] RT I 2003, 24, 148; RT I, 05.11.2014, 5.

[70] See also Kundla in Mõttus et al. 2012, Introduction to Chapter § 18^1, comm. 5.

[71] Ibid., § 152^4, comm. 5.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 On the reasons behind the amendments and the factors that influenced the content of the amendments, see Sects. 1.2.2–1.2.3 and 1.5.3.

1.5.3 The CREAA, introduced by a referendum in 2003, unfortunately entails more problems than it solves. As pointed out above, it was heavily criticised already in the course of the *travaux préparatoires*. The application of the CREAA has shown that some of that criticism was justified. The following proposal is therefore another attempt to point out the key issues regarding the CREAA and to offer a suitable solution to these problems.

Delegation of powers clause Sovereignty and the partial delegation of powers are the key aspects of all international cooperation clauses. The Constitution in § 1(2) establishes a particularly strong sovereignty clause: 'The independence and sovereignty of Estonia are timeless and inalienable.' It is one of the strongest accentuations of sovereignty in Europe[72] and perhaps even the world. It should also be stressed that the fear of a rollback to a Soviet Union-type organisation was the main consideration behind the wording of § 1(2).[73]

Amending the Constitution by a separate act has been sharply criticised, as seen in Sects. 1.2.3–1.2.4. Even if it is not explicitly prohibited by the Constitution, this practice does not constitute a welcome way to amend a legal document of central importance. Amending the text of the Constitution should be preferred in order to preserve legal clarity and to avoid unnecessary interpretation issues. What is more, both of the relevant sections, § 1 and § 2 CREAA, introduced problems that could have easily been avoided by simply amending the text of the Constitution.

It is not only the EU that restricts sovereign statehood in the globalised world, but also the Council of Europe, NATO, the UN, etc. In 2012 the question of international organisations other than the EU reached the SC in a case regarding the ESM Treaty. The delegation of powers to the ESM was found to be outside of the regulative effect of the CREAA.[74] The SC *en banc* identified an infringement of the principle of sovereignty but found by an extremely narrow majority of ten votes to nine that this was proportionate and justified by substantial considerations.[75] This tactic of reasoning has been sharply criticised, particularly by Justice Luik in his dissenting opinion. Justice Luik clearly held that 'due to the existence of the prohibition on partial waiver of sovereignty, the Constitution does not permit ratification of the Treaty',[76] with reference to § 1(2) of the Constitution.

Indeed, this was perhaps the most problematic point in the reasoning of the SC. Section 1 CREAA does not permit the delegation of powers to any international

[72] Albi 2002, p. 42; cf. the table in Albi 2005, p. 26 et seq. and its summarised background p. 30.
[73] Cf. Peep 1997, p. 68.
[74] SCebj 12.07.2012, 3-4-1-6-12, para. 110.
[75] SCebj 12.07.2012, 3-4-1-6-12, paras. 176–203 and 207–210.
[76] Dissenting Opinion of Justice Luik to SCebj 12.07.2012, 3-4-1-6-12, para. 14.

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organisation other than the EU and, in the light of this conclusion, the restriction of sovereignty for any other purpose is in fact questionable in the light of § 1(2) of the Constitution. Taking the aforementioned aspects into consideration, it would seem appropriate to amend the sovereignty clause with an exception that would also allow the delegation of powers to other international organisations, instead of restricting its application solely to the EU. Simultaneously, the minimum requirements for such organisations should be established to exclude the legality of any potential attempt to incorporate Estonia into any organisation that does not respect human rights, democracy or the rule of law.[77] A good example of such a clause is Art. 3a of the Constitution of Slovenia (see the Slovenian report in this Volume).

European Union clause In addition to a more detailed delegation of powers clause, (a) revised provision(s) concerning the functioning and aims of the EU should be introduced. The author of this section recommends the introduction of a set of conditions for the EU in the Constitution. The freedom that was regained in 1991 is based on respect for human dignity, democracy, the rule of law, a social state and the national identity of Estonia. These fundamental principles should be respected both nationally and within the EU. The guarantee of equally effective protection of fundamental rights on the EU level should also be mentioned. These criteria are necessary to stress the objectives of the EU for Estonian political decision-makers and to guarantee an effective constitutional review of future amendments to the EU treaties. An example of such a clause is Art. 23(1)1 of the German *Grundgesetz* (see the German report in this Volume). In the Estonian Constitution, the systematic position for this type of article could be in the preamble or in Chapter I or IX of the Constitution; the preferable position, however, would be a new § 120(1) of the Constitution.

Qualified majority clause There are three possible procedures for delegating powers to the international level. The first and probably most democratic procedure would be the holding of a referendum for any delegation of powers. The second possibility would be to follow the regular legislative procedure in Parliament, i.e. powers could be delegated by a simple majority. The third alternative, in a sense the golden mean, would be to introduce a legislative procedure which requires a qualified parliamentary majority.

Compared to other possibilities, referendums are usually financially more onerous, more time-consuming and often politically unpredictable. Furthermore, powers are delegated through international treaties and, according to § 106(1) of the Constitution, no ratification of any international treaty shall be submitted to a referendum. However, a mere simple majority would not correspond to the importance of the decision. Therefore, in order to stress the importance of a delegation of powers, a qualified majority of two-thirds of all the members of the

[77] The best solution would be to add a new section § 1(3) to § 1. Such clause would determine legally that Estonia will remain part of the free world, and Soviet-type organisations would thus be precluded.

Riigikogu, which is presently foreseen in four instances in the Constitution, would seem appropriate. A comparable rule can also be found in Art. 3a of the Slovenian Constitution.

Exercise of power clause According to § 3(1), of the Constitution, state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. According to § 2 CREAA, when Estonia has acceded to the EU, the Constitution shall be applied taking into account the rights and obligations arising from the Accession Treaty. As the SC asserted in its opinion of 11 May 2006,[78] § 2 CREAA led to a suspension of a large part of the Constitution and to a redefinition of § 3(1) of the Constitution. This has been described as one of the most significant (legal) changes caused by accession to the EU.[79] The SC has even relinquished its competence to perform constitutional review if EU law collides with the Constitution, with reference to the competence provision: '§ 152(2) of the Constitution, as well as the Constitutional Review Court Procedure Act passed for the implementation thereof, must not be applied to the extent that these enable to declare invalid, due to unconstitutionality, a provision relating to EU law of any Act or other legislation, which is in conformity with the EU law on the basis of which it was enacted'.[80]

The main argument in support of the view of the SC is that the SC does not have competence to exercise judicial review over national legislation transposing EU law into national law.[81] This restrictive interpretation of the SC's competence has been sharply criticised with overweighing arguments.[82] Since the Constitution gives the SC universal competence to review all laws that might contradict the Constitution, there can be no doubt that the SC is competent to review all laws that are applied in Estonia. If the SC thereby comes to the conclusion that the object of the review is national legislation transposing EU law, it should take the primacy of EU law into consideration in deciding the case. Otherwise, by suspending some of the norms of the Constitution, the SC would decide on the validity of the norms on which its own competence for constitutional review is based. Pursuant to the Constitution, however, this would be *ultra vires*.[83]

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[78] See Sect. 1.3.4, CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 16. Cf. CRCSCj 26.06.2008, 3-4-1-5-08, para. 30.

[79] Madise et al. in Madise et al. 2012, Introduction to the CREAA.

[80] CRCCo 26.06.2008, 3-4-1-5-08, para. 30.

[81] Kalmo 2008, p. 583 et seq.; Laffranque 2007b, p. 535 et seq.; Laffranque 2009, p. 498. Cf. the discussion in Ernits 2011, p. 49 et seq.

[82] Lõhmus 2011, p. 24 et seq.; Mälksoo 2010, p. 147 et seq.; Ernits 2011, p. 37 et seq. and 61 et seq.; Ernits 2012, p. 137 et seq. (See also Sect. 2.9)

[83] Ernits 2011, p. 49 et seq.; cf. Lõhmus 2011, p. 25. In 2015, the SC revised partially its earlier far-reaching position, cf. SCebj 15.12.2015, 3-2-1-71-14, para. 81, 83: 'The fact that any provisions are compatible with European Union law cannot lead to the conclusion that the same provisions are also compatible with the Estonian Constitution or that declaring a provision unconstitutional and repealing it would constitute a breach of European Union law. The connection of a legal act with EU law, or an opinion of any other institution on the compatibility of

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It is well established that after accession to the EU, state powers can be exercised not only on the basis of parliamentary laws but also on the basis of directly applicable EU law. However, instead of declaring a conflict between the Constitution and EU law, suspending the Constitution[84] and relinquishing competence for constitutional review, it would be advisable to re-interpret the relevant provisions of the Constitution (and thus still apply them) in conformity with EU law, and thus to apply EU law on the basis of the Constitution to the extent possible. As long as there is no violation of the fundamental constitutional principles, it would be the legitimate way to achieve both: conformity with the EU Treaties and preservation of the Constitution, including the constitutional review competence of the SC.[85] This concept is not new in the context of other EU Member States.[86] It would, however, be an innovation in the Estonian context.

Since § 2 CREAA serves as the basis for the current interpretation of the SC, it would be recommendable to abandon the present text of § 2 CREAA and to choose a solution that better fits the system of the Constitution. Instead of integrating § 2 CREAA into the text of the Constitution, § 3 of the Constitution should be amended with a new para. 2, whereas the existing para. 2 would become the new para. 3. A good example of such a clause is Art. 8(4) of the Constitution of Portugal (see the Portugal report in this Volume). This would help to avoid the erosion of the Constitution and at the same time systematically guarantee that EU law is applied in accordance with the Constitution.

Parliamentary participation and information clause The 1998 legal expert report on the Constitution proposed *inter alia* a further clause introducing the obligation of the Government to inform the *Riigikogu* as early as possible and comprehensively of matters relating to the EU. Although a similar procedure is foreseen in § 152^1 RRPA, no such guarantee is provided by the Constitution. As this question concerns the checks and balances on state powers, it is a constitutional matter. According to the present regulation, the Government is not obliged to involve the Riigikogu in matters concerning the EU and Parliament is not able to effectively demand information and compliance with the parliamentary opinion by the Government. It would therefore be necessary to include such provisions in a

domestic legislation with EU law cannot in itself preclude review of the constitutionality of the legal act within the meaning of § 152 of the Constitution. […] Within the boundaries set by EU law, including state aid guidelines, the national legislator is bound by the requirements arising from the Estonian Constitution, and the national courts by the duty under § 152 of the Constitution to check the constitutionality of the measure(s) chosen for achieving the aim. By no means does EU law prohibit member states from ensuring domestic fundamental rights to the extent that the exercise of the rights does not endanger the supremacy, uniformity and effectiveness of EU law.' However, it still remains unclear how far would the SC go in recognising the primacy of the EU law over the Constitution.

[84] CRCSC Opinion 11.05.2006, 3-4-1-3-06, para. 16; CRCSCo 26.06.2008, 3-4-1-5-08, para. 30.

[85] Cf. Ernits 2011, p. 61 et seq.

[86] Cf. Ehricke 1995, p. 598 et seq.; Nettesheim 1994, p. 261 et seq.; Heukels 1999, p. 313 et seq.

future reform package (e.g. in Chapter VI of the Constitution). Comparable rules can also be found in Art. 23(2) and Art. 45 of the German *Grundgesetz*.

Further issues The list of the aforementioned problems is not exhaustive. There are further questions, for example whether there should be a parliamentary committee authorised to exercise the rights of the Parliament in matters concerning the EU, whether § 111 and/or § 112 of the Constitution should be amended with a euro clause and/or European Central Bank clause, and whether the Constitution needs to contain an equal rights clause for European citizens. There are, moreover, other issues that should be analysed in depth, e.g. the often-cited § 58 of the Constitution that allows for the restriction of the right to vote of imprisoned Estonian citizens only.

Furthermore, there has been a call for a general renovation of the Constitution of 1992.[87] The need for a general renovation is questionable, since there is no constitutional crisis in Estonia and the Constitution of 1992 has proven, beyond the CREAA, to be well-functioning and, in a historical perspective, the most successful Constitution for Estonia ever.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Constitutional rights are provided in Chapter II of the Constitution. Five general rights can be identified: a general right to liberty in § 19(1), general right to equality in § 12(1), general right to state protection in § 13(1), general right to organisation and procedure in § 14[88] and a general social right in § 28(2).[89] The chapter on constitutional rights is otherwise rather comprehensive and detailed.[90] Constitutional rights and fundamental principles like the rule of law are enforceable in courts. They are procedurally guaranteed by the general right to address a court in the case of an alleged violation of a right, provided for in § 15(1).

[87] Maruste's written report for *Eesti Õigusteadlaste Päevad* (Congress of Estonian lawyers) 2004, cited in Maruste, supra n. 47.

[88] 'The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments.'

[89] This division was first introduced by Robert Alexy in the first systematic monograph concerning fundamental rights in the Estonian Constitution: Alexy 2001, pp. 51 et seq., 56 et seq., 68 et seq., 73 et seq., 76 et seq.

[90] It contains classic rights and liberties such as the right to privacy in § 26, freedom to choose an occupation in § 29(1), right to property in § 32, inviolability of the home in § 33, right to free movement in § 34, freedom of religion in § 40, secrecy of correspondence in § 43, freedom of expression in § 45, freedom of assembly in § 47, etc., as well as special social rights such as the right to education in § 37.

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However, the enforceability of constitutional rights has not been fully developed. It remains disputable in Estonian constitutional law theory whether there is a right to an individual constitutional complaint to the SC on the grounds of the Constitution or whether all courts have the obligation to enforce constitutional rights with no room for a direct complaint to the SC. It can be noted that the Constitutional Review Court Procedure Act (CRCPA)[91] does not foresee an individual constitutional complaint.

2.1.2 Section 11 of the Constitution states: 'Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted'. The aforementioned § 3(1) and § 11 define the general minimum requirements for every restriction: every infringement of a constitutional right requires a legal basis and must be proportional. However, these provisions cannot be considered as sufficient authorisations to restrict a particular constitutional right. If the legislator wants to restrict a particular constitutional right, it must consider the statutory reservation of the particular constitutional right. For example, the second sentence of § 26 of the Constitution states: 'State agencies, local governments and their officials shall not interfere with the private or family life of any person, except in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence or to apprehend a criminal offender'. This is an example of a clause that states a qualified statutory reservation. Beyond this, there are constitutional rights with a simple statutory reservation (e.g. § 29(1), second sentence: 'Conditions and procedure for the exercise of this right may be provided by law') and rights without any statutory reservation (e.g. § 38(1)). A simple statutory reservation does not add anything substantial to the general minimum requirements, whereas the SC has specified that only other fundamental rights or constitutional values can provide a legitimate justification for an infringement of a fundamental right established without reservations.[92] In every case the state has a duty to justify all infringements of rights and liberties.[93]

2.1.3 The rule of law can be considered as one of the fundamental principles of the Constitution anchored in § 10 and determining the rules and principles for the exercise of state power.[94] The rule of law is the most complex principle in the Constitution, containing further sub-principles such as the separation of powers and due checks and balances, the supremacy of law, the reservation of law and certainty of law, non-retroactivity, legitimate expectations, the principle of proportionality, access to courts, judicial review and judicial independence.

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[91] *Põhiseaduslikkuse järelevalve kohtumenetluse seadus*. – RT I 2002, 29, 174; RT I, 23.12.2013, 57.

[92] SCebo 28.04.2004, 3-3-1-69-03, para. 28; SCebj 03.07.2012, 3-3-1-44-11, para. 72.

[93] Cf. Ernits in Madise et al. 2012, Introduction to Chapter 2 of the Constitution, comm. 8 et seq.

[94] Cf. CRCSCj 19.03.2009, 3-4-1-17-08, para. 26.

In the Estonian legal commentary, five key elements of the rule of law principle have been identified:[95] (1) restriction of state power by constitutional rights and the principle of proportionality; (2) separation of powers and due checks and balances; (3) legal certainty; (4) legality; and (5) access to courts and judicial review.

Legal certainty is one of the five central postulates of the rule of law principle and is intended to create order and stability in society.[96] The SC has stated:

> The principle of legal certainty is based on § 10 of the Constitution …. In the most general sense this principle should create certainty in regard to the current legal situation. Legal certainty means clarity in regard to the content of valid norms (principle of legal clarity) as well as certainty that the established norms shall remain in force (principle of legitimate expectations).[97]

Legal clarity Legal clarity has a double nature in the Constitution. First, it is a fundamental right guaranteed by § 13(2), according to which 'the law shall protect everyone from the arbitrary exercise of state authority'.[98] Already in its early case law, the SC proclaimed that 'insufficient regulation upon establishing restrictions on fundamental rights and freedoms fails to protect everyone from the arbitrary treatment of state power'.[99] The classic meaning was given to subjective legal clarity by the SC *en banc* in 2002:

> Legal norms must be sufficiently clear and comprehensible, so that an individual can foresee the conduct of public power with a certain probability and can regulate his or her conduct. A citizen must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.[100]

Secondly, according to the SC, legal clarity also derives as an objective principle directly from the rule of law set out in § 10.[101]

Legitimate expectations Legitimate expectations include three subcategories: *nulla poena sine lege*, non-retroactivity and legitimate expectation in a narrower sense.[102] First, the *nulla poena sine lege* rule in § 23(1), and (2), can be identified as *lex specialis* to the general principle of legitimate expectations and is explored in detail in Sect. 2.3.2.

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[95] Ernits in Madise et al. 2012, p. 93, § 10 of the Constitution, comm. 3.4. et seq.

[96] CRCSCj 30.09.1994, III-4/1-5/94; 23.03.1998, 3-4-1-2-98, para. IX.

[97] CRCSCj 02.12.2004, 3-4-1-20-04, para. 12; 15.12.2005, 3-4-1-16-05, para. 20; 20.03.2006, 3-4-1-33-05, para. 21; 31.01.2007, 3-4-1-14-06, para. 23.

[98] SCebj 28.10.2002, 3-4-1-5-02, para. 31; CRCSCj 20.03.2006, 3-4-1-33-05, para. 21; Judgment of the Criminal Law Chamber of the SC (CLCSCj) 28.02.2002, 3-1-1-117-01, para. 12.

[99] CRCSCj 12.01.1994, III-4/1-1/94. See also Alexy 2001, p. 36.

[100] SCebj 28.10.2002, 3-4-1-5-02, para. 31.

[101] SCebj 10.12.2003, 3-3-1-47-03, para. 30; CRCSCj 31.01.2007, 3-4-1-14-06, para. 22.

[102] Ernits in Madise et al. 2012, § 10, comm. 3.4.3.2.

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The second element is non-retroactivity which derives from the constitutional interpretation of the SC. The SC proclaimed already in its early case law in 1994: 'One of the general principles of law is that as a rule, laws must not have retroactive effect.'[103] Later the SC, referring to its earlier case law, specified that the legislator is entitled to issue legislation with retroactive effect in areas other than criminal law, but it must thereby take into account the will of the people expressed in the Constitution, bear in mind the general interests of the state, and consider the actual situation as well as the principle of legality.[104] The administrative law chamber of the SC has stated even more precisely that the legislator may give retroactive force to a law if there is a well-founded need, it does not cause disproportionate harm to legitimate expectations and the law is not surprising for the person concerned.[105] Recently, the SC has restricted its point of view: 'It is generally inadmissible to increase obligations with a genuine legal instrument of retroactive force, which means that no legal consequences may be established on actions already performed in the past.'[106]

The third element of legitimate expectations is legitimate expectation in a narrower sense, concerning 'non-genuine retroactive force', which arises 'if it concerns an activity that has started, but has not yet ended by the time of the adoption of a legal instrument, to be more exact, if it establishes prospectively legal consequences for an activity that has started in the past'.[107] The most important definition was provided in 2004:

> Pursuant to the principle of legitimate expectations everyone must have the possibility to arrange his or her life in reasonable expectation that the rights given to and obligations imposed on him or her by the legal order shall remain stable and shall not change dramatically in a direction unfavourable for him or her.[108]

Thus, according to the principle of legitimate expectation in a narrower sense,

> [e]veryone has a right to conduct his or her activities in the reasonable expectation that applicable Acts will remain in force. Everyone must be able to enjoy the rights and freedoms granted to him or her by law at least within the period established by the law. Modifications to the law must not be perfidious towards the subjects of the law.[109]

If something is promised by law, the legitimate expectation is that the promise shall be applied to those who have started to exercise their rights.[110] However,

> [t]he principle of legitimate expectations does not mean that the restriction of persons' rights or withdrawal of benefits is impermissible. The principle of legitimate expectations

[103] CRCSCj 30.09.1994, III-4/1-5/94.

[104] CRCSCj 20.10.2009, 3-4-1-14-09, para. 50.

[105] ALCSCj 17.03.2003, 3-3-1-11-03, para. 33.

[106] CRCSCj 16.12.2013, 3-4-1-27-13, para. 61.

[107] Ibid.

[108] CRCSCj 02.12.2004, 3-4-1-20-04, para. 13; 31.01.2012, 3-4-1-24-11, para. 49.

[109] E.g. CRCSCj 30.09.1994, III-4/1-5/94; 31.01.2012, 3-4-1-24-11, para. 49 et seq.

[110] CRCSCj 17.03.1999, 3-4-1-2-99, para. II.

> does not require fossilisation of the valid regulatory framework – the legislator is entitled to re-arrange legal relationships according to changed circumstances and, by doing so, inevitably deteriorate the situation of some members of society. The legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms.[111]

Prohibition of secret laws The rule that only published laws can be valid or the prohibition of secret law plays a central role in the Estonian Constitution – § 3(2), second sentence states explicitly: 'Only published laws have obligatory force'. This norm can be considered as a reaction to the tendency of the Soviet occupation regime to apply secret laws from time to time. In particular, the deportations of March 1949 during which more than 20,000 persons were expatriated and transported to Siberia were based on secret Soviet regulations.[112] Furthermore, since § 3 of the Constitution is located in Chapter I, it not only belongs formally to the core elements of the rule of law principle, but it can also be amended only by a referendum. Beyond this, the *vacatio legis* principle can be considered as part of the principle of prohibition of secret law: 'The requirement arising from the *vacatio legis* principle is that, prior to the entry into force of amendments, persons concerned must have sufficient time to examine the new legislation and take it into account in their activities.'[113]

Legality The rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute derives from § 3(1) of the Constitution, according to which: 'State authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith'. Several sub-principles derive from this norm; the two most important in the present context shall be presented briefly.

According to the principle of parliamentary reservation, the legislator is obliged to regulate essential questions in law itself: 'What the legislator is … obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and on the condition of judicial review'.[114] This defines the separation of powers principle, or, more specifically the division of powers between the legislator and the Government as the issuer of regulations: 'The reservation of law principle delimits the competence of the legislative and executive powers'.[115] Robert Alexy has called this aspect the democratic dimension of the principle of legislative reservation.[116] The SC has stated that in regard to issues concerning fundamental rights, all

[111] E.g. CRCSCj 02.12.2004, 3-4-1-20-04, para. 14; cf. CRCSCj 31.01.2012, 3-4-1-24-11, para. 49.

[112] See Jäätma 2006, p. 31.

[113] CRCSCj 16.12.2013, 3-4-1-27-13, para. 51.

[114] CRCSCj 12.01.1994, III-4/1-1/94. See also: CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[115] CRCSCj 26.11.2007, 3-4-1-18-07, para. 36; 20.10.2009, 3-4-1-14-09, para. 32.

[116] Alexy 2001, p. 36.

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decisions that are essential from the point of view of the exercise of fundamental rights must be taken by the legislator.[117]

According to the principle of legal basis, every infringement of any constitutional right needs a legal basis. According to the SC, '[p]ursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator'.[118] Public authority is only entitled to act if there is a legal basis or enabling act permitting it to do so. The law must determine the conditions for and extent of every infringement.

Access to courts and the right to judicial review Access to courts and the right to judicial review result from § 15(1) of the Constitution: 'Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional'. This guarantee – a constitutional right in itself – is broad and strong and must be regarded as a core element of the rule of law.[119] It enables the rule of law to be rendered fully justiciable through a constitutional right, i.e. if there is an infringement of any constitutional right which constitutes a violation of any of the sub-principles of the rule of law, the constitutional right is also violated. The SC has also stressed the close tie between Art. 6(1) of the European Convention on Human Rights (ECHR) and § 15(1) of the Constitution: 'The violation of Art. 6(1) of the Convention, found by the European Court of Human Rights, also constitutes a violation of § 15 of the Constitution'.[120]

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

In Estonia, the balancing of fundamental rights with economic free movement rights has not raised substantial constitutional issues or discussion. There have, however, been some cases where such a discussion would have been merited.

In 2009, the media covered the case of Aivo Piirsoo,[121] a truck-driver from a small Estonian village who had been detained in Germany on the accusation of smuggling cigarettes. He had been released due to his innocence. Approximately nine years later, he discovered that his Estonian bank account had a negative

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[117] SCebj 03.12.2007, 3-3-1-41-06, para. 21; 02.06.2008, 3-4-1-19-07, para. 25; cf. CRCSCj 24.12.2002, 3-4-1-10-02, para. 24.

[118] CRCSCj 13.06.2005, 3-4-1-5-05, para. 9; 20.10.2009, 3-4-1-14-09, para. 34.

[119] Cf. CRCSCo 05.02.2008, 3-4-1-1-08, para. 3.

[120] SCebj 06.01.2004, 3-3-2-1-04, para. 27.

[121] Henno, E. (2009, November 4). *Saksamaa nõuab eestlaselt miljoneid kroone* (Germany is demanding millions of kroons from an Estonian). Postimees. http://www.postimees.ee/183910/saksamaa-nouab-eestlaselt-miljoneid-kroone.

balance of 6.7 million Estonian kroons (approx. 430,000 EUR). The Estonian Tax and Customs Board had frozen the bank account upon the request of the German authorities due to a claim for tax and interest on the illegal cigarettes. With interest, the total claim amounted to more than 10 million Estonian kroons (i.e. approx. 640,000 EUR). The case made apparent the fact that there is no judicial involvement in administrative cooperation, i.e. authorities can cause a significant change in a person's financial standing without prior judicial review in the Member State of residence of the person. It became apparent that in cases of such cooperation, there is no effective remedy for an ordinary citizen (in this particular case with a monthly salary of ca. 700 EUR) without sufficient funds for a cross-border legal battle. It is at minimum debatable whether this is in line with the requirements of Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter) and the equivalent provisions of the Estonian Constitution.

A similar series of events unrolled when a truck driver, Neeme Laurits, was jailed in Finland for nine months, accused of organising international drug-trade.[122] He was picked up by the Estonian police from his home in Estonia and delivered to the Finnish authorities pursuant to a court order issued by an Estonian judge to execute a European Arrest Warrant (EAW). The accusations related to events in February of the same year. However, Mr. Laurits had not in fact travelled to Finland within the five years before his detention. The main evidence against him in Finland appeared to be the fact that three traffickers arrested in Finland all had his mobile phone number in their phones. Hence, he was treated as the mastermind of the criminal scheme. The actual explanation was that Mr. Laurits had worked in Estonia conducting vehicle roadworthiness tests years ago – and thus they had his number as that of an ordinary service provider. He was later released and acquitted by a Finnish appeals court.

There has been no extensive discussion about the above cases in the Estonian academia. A prominent attorney, Kaido Pihlakas, sharply criticised the system of European arrest warrants in an article published in the media, referring to the fact that Estonia is too eager to trust foreign authorities when executing their requests.[123] He proposed that the relevant procedure be expanded to include the right of a person to be heard before being extradited and that a simpler procedure for obtaining compensation for having been detained should be established. A Member of Parliament and former judge of the ECtHR opined that there is a strong need for local judicial supervision and stated that '[d]omestic control must be

[122] Randlaid, S. (2012, February 1) *Narkoparuniks tembeldatud eestlane pisteti 9 kuuks Soome vanglasse* (Estonian labelled as drug baron and thrown into Finnish jail for 9 months). Estonian National Broadcasting. http://uudised.err.ee/v/eesti/242d45bc-0425-415a-b986-4163decf25dc.

[123] Loonet, T. (2012, February 29). *Advokaat: Eesti täidab Euroopa vahistamismäärusi liiga püüdlikult* (Attorney: Estonia executes European Arrest Warrants too eagerly). http://www.postimees.ee/756124/advokaat-eesti-taidab-euroopa-vahistamismaarusi-liiga-puudlikult.

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substantive and not only formal'.[124] The fact that this is not the case with the European arrest warrant is obvious.

Indeed, there seems to be a strong imbalance between the effectiveness of the extradition process and the mechanisms available for obtaining compensation. At a minimum, individuals should be able to initiate compensation mechanisms with their domestic authorities. Thus, the requesting Member State would still obtain full and efficient cooperation from other Member States during the extradition process and at the same take into account that those very same authorities would later be entitled to order compensation measures equally effectively. This would most likely reduce the moral conflict involved, as the risk of actually having to pay compensation would most likely increase significantly.

The third example of a shift in the protection of fundamental rights concerns the excess stocks cases, which will be discussed in Sect. 2.6.

2.3 Constitutional rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The Presumption of Innocence

2.3.1.1 The first two paragraphs of § 22 of the Constitution stipulate as follows:

> No one may be deemed guilty of a criminal offence before he or she has been convicted in a court and before the conviction has become final.
>
> No one is required to prove his or her innocence in criminal proceedings.

The principle of the presumption of innocence is closely related to the right to liberty and security guaranteed by § 20 of the Constitution ('No one may be deprived of his or her liberty except in the cases and pursuant to a procedure provided by law') and to the grounds for lawful deprivation of liberty listed in § 20.

There has been no significant constitutional debate covering the presumption of innocence in the context of surrender procedures. Instead, more general questions concerning the right to defence during surrender proceedings – in the situation where the courts do not examine evidence for or against the suspicion of a criminal offence set out in a European arrest warrant – have been raised both in the media and in professional discussions in recent years (mainly from 2012 onwards, after media coverage of the Laurits case, see Sect. 2.2). However, the legal commentary has found that e.g. in the case of a valid alibi, the surrender of a person should be refused on grounds of conflict with the general principles of Estonian law, whereby

[124] Krjukov, A. (2012, February 5). *Maruste: kodanike väljaandmisel peab olema tugev siseriiklik kontroll* (Maruste: Strong domestic control is needed when extraditing citizens). Estonian National Broadcasting. http://uudised.err.ee/v/eesti/4cd69e51-2204-498c-8d0b-b4aa1377166e.

suspicion of guilt is a precondition for surrender.[125] Until 1 January 2015, it was not possible to refuse a request for surrender due to the general grounds for refusal in international cooperation in criminal matters (*inter alia* conflict with the general principles of Estonian law) specified in § 436(1) CCP, except if there was reason to believe that the request had been issued for the purpose of bringing charges against or punishing a person on account of his or her race, nationality or religious or political beliefs, or if the situation of the person may have deteriorated for any such reasons. Due to the restrictions on the right to appeal an EAW, the SC has not had enough opportunities to rule upon matters regarding surrender. The constitutional aspects of surrender proceedings have not been successfully raised before the courts as of yet. However, the evaluations given by SC to the regulation of extraditions under international treaties could, by analogy, be in some aspects relevant.

Domestic criminal procedure requires that in order to take a person into custody, a reasonable suspicion and legal (constitutional) ground for deprivation of liberty has to be present. The same applies when an EAW is issued by Estonia. In the context of extradition under international treaties, the SC has, in response to the defence's argument that extradition to and the conduct of criminal proceedings in the USA would infringe the fundamental rights of the defendant, acknowledged the limitation of fundamental rights. The SC concluded that the fundamental rights of a person in domestic proceedings were guaranteed since the defence had, during the court proceedings, a possibility to effectuate the right to protection of fundamental rights[126] and, in addition, there was an option to contest the extradition decision (either adopted by the Government or the Ministry of Justice) in an administrative court.[127]

The legal situation of the protection of fundamental rights in the framework of surrender between EU Member States differs from that in domestic criminal proceedings by virtue of the essence of surrender. In EAW proceedings, the right to appeal is restricted, as a ruling made by a county court can be contested only in the circuit court, whose judgment is final (§ 504(4) CCP). In order to ensure the uniform application of law, the SC has only explained that restrictions of basic rights may occur prior to the issue of an EAW as well as during execution of the EAW in the requesting state, but not through issue itself. Therefore, disputes concerning the existence of a legal ground for deprivation of liberty in Estonia do not include the right to contest an EAW by the requested person in Estonia. If there was no legal ground for detention, the person is entitled to claim compensation.[128]

Interpreting the evaluation of the SC by analogy, it can be concluded that the constitutional ground for arrest for surrender is § 20(1)6) of the Constitution. The SC has found that arrest for extradition is different from taking a person into custody in domestic criminal proceedings, because in extradition proceedings the

[125] Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 7.1.

[126] The legal admissibility of the extradition of a person shall be verified by a court in extradition proceedings pursuant to international treaties.

[127] CRCSCo 29.05.2013, 3-4-1-10-13, para. 11.

[128] CLCSCo 19.09.2011, 3-1-1-93-11, paras. 17 and 18.

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decision to deprive the person of liberty has already been made by a court of the requesting state. The principle of mutual recognition in international co-operation in criminal procedure means that the executing state is not allowed to question such a decision. In addition, the grounds for deprivation of liberty may to some extent vary from state to state.[129] The same limitation upon the courts therefore applies accordingly in the case of surrender.

From a wider perspective of a right of defence, in April 2012 the Estonian Bar Association submitted a proposal to the Legal Affairs Committee of the Estonian Parliament to amend the regulation of surrender in the CCP, by way of a brief summary, as follows: (1) refusal to surrender a person on the ground of a conflict with the EU Charter should be provided for; (2) the list of the rights of a person arrested for surrender should be stipulated, including the right to be heard immediately by a judge; (3) the requirements for formalising voluntarily consent to surrender should be defined; (4) there is a need for more specific regulation in cases where a party requests that additional information be sought from a requesting state. The committee forwarded the proposal to the Minister of Justice. As the Minister of Justice did not support the amendments,[130] in November 2012 the Estonian Bar Association asked the Chancellor of Justice to verify the conformity of the surrender regulation with the Constitution. The Chancellor of Justice initiated the respective proceedings in April 2013.

Although the legal analysis of the Chancellor of Justice is still pending, he expressed his preliminary opinion in the request for information sent to the Minister of Justice.[131] He found that in addition to the legal interpretations, how the regulation governing surrender procedures is applied in practice, in other words, what kind of problems have been raised in protecting the fundamental rights of the persons affected and how these problems have been handled, must inevitably be explored. The Chancellor of Justice also established that there is no such overview on the Ministry of Justice website or in the explanatory memorandum to the latest

[129] CLCSCo 19.12.2013, 3-1-1-101-13. In this case the defence lawyer claimed that the CCP is unconstitutional to the extent that it does not provide for alternatives (bail, electronic surveillance) to custody in extradition proceedings, as are provided for in domestic criminal proceedings. According to the SC decision, there is no unlawful unequal treatment because of the different legal situation: in extradition proceedings the decision to take a person into custody has already been made by the requesting state, whereas in domestic proceedings it is decided by the domestic court. Furthermore, the legislator has not expanded the domestic regulation of imposing bail or electronic surveillance instead of taking a person into custody to the regulation of international co-operation in criminal procedure.

[130] Minister of Justice letter No. 8-2/8349 (23 October 2012), http://adr.rik.ee/jm/.

[131] Chancellor of Justice letter No. 6-1/130507/1301793 (16 April 2013), http://adr.rik.ee/okk/. The opinion of the Chancellor of Justice is based on the same document. Both co-authors of Sect. 2.3 were involved in preparing this preliminary opinion. After this report was written, the new Chancellor of Justice, Ülle Madise, took office in March 2015. She issued a final opinion in which she found in an abstract review of constitutionality that the provisions of the Code of Criminal Procedure relating to the EAW are not in conflict with the Constitution. See Chancellor of Justice Letter No. 6-1/130507/1601468 (7 April 2016), http://adr.rik.ee/okk/dokument/4680282.

draft law dealing with international co-operation in criminal matters.[132] Some individual cases have been discussed in the media as well as in legal commentary.[133]

In short, the Chancellor of Justice focused his analysis on two main topics: (1) can the person affected and his/her counsel effectively exercise the right of defence in surrender proceedings, considering the short time limits foreseen by the CCP; this includes the question of how the clause enabling a court to obtain additional information from a requesting state is applied in practice; (2) how the state reacts or should react if subsequently it becomes evident that the person surrendered has been acquitted or released on other grounds (the issue of compensation for damage).

The Estonian legal literature has pointed out that the exercise of some procedural rights in surrender proceedings is problematic, e.g. the right to notify a person close to the detainee of his/her detention.[134] Additionally, the question of the conformity of the CCP with Art. 12 of the EAW Framework Decision (FD)[135] has been raised, as § 503(4) of the CCP (mandatory detention until factual surrender) excludes the use of alternatives to detention in surrender proceedings.[136] Another issue that has raised concerns is the conformity of § 492(3) of the CCP (Estonia will surrender its citizens who reside permanently in Estonia for the period criminal proceedings are conducted, provided that the punishment imposed in the requesting state will be executed in Estonia), with the prohibition of discrimination.[137]

From the perspective of the right of defence, it is important to keep in mind the readiness and willingness of defence lawyers to request, if needed, clarification of foreign law from the requesting state or a preliminary ruling from the Court of Justice (CJEU). The Chancellor of Justice has also addressed the Estonian Bar Association and raised the question of the need for training for defence lawyers. Additionally, the Chancellor of Justice has requested examples of problematic practices of surrender.[138] In its reply, the Bar Association advised that in the course of its supervision, it has discovered no misgivings on the part of advocates regarding surrender proceedings.

2.3.1.2 Estonian law guarantees the right to be heard in court before surrender to all persons, irrespective of consent to surrender (§ 502(4)3) CCP). An analysis of Estonian court practice has confirmed this.[139]

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[132] Draft Act No. 578 SE, adopted 12 June 2014.

[133] E.g. Albi 2015.

[134] Plekksepp in Kergandberg and Pikamäe 2012, § 502, comm. 3.4.

[135] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[136] See CLCSCo 19.12.2013, 3-1-1-101-13. By analogy, the alternatives to detention are excluded also in surrender proceedings, although once in the practice of the county courts, bail was imposed instead of detention (Order of the Harju County Court 12.09.2008, 1-08-4553).

[137] Plekksepp in Kergandberg and Pikamäe 2012, § 504, comm. 4.1. and § 492, comm. 3.2.

[138] Chancellor of Justice letter No. 6-1/130507/1301794 (16 April 2013), http://adr.rik.ee/okk/.

[139] The summary of court practice (2004–2012) is based on the MA thesis by Marje Allikmets 2013.

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Estonian courts have on several occasions been faced with claims on the part of the defence that the person has an alibi, that the person was not aware of the allegations or that the respective circumstances set out in the EAW were superficial. In contesting an EAW, requested persons and their counsel have sought to prove the existence of an alleged alibi, although they have often been unsuccessful for different reasons. In court practice from 2002–2012, there were at least two cases where the court, in order to refute reasonable suspicion, decided to request additional information from the requesting state.[140] In general, an analysis of court practice indicates that overall, no preliminary review of evidence takes place and, as a rule, Estonian courts follow the principles of mutual recognition and mutual trust strictly.

In connection with the right to be heard, it is worth mentioning that the Estonian Bar Association has proposed that a person's right to be heard by a judge immediately after his/her arrest should be included in the CCP. However, in a reply to the Chancellor of Justice, the Minister of Justice held that such amendment would have no added value.[141] A requested person has the opportunity to express his/her opinion on three occasions: upon arrest, at the court hearing in which detention before surrender is decided and at the court hearing in which surrender is decided. According to the Minister of Justice, additional questioning would not in any way support the possibility of the Estonian court to evaluate the decision of the requesting state to issue an EAW in respect of a particular person objectively, if the evidence reviewed by the requesting state is unknown to the Estonian court. The Minister of Justice also referred to cases where a person has claimed his/her innocence and has managed independently to obtain essential supportive evidence within 24 hours, in result of which the EAW has been withdrawn.[142] However, the Minister of Justice also noted that a refusal to surrender a person to a Member State does not entail the obligation of the requesting state to withdraw the EAW and to remove the notice of a wanted person in the Schengen Information System (SIS). According to the Minister of Justice, it has happened that after an Estonian court has refused surrender, the person has been arrested based on an SIS notice in some other Member State and has nevertheless been surrendered.

The Chancellor of Justice is of the opinion that a person's right of defence can be seen as a right to get explanations from his or her defence lawyer with regard to

[140] Harju County Court Order 22.12.2011, 1-11-13412 and Tallinn City Court Order 21.11.2005, L-15/05.

[141] Minister of Justice letter No. 10-2/13-4291 (4 June 2013), http://adr.rik.ee/jm/. Here and subsequently, the opinion of the Minister of Justice is based on same document if not shown otherwise.

[142] (2007, April 26) Itaalia nõudis Eestist välja süütu mehe (Italy demanded extradition from Estonia of innocent man). Eesti Ekspress. http://ekspress.delfi.ee/news/paevauudised/itaalia-noudis-eestist-valja-suutu-mehe.d?id=69107847; see also Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 1.2.

surrender proceedings and the related documents, as well as the use of defence tactics such as presenting evidence in order to preclude or restrict surrender. Considerable weight should be attributed to the right to consent or refuse to consent to surrender. According to § 499(3) CCP, consent, once given, cannot be withdrawn. The Chancellor of Justice has therefore proposed that the Minister of Justice consider elaborating the requirements for how consent is obtained and formalised. Statistical data show that the majority of surrendered persons consent to surrender.[143] However, it is notable that Neeme Laurits, who was surrendered to Finland and acquitted after 9 months of detention and whose case was extensively discussed in the Estonian media, is among those who have consented to surrender. According to Laurits, he had agreed to surrender because the police told him that if he did, even if the request was groundless, then at least he could be back from Finland in a couple of days. If he did not agree, he would be thrown in jail for several months in Tallinn and then would be surrendered to Finland anyway.

At the same time no data exists on the number of cases in which consent has been given but the initial suspicion has turned out to be unsubstantiated or the criminal proceedings have been terminated for some other reason. The Chancellor of Justice has emphasised that even if it can be assumed that protection of the fundamental rights of the requested person will be endangered only in exceptional cases, it is the obligation of the state to guarantee a fair trial to everyone. Therefore, in his opinion, the factual application of the regulation of surrender proceedings has to be explored.

The Chancellor of Justice also recalled that the time limits in surrender proceedings are tight and, because of this, it is of practical importance to evaluate whether the exercise of the right of defence is at all effectively possible within these time limits. The true aim of the right to be heard and its impact on the decision taken in surrender proceedings is also relevant.

If a surrender decision cannot be made within the prescribed term, the time period for making the surrender decision shall be extended by thirty days (§ 502(7) CCP). A court may set a term for the submission of additional information (§ 502 (5) CCP) by the requesting state, although it may extend the length of detention. The right of a court to acquire additional information and the right of the parties to request it from the court are relevant first and foremost in cases of incomplete or ambiguous EAWs, e.g. if there are doubts concerning the identity of the person requested or the facts relating to or classification of the criminal offence (i.e. check of double criminality, if allowed).[144] The SC has acknowledged the need for additional information where there is uncertainty whether the limitation period for the criminal offence has expired or it is unclear whether the person requested has absconded from criminal proceedings.[145]

[143] According to the summary of court practice 2004–2012, consent was given to 226 (74.3%) of the total of 304 surrender requests.

[144] Plekksepp in Kergandberg and Pikamäe 2012, § 502, comm. 5.

[145] CLCSCo 18.03.2009, 3-1-1-9-09, para. 8.3.

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In the above-mentioned preliminary opinion, the Chancellor of Justice noted that in the case of reasonable doubt, a request for additional information may be of critical importance. Surrender of a person may be refused if additional information has not been submitted by the deadline determined by the court. Additional information may, and as previously mentioned has, in (rare) individual cases resulted in the withdrawal of an EAW.

In practice, defence lawyers seek to convince the court of the need to request additional information, especially when the substance of the charge is incomplete or unclear. In reply to one such request, a county court explained that in surrender proceedings there is no room for disputes in respect of the substance of the charge.[146] In most cases such request will not be satisfied. Based on the court practice, it is possible to conclude that in deciding on a request for additional information, the court will primarily rely on the opinion of the prosecutor.[147]

In the preliminary opinion, the Chancellor of Justice categorised the potential problems in exercising the right of defence in surrender proceedings as follows: (1) defective regulation (e.g. insufficient time limits); (2) officials violating their duties (e.g. not allowing examination of respective documents; not explaining a person's rights to them); (3) incompetent defence lawyers; (4) concurrence of these reasons. In domestic court proceedings there is the additional factor of the understanding of judges of the role and competence of courts in surrender proceedings.

Overall, an analysis of court practice reveals that, as a rule, Estonian courts do not carry out preliminary judicial review in order to evaluate the factual basis of an EAW, although the right to be heard is guaranteed to all requested persons. On several occasions, the courts have *expressis verbis* found that the court hearing the EAW case does not have any competence to deal with the substance of the charge, and is allowed only to check whether circumstances exist which preclude or restrict the surrender of the person. Therefore, the majority of court rulings deciding on surrender are laconic in their formulation. The same applies to decisions on detention for the purposes of surrender. In the latter case, the courts usually write in their decisions that the court has no reason to doubt the information sent by the requesting state and, in order to ensure the execution of the EAW, the person has to be detained. Courts have sometimes additionally explained that it is reasonable to assume that upon issuing an EAW, the requesting state has ascertained the relevant facts on which the charge is based and that this is sufficient for arrest as a precondition for surrender.[148]

In legal commentary, however, it has been remarked that the examination of an EAW is not always formalistic and, in the case of reasonable doubt, certain substantial requirements have to be followed to control the validity of relevant information.[149] The SC has, in the context of the expiry of the limitation period of the

[146] Harju County Court Order 21.03.2012, 1-12-2617.

[147] E.g. Harju County Court Order 29.05.2012, 1-12-73 and 03.01.2011, 1-10-16977.

[148] E.g. Harju County Court Order 03.12.2012, 1-12-11375.

[149] Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 7.1.

offence, noted the following: if an EAW does not contain information that the person requested has absconded from the criminal proceedings, the court must hold that this has not happened. If the court still has doubts concerning the circumstances on which an EAW is based (including expiration of the limitation period), the court has to acquire additional information from the requesting state.[150]

2.3.2 *Nullum crimen, nulla poena sine lege*

This principle is stipulated in § 23(1) and (2), first sentence of the Constitution:

> No one may be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed.
>
> No one may be sentenced to a penalty that is more severe than the one that was applicable at the time the offence was committed.

The principle of legality in criminal matters derives from this provision, in conjunction with § 13(2) of the Constitution, which provides that everyone is entitled to protection by the state and of the law.

As far as it is known to the Experts, in practice no problems with the application of the *nulla poena sine lege* rule have arisen. Estonia has on one occasion refused the surrender of a person to Sweden due to the fact that the act committed (infringement of the Swedish law regulating the collection of debts) was not punishable in Estonia and it was not an offence in the list of 32 offences in the EAW FD.[151] In legal literature, there has been no additional discussion on this subject. The legal commentary only refers to the decision of 18 July 2005 of the German Constitutional Court and to the CJEU *Advocaten voor de Wereld* decision.[152]

In the view of the Experts, there is a justified concern regarding the legal regulation of surrender, as the 32 crimes stipulated in the EAW FD include offences that are not harmonised in EU law. In addition, this may cause problems relating to the proportionality of the offence on which an EAW is based. The SC has stated in *obiter dictum* that in the case of an offence other than one stipulated in the EAW FD, the court may not solely rely on the qualification of the act stated in the EAW by the requesting state, and must therefore verify whether the facts of the case correspond to the necessary elements of an offence stipulated in Estonian law.[153]

[150] CLCSCo 18.03.2009, 3-1-1-9-09, para. 8.3.

[151] Harju County Court Order 21.11.2007, 1-07-14422.

[152] Plekksepp in Kergandberg and Pikamäe 2012, § 491, comm. 2.2.

[153] CLCSCo 18.03.2009, 3-1-1-9-09, para. 8.2.

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2.3.3 Fair Trial and *In Absentia* Judgments

Everyone's right to attend all hearings held by a court in his/her case is stipulated in § 24(2) of the Constitution. The CCP provides some grounds for a court hearing without the participation of the accused. As an exception, a criminal matter may be heard in the absence of the accused if his/her whereabouts in Estonia cannot be established, there is sufficient reason to believe that he/she is outside the territory of Estonia and is absconding from the court proceedings, reasonable efforts have been made to find him/her and the court hearing is possible without the accused (§ 269(2) CCP). If an *in absentia* hearing is not possible due to the facts of the case, there may be grounds for issuing an EAW.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Estonia does not provide any practical assistance to surrendered citizens or permanent residents. In the view of the Chancellor of Justice,[154] it would be important to explore the practical aspects of implementing EAWs and, if necessary, to learn from any mistakes.

In response to the Chancellor of Justice, the Minister of Justice has stated that the rare, negative cases covered by the media have not been caused by any miscarriage of justice by Estonian law enforcement authorities, but by a reappraisal of the evidence in the requesting state.

In response to the question whether the state should be obliged to give necessary contact information to persons surrendered, the Minister of Justice responded that Estonia does not have information about the authorities a person could turn to in order to get more information about one's rights in another Member State.

The Minister of Justice replied to the Chancellor of Justice that the state does not have any information concerning the criminal proceedings of surrendered persons in other Member States. Thus, there is no plan to analyse 'the fate' of surrendered persons. Likewise, Estonia does not give information to other states about criminal proceedings in which Estonia has issued an EAW. According to the Minister of Justice, there have only been a few cases in one Member State where, figuratively speaking, the person surrendered has come to the Estonian embassy on the following day asking for help in returning to Estonia.

In practice, individuals themselves and their defence lawyers have sometimes claimed that they do not have any information about the proceedings in another Member State and that Estonia should protect and help its citizens in surrender

[154] Preliminary opinion of the Chancellor of Justice, Chancellor of Justice letter No. 6-1/130507/1301793 (16 April 2013), http://adr.rik.ee/okk/.

proceedings.[155] Estonia, however, does not have any public or non-governmental organisations that provide assistance to surrendered persons.

Unquestionably, several problems arise when participating in criminal proceedings in another Member State, e.g. starting with the need for translation. Questions regarding the guarantee of fundamental procedural rights equally to citizens and permanent residents do not arise only in the case of surrender, but also in all other cases involving foreigners. Freedom of movement within the EU has raised the number of alien suspects and accused persons. Ideally, the state should provide additional help for its citizens and permanent residents in proceedings in other Member States, even though under recent EU directives defence rights in the requesting state are now more clearly regulated.

2.3.4.2 According to information from the Minister of Justice, 8,508 criminal convictions entered into force in 2013, 94 (1.1%) persons were partially acquitted and 73 (0.86%) were fully acquitted (this data may include cases where the prosecutor withdrew the charges or the proceedings were terminated on grounds other than acquittal). In 2012, the percentage of partially or fully acquitted persons was 1.62% (156 of 9,638).[156]

Between 2011–2013 only one of all the persons surrendered to Estonia was partially acquitted. According to the official data,[157] during these years 67, 61 and 88 EAWs, respectively, were issued in Estonia. At the time of the compilation of this data, during those years, 31, 39 and 45 persons, respectively, were surrendered to Estonia (including surrenders on the basis of EAWs issued in earlier years). Therefore, the percentage of surrendered persons who have been acquitted cannot be reliably compared to the percentage of individuals who have been acquitted in domestic criminal proceedings.

There is no information on how many of the individuals surrendered from Estonia have subsequently been found innocent.

The legal literature has pointed out a problem which arises from a so-called negative conflict of competency, i.e. a situation where none of the Member States involved foresee any rules for compensation for violations that occur in surrender proceedings.[158] One of the reasons may be the absence of such rules in the EAW FD.

With regard to compensation for damage, the Chancellor of Justice has made a proposal to analyse whether the Minister of Justice could help surrendered

[155] Harju County Court Order 27.03.2012, 1-12-2397.

[156] Urvo Klopets (adviser in the Criminal Policy Department of the Ministry of Justice) in response (e-mails of 13 and 17 June 2014) to the enquiry of Saale Laos (6 June 2014). For statistical data see also '*Kuritegevus Eestis 2012*' (Crime in Estonia in 2012), p. 29. http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/17._kuritegevus_eestis_2012_0.pdf.

[157] Webpage of the Ministry of Justice, statistics on international legal aid. http://www.just.ee/et/eesmargid-tegevused/rahvusvaheline-oiguskoostoo/rahvusvahelise-oigusabi-statistika.

[158] Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 6.2.2.

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individuals by publishing overviews of the rules on state liability and pertinent court practice in the Member States that submit the most EAWs to Estonia.

The Minister of Justice is of the opinion that Estonia could compensate for damage only in cases where Estonia is the requesting state. The SC has stated that the state's obligation to pay fair compensation even in the case of a lawful restriction in an extraordinary manner of some fundamental right (obligation to endure the performance of criminal procedural acts in respect of a person, as criminal proceedings serve the public interest) arises from the Constitution.[159] In the opinion of the Chancellor of Justice, the same principle applies to international co-operation in criminal procedure, including surrender. The Compensation for Damage Caused in Offence Proceedings Act (entered into force 1 May 2015) includes rules on compensation for damage caused by measures applied in the course of international co-operation in criminal proceedings.[160]

Publication in the media of the Neeme Laurits case in Finland brought about public debate and calls for a more thorough control of EAWs by the domestic courts, including from politicians (e.g. statement of the head of the Constitutional Committee of the *Riigikogu*).[161]

In another case, a person surrendered to Italy who had been accused because he had been a passenger in the same bus as the actual criminals, was released three months later.[162] There has also been at least one negative case concerning identity theft, in which a person was surrendered to France, although the accused claimed that his passport had been stolen; he was released soon after the surrender.[163] In this case, it was problematic that the court had not requested any necessary supplementary information.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The above-mentioned *Piirsoo* case (see Sect. 2.2)[164] is remarkable, but unfortunately there is no public information as to whether the topic has been discussed any further in Parliament or at the Governmental level.

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[159] E.g. SCebj 31.03.2011, 3-3-1-69-09, paras. 60 and 64.

[160] RT I, 20.11.2014, 1, Compensation for Damage Caused in Offence Proceedings Act § 2(4), see also explanatory memorandum to Draft Act No. 635 SE, paras. 12 and 13.

[161] See supra n. 124.

[162] Filippov, J. (2008, December 18). Itaalia vaikib Eesti juveeliröövlitest (Italy silent on Estonian jewel thieves). http://ekspress.delfi.ee/news/paevauudised/itaalia-vaikib-eesti-juveeliroovlitest.d?id=27684285; see also supra n. 142.

[163] Plekksepp in Kergandberg and Pikamäe 2012, § 492, comm. 4, with reference to Harju County Court Order 06.06.2008, 1-08-6004.

[164] Also reflected in the paper by Albi 2015, p. 176.

2.3.5.2 There has been no extensive debate on the move to mutual recognition in criminal matters. However, related issues have arisen in the context of specific cases. In legal commentary, Plekksepp has criticised the shift to mutual recognition in criminal matters, stating that unlike the free movement of goods, penal law is a societal and cultural construction, based on agreements and values recognised in the particular Member State.[165]

2.3.5.3 From a critical point of view it could be concluded that it is largely unclear what the role of the courts is in safeguarding individual rights in surrender proceedings, what level of protection is guaranteed by the Constitution and what, in addition to the formal prerequisites for surrender, the courts can assess. There is no relevant CJEU case law as of yet and it is not clear how the Charter can and will be applied in practice.

In short, Estonia tends to satisfy all EAWs. Court practice indicates that courts in Estonia operate exactly pursuant to the regulation in the CCP (and therefore pursuant to the EAW FD) and, as a rule, they have not established any new grounds for refusal to execute an EAW.

As of 31 December 2012, courts in Estonia have refused to execute 8 (i.e. 2.6% of all) EAWs. Only in one notable case did a court refuse surrender on the grounds of a general provision of international co-operation, as the accused had a valid alibi.[166] However, it has to be said that in many other similar cases, courts have satisfied the request to surrender. On three occasions, Estonia has refused surrender on the grounds that the double criminality requirement was not fulfilled.[167] On one occasion, the EAW was considered to be an international rogatory letter.[168] A requesting state has twice annulled an EAW after Estonia asked for additional information,[169] and Estonia has once refused surrender due to expiry of the limitation period.[170]

[165] Plekksepp in Kergandberg and Pikamäe 2012, § 490, comm. 1.2.

[166] Harju County Court Order 29.03.2007, 1-07-3718; see also Plekksepp in Kergandberg and Pikamäe 2012.

[167] Tartu County Court Order 24.04.2012, 1-12-3543 (causing damage to a person's health did not constitute a criminal offence under Estonian law, as the health disorder caused persisted less than four weeks); Harju County Court Order 25.09.2008, 1-08-12380 (theft of a CD-player is a misdemeanour under Estonian law because of the low value of the object) and 21.11.2007, 1-07-14422 (infringement of the Swedish law regulating collection of debts).

[168] Harju County Court Order 31.03.2008, 1-08-4051.

[169] Harju County Court Order 22.12.2011, 1-11-13412 and Tallinn City Court Order 21.11.2005, L-15/05.

[170] Tallinn Circuit Court Order 17.11.2008, 1-08-13649.

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2.3.5.4 The question of proportionality arises in the context of deprivation of liberty (detention for surrender), as this constitutes an intensive restriction of a fundamental right. To date, the European handbook on how to issue a European arrest warrant,[171] which also introduces a proportionality test, is just an advisory guideline.

The Minister of Justice has explained that even though the CCP does not provide any requirement of a proportionality test, various guidelines and trainings have emphasised that authorities conducting proceedings should consider proportionality. The Minister of Justice has confirmed that Estonia has not submitted any EAWs that have been in conformity with the EAW FD but not proportionate.

In the Experts' view, application of the EAW FD needs to be assessed and problems that arise should be resolved through amendments to the EAW FD (if application of the EAW FD on the national level is problematic). If the competence of the local courts is to be reinstated, the problems this aims to resolve (e.g. re-establishment of the requirement of double criminality, pre-evaluation of evidence, etc.) must first be identified. It is therefore difficult to support a general proposal to widen the jurisdiction of the courts of the executing state to expand preliminary judicial review. It is clear that the amount and quality of evidence may vary depending on the stage of the pre-trial procedure, and the prerequisites for suspicion of guilt (e.g. for arrest) may differ among the Member States. As a starting point, it may be reasonable to reassess the time-limits for proceedings and to focus on requesting additional information without having false modesty about distrusting the judicial authorities of another Member State.

2.4 The EU Data Retention Directive

2.4.1 The implementation of the Data Retention Directive 2006/24/EC[172] (DRD) has not raised any serious constitutional concerns in Estonia. The Directive was implemented in national law by amendment of the Electronic Communications Act (ECA) in 2007.[173] According to § 111^1 ECA, communication data is generally retained for one year. Requests submitted and information given to specific authorities is retained for two years. In the interest of public order and national security, the Government can extend these terms of retention.

[171] Council of the European Union, 17195/1/10 REV 1 (17 December 2010).

[172] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[173] Draft Act No. 62 SE (28 May 2002).

By the amendment of 2012,[174] the legal classification of requests submitted by law enforcement agencies to communication services providers was downgraded from 'measures of surveillance activities' to 'general investigative activities'. This means that certain special legal requirements for surveillance activities, *inter alia*, the agencies' obligation to notify the person subjected to surveillance measures after their completion, no longer apply to the requests concerned. Additionally, through this amendment, the right of request was no longer restricted to criminal proceedings exclusively, and was extended to misdemeanour proceedings. This right, which had been exclusive to the specific prosecution authorities, was extended to other authorities entitled to process administrative offences (e.g. the Environmental Inspectorate, the Financial Supervisory Authority and the tax and customs authorities). Aware of the European Commission's critical approach to the vague term 'serious crime' used in the Directive, the legislator defended the amendment by declaring that the right to define the term 'serious crime' lies with the national legislator.[175]

The explanatory memorandum to the amending act did not consider questions concerning the compatibility or proportionality of the measures envisaged, rather the motivation for their adoption was based particularly on the necessity to reassess the needs of internal security after the terror attacks in Madrid and London in 2004–2005.[176]

According to the Estonian legislator[177] and the prevailing legal opinion,[178] the statutory duties provided for in the DRD did not interfere with the right to secrecy of correspondence guaranteed in § 43 of the Estonian Constitution,[179] as the retention obligation refers only to connection data but not to its content. Although the retention of connection data does encroach on the right to the inviolability of private life guaranteed in § 26 of the Constitution, the latter is seen as less entitled to protection than the right to secrecy of correspondence.[180] The general diagnosis is that these topics are not in the awareness of the Estonian public at large.[181] At the same time, the practical realisation of an e-state – including e-governance, e-healthcare and e-voting, to name only a few areas – has long become reality in Estonia.

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[174] Draft Act No. 175 SE (6 February 2012).

[175] Explanatory memorandum to Draft Act No. 175, supra n. 174, p. 6.

[176] See explanatory memorandum to Draft Act No. 62, supra n. 173, pp. 11 and 13.

[177] Ibid., p. 12.

[178] Kask et al in Madise et al. 2012, § 43, comm. 6.

[179] 'Everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means. Derogations from this right may be made in the cases and pursuant to a procedure provided by law if they are authorised by a court and if they are necessary to prevent a criminal offence, or to ascertain the truth in criminal proceedings.'

[180] See explanatory memorandum to Draft Act No. 62, supra n. 173, p. 12.

[181] See also Tigasson's critical remarks on the lack of public awareness concerning the topics of eavesdropping and surveillance in Estonia. Tigasson, K.-R. (2013, October 30). *Klaasist maailm* (Glass world). Eesti Päevaleht. http://epl.delfi.ee/news/arvamus/kulli-riin-tigasson-klaasist-maailm.d?id=66999970.

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Concerning the disclosure of personal information, the Estonian SC has without further consideration approved the Estonian lawmaker's general decision to disclose the identity of the defendant in court decisions (the latter are generally made public via the Internet).[182] It has also approved the right of creditors to publicly disclose their debtors, arguing that this constitutes an appropriate instrument to protect the legitimate interests of the former.[183] These judgments exemplify the Court's disposition to accept restrictions to the right to privacy and/or the secrecy of correspondence where it finds the given grounds justifiable.

In a recent ruling of February 2015, the Criminal Law Chamber of the SC also delivered its opinion on the invalidation of the DRD and its legal impact on national law.[184] In its decision, the Chamber acknowledged that the invalidation of the DRD does not automatically lead to the unconstitutionality of the respective national law, and upheld the constitutionality of the Estonian rules on data retention discussed above as in force prior to the amendments of 2012. According to the Chamber's majority view, the classification of insurance fraud as a 'serious crime' was up to the legislator, while the proportionality of the measure was ensured in particular by the requirements applicable to surveillance activities.[185] Two out of the six justices of the Chamber presented a dissenting opinion. Among other issues, they challenged the adequacy of the procedural guarantees under the measures, and questioned the Chamber's view concerning the proportionality of the general one-year data retention period.[186]

There is another aspect that has in the past made data retention an unlikely topic for particular concern in Estonia. This is the issue of national security. Due to its historical experience and geo-political position, since the restoration of independence in 1991, Estonia has regarded NATO and therewith the U.S. as the strongest guarantors of its sovereignty and security interests.[187] For this reason, Estonia unequivocally supported – rhetorically and militarily – the U.S. invasion of Iraq, notwithstanding the strong opposition of e.g. Germany and France.[188] This may help explain Estonia's willingness to prioritise security matters over aspects of personal freedom.

Based on the above, it seems rather unlikely that the SC would have considered declaring measures on data retention – even if they were not part of the EU legal order – unconstitutional prior to the CJEU's decision to annul the DRD.

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[182] See, e.g., CLCSCo 10.09.2007, 3-1-1-35-07.

[183] E.g. Judgment of the Civil Chamber of the Supreme Court (CiCSCj) 21.12.2010, 3-2-1-67-10, para. 22.

[184] CLCSCj 23.02.2015, 3-1-1-51-14.

[185] Ibid.

[186] CLCSCj 23.02.2015, 3-1-1-51-14, dissenting opinion of Justices Kergandberg and Laos para. 5 et seq. Furthermore, the judges underlined that if the Criminal Chamber had doubts concerning the conformity of the regulations with the Constitution, it would by law be obliged to refer the decision on the constitutionality of the legal norms to the SC *en banc* (ibid., paras. 1 and 3).

[187] See also: Sprūds 2012, p. 60 et seq.; Kaldas 2006, pp. 97 and 107 et seq.

[188] Ibid.

The author's view is corroborated by the Estonian answers to the Questionnaire on the Area of Freedom, Security and Justice and the Information Society for the FIDE Congress in Tallinn 2012.[189] Concerning the question of the impact of the Data Retention Directive on the legal order of the Member State, Estonia's answers focus on the Directive's vital role in the fight against terrorism and serious crime and reiterate the importance of every Member State to implement the Directive as soon as possible.[190] Equally, the invalidation of the DRD by the CJEU did not attract any special interest at societal level in Estonia. However, the Ministry of Justice in cooperation with the Ministry of Economic Affairs and Communications decided in spring 2014 to conduct a legal analysis on the rules in question. Additionally, the Estonian Chancellor of Justice has asked the Ministries of Justice, of the Interior and of Economic Affairs and Communications for their opinion on the constitutionality of the national regulation in force. The Government's official conclusions are still pending at the time of writing in May 2015.

2.5 Unpublished or Secret Legislation

2.5.1 In the context of EU law, the issue of unpublished or secret measures has arisen in case law on the applicability of measures adopted immediately before EU accession.

In 2006, the SC was confronted with the question of whether EU legislation, which had not been published in Estonian, was binding on individuals. In two decisions of the Administrative Law Chamber of the SC of 10 May 2006, the applicants argued that they were not to be blamed for incorrectly declaring their goods to the customs authorities. The case related to customs declarations filed immediately after the accession of Estonia to the EU. According to the applicants, they did not knowingly submit false data to the customs authorities as 'they did not and could not have known it, as the EU rules were hard to access and the relevant Estonian regulations were passed, so to speak, at the last minute'. The SC stated that ignorance of the law does not release the declarant from the duty to submit correct data to the authorities. The court also decided that since the applicant acted as a professional customs broker, it was irrelevant whether the EU acts had been published in Estonian.[191]

Curiously enough, this decision relies on a number of cases from the CJEU regarding substantive rules. Yet the decision makes no reference to the obligation of the court of last instance to refer matters of EU law for a preliminary ruling (Art. 267 TFEU). Almost exactly at the same time, namely on 24 March 2006, a Czech court, faced with a similar dilemma of EU legislation having to be published in the

[189] Antonova et al. 2012, p. 319 et seq.

[190] Ibid., p. 325 et seq.

[191] ALCSCj 10.05.2006, 3-3-1-65-05 and 3-3-1-66-05.

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official language of the Member State, referred a question to the CJEU, which led to the famous *Skoma-Lux* decision.[192]

Consequently, the SC had to revisit its earlier position. As an example of creative judicial writing, the Court placed the responsibility on the CJEU, stating that '[a]t the time of the processing of the current administrative matter, the CJEU has in its more recent practice expressed a clear position regarding the central importance to the rights of individuals of the requirement to publish EU legal acts in the language of the Member States, which is why in solving of the current case it is not appropriate to take into account the positions of the chamber expressed in the 10 May 2006 decisions'.[193]

In the *Pimix* case, the CJEU, responding to a request from the Estonian SC, confirmed that 'the relevant provisions of Regulations Nos 1789/2003 and 1972/2003 could not be enforced against individuals in Estonia with effect from 1 May 2004, since they had not been properly published in Estonian in the Official Journal of the European Union or reproduced in Estonian national law'.[194]

The Constitution foresees that laws have to be published and that only published legislation can have mandatory force; this is also a key part of the rule of law. According to Estonian legal doctrine, publication of laws is a necessary precondition for their legal existence as such.[195] Accordingly, the prevailing opinion is that unpublished legislation cannot be binding and valid laws cannot be declared secret. The Estonian rule is stricter, and the law is considered non-existent instead of merely 'not enforceable'.

Another question relates to secret regulations of a minister (or of the Government). Such regulations mainly concern national security, e.g. regulations concerning the methods used by that authority to secretly gather information, but also e.g. the requirements for encrypted materials and processing and protection thereof. Section § 3(2) of the Constitution, which states that only published laws may have binding force, does not explicitly mention 'regulations'. Non-publication of some regulations is *expressis verbis* allowed by § 4(2) of the *Riigi Teataja seadus* (the Estonian State Gazette Act)[196] and is based on the understanding that 'law' in the sense of § 3(2) of the Constitution must be interpreted to mean only Acts of Parliament. In these cases, the State Gazette publishes only the title, date and number of the regulation together with its unclassified provisions. However, this interpretation of § 3(2) is not mandatory: the SC has not yet answered the question whether the word 'law' in the meaning of § 3(2) of the Constitution only refers to Acts of the Parliament or also to regulations of the Government or a minister. Although Acts of Parliament are the only 'laws' in the formal sense, 'law' in the substantive sense includes all acts that are addressed to an undetermined number of addressees. Thus, in the substantive sense, regulations are also

[192] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, para. 37.

[193] ALCSCj, 13.10.2008, 3-3-1-36-08, para. 21.

[194] Case C-146/11 *Pimix* [2012] ECLI:EU:C:2012:450, para. 42.

[195] Merusk et al in Madise et al. 2012, § 3, comm. 4.

[196] *Riigi Teataja seadus.* – RT I 2010, 19, 101.

'laws'.[197] Furthermore, there are good reasons to treat regulations as laws in the sense of § 3(2) of the Constitution. First, there is neither a theoretical nor a practical need to enact secret regulations because everything that must remain secret may also be adopted by an administrative act that will be classified according to the State Secrets and Classified Information of Foreign States Act.[198] Secondly, it is questionable whether a universal legal norm can be valid at all without prior publication, since an unpublished act cannot be followed by the public and cannot therefore be socially effective.[199] Thus, there is no consensus among Estonian scholars whether § 3(2) excludes secret regulations of the Government or a minister or not.

A practical example of unpublished documents having a character similar to unpublished legislation is the question of references to national or international standards, such as e.g. CEN and CENELEC as well as ISO and IEC. For instance in construction related disputes, the standards form a part of the rules relevant to solving disputes. As the standards are not available without charge, they may be considered similar to unpublished legislation *de facto*. So far the Estonian courts have not addressed this issue and the standards have been accepted as relevant in litigation. For example in civil litigation, a county court has referred to standard EN 976-2 regarding underground tanks of glass-reinforced plastics when dismissing a buyer's damage claim that relied on a lack of installation instructions in the documents handed over with a purchased underground tank.[200]

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

The Estonian SC has taken a relatively liberal approach towards accepting EU law as interpreted by the CJEU.[201] There have been very few cases in the SC in which the argument of EU law being contrary to national constitutional law has arisen.

Such cases have primarily concerned the taxation of excess stocks (of e.g. sugar) that took place at the time of the accession of Estonia to the EU in 2004.[202] There

[197] Cf. Merusk 1995, p. 13.

[198] *Riigisaladuse ja salastatud välisteabe seadus*. - RT I 2007, 16, 77.

[199] The concept of legal validity, according to Gustav Radbruch, includes three elements: a legal, a social and a legal philosophical element, see Radbruch 1914, p. 158 et seq. The publication of a universal act can be considered as a precondition for social effectiveness. If it is lacking, the validity of the act is questionable.

[200] Harju County Court Judgment 16.03.2011, 2-06-11240, para. 7; upheld on appeal by the Tallinn Circuit Court 20.03.2012.

[201] For an analysis of the practice of the SC, see Ginter 2008.

[202] For a detailed discussion, see Albi 2009, pp. 46–69 and Albi 2010, pp. 791–829. Albi's analysis suggests that the standard of protection of e.g. legitimate expectations and property rights by the CJEU in these cases was significantly lower than in the established Estonian case law.

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were many issues with constitutional implications in the matter, however only two will be mentioned here: the issue of legal certainty and the right to property. Undertakings were requested to make payments for excess stocks of certain products as of 1 May 2004. Up until the last minute, it was not clear which products would be subject to the tax and how it would be determined what stock would be considered normal and what would be considered to be in excess of that normal. The relevant regulations were, however, not adopted by the European Commission in due time. EU Regulation 1972/2003 entered into force only on 1 May 2004, and the draft was amended immediately before its enactment – i.e. on 10 April 2004 and 20 April 2004. In Estonia, the Surplus Stocks Act, implementing the EU regulations, was published on 27 April 2004 and took effect on 1 May 2004. This gave the relevant undertakings nowhere near enough time to adjust their behaviour or dispose of excess stocks.

The most famous case where property rights were invoked is the 5 October 2006[203] decision of the SC (the excess stocks case). The applicant challenged the administrative prescriptions ordering it to pay a fee on its excess stock of sugar at the time of the accession of Estonia to the EU. The applicant (unsuccessfully) argued, *inter alia*, that the challenged administrative acts as well as the legislative provisions which formed the legal basis for those acts breached provisions of the Estonian Constitution protecting the rights of enterprise and property. The applicant also requested that the relevant regulations of the European Commission be set aside because they breached the Estonian Constitution.

In the light of the SC's stringent rule of law case law outlined in Sect. 2.1.3, it is very doubtful that in a wholly internal situation such a significant financial impact, imposed over such a short period of time, would have been acceptable under national constitutional rules.[204]

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 In Estonia, the ESM Treaty was subject to a constitutional challenge by the Estonian Chancellor of Justice. In his legal challenge to the Estonian SC, the Chancellor of Justice pointed out that the unprecedented magnitude of the financial commitment could potentially seriously limit the very ability of the state to ensure the functioning of state institutions, including the judicial system, and the protection

[203] ALCSCj 05.10.2006, 3-3-1-33-06, http://www.juradmin.eu/docs/EE01/EE01000007.pdf.

[204] In Case C-146/11 *Pimix*, n. 194, the CJEU decided that the regulations could not be enforced against individuals due to the fact that they had not been published in Estonian. No consideration regarding the temporal scope of application was expressed in the decision.

of the rights and social welfare benefits envisaged under the Constitution.[205] The case has been analysed in detail in other publications.[206]

According to the treaty framework, after the 'temporary correction period', the contribution of Estonia, if the maximum capital calls allowed under the ESM Treaty were to be made, would amount to 1.79 billion EUR.[207] In 2013, the GDP at current prices of Estonia was 18.4 billion EUR.[208] Accordingly, the maximum contribution would amount to approximately 9.7% of the GDP. Estonia's commitment to the European Financial Stability Facility (EFSF) is close to 2 billion EUR.

The issue of whether those amounts would be added together or absorbed was of central focus during the parliamentary debate, where the reporting Member of Parliament (MP) was unable to provide a consistent response.[209] The debate is best illustrated by the following question of MP Igor Gräzin:

> You have heard that they are not summed. I have heard that they are. You have heard one thing, I have heard another. Hasn't the thought crossed your mind that if we are talking about billions, it would be wise to check if they are or are not summed?

The fact that the contribution of Estonia is very large was also one of the central arguments of the national constitutional challenge, where the constitutionality of the 'emergency voting' mechanism set out in Art. 4(4) of the ESM Treaty was questioned.

It was argued that the emergency voting provisions render this mechanism contrary to the principle of parliamentary democracy, the principle of parliamentary prerogatives, parliamentary control over public finances and the principle of a democratic state subject to the rule of law. More generally, the delegation of responsibility over public finances from Parliament to the executive branch would, according to the petition, break the chain of legitimation and political responsibility; it would greatly impact the budgetary powers of Parliament and its ability to use funds to guarantee the rights and liberties of the people.

The constitutional challenge also focused on the issue of 'incalculable risks' and the Parliament no longer being able to exercise overall budgetary responsibility. In the German ESM case, the German Constitutional Court noted the ambiguities in the Treaty's wording about whether a maximum limit exists, and thus requested Parliament to address this issue in the ratification process. In Estonia, the SC was confident in deciding that the amount set in the Treaty 'is the maximum limit of the obligations of Estonia, which cannot be changed without its consent and without

[205] SCebj 12.07.2012, 3-4-1-6-12 on the ESM Treaty.

[206] Ginter 2013, pp. 335–354; Ginter and Narits 2013, pp. 55–76.

[207] See Art. 42 of the ESM Treaty.

[208] Press release by Statistics Estonia 'Economic growth slowed down in 2013' (11 March 2014), http://www.stat.ee/72427.

[209] Minutes of the XII Riigikogu (30 August 2012), (available in Estonian) http://stenogrammid.riigikogu.ee/et/20120830/.

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amending the Treaty'.[210] However, Justice Kõve, one of the dissenting justices, argued along the same lines as the *Bundesverfassungsgericht*, stating that

> I deem it necessary to note that I am not convinced that the opinions of the SC *en banc* on the interpretation of the Treaty are correct. Namely, I am not convinced that the maximum limit of the possible obligations of Estonia according to the Treaty does not in any case exceed 1.302 billion euros and that obligations larger than that may arise for Estonia only through amendment of the [Treaty].[211]

This is evidence of the fact that the existence or absence of an upper limit was discussed in the deliberation room.

The same issue was addressed in the parliamentary debate. When the head of the parliamentary Finance Committee was asked whether the maximum amount of the contribution could be increased under the emergency procedure, the chairperson responded that '[t]his is the information I have at the moment and what I will base my decisions on in today's voting. Should you have different information be sure to let me … know. … I suppose it is so'.[212] In a press conference, the Prime Minister of Estonia was quoted as saying '[f]irst the ESM must be ratified and then we can discuss the details'.[213]

The fact that under Arts. 8(4) and 9(3) of the ESM Treaty the capital calls have to be met 'irrevocably and unconditionally', within seven days, was not analysed from the point of view of the Constitution. In a dissenting opinion, six justices proclaimed that '[t]his is the most important case in the history of [Estonian] constitutional review'.[214] In the same dissenting opinion, the six justices pinpointed the very same issue, writing that '[w]e find that in addition to Art. 4(4) of the Treaty referred to by the Chancellor of Justice, also the irreversible and unconditional nature of the financial obligations to be assumed by the Treaty … and the limited nature of judicial review of the operations of the ESM …, as referred to by Anneli Albi …, should have been addressed as related provisions'. In the opinion of the dissenting judges, this condition also should have been taken into account when analysing the seriousness of the interference with the Constitution. According to the dissenting judges, as the obligations are irrevocable and unconditional, '[c]onsequently, the *Riigikogu* cannot, without breaching the Treaty, alleviate the effect of

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[210] SCebj 12.07.2012, 3-4-1-6-12, para. 144.

[211] Dissenting Opinion of Justice Kõve to SCebj 12.07.2012, 3-4-1-6-12. Estonian law does not recognise the term 'concurring opinion' which is why, although justice Kõve supported the final decision, the opinion is titled 'dissenting'.

[212] Quoted text by MP Sven Sester, see minutes of the XII Riigikogu, VIII session (18 December 2014), (available in Estonian) http://stenogrammid.riigikogu.ee/et/201412181000. The final comment by MP Sester was edited out of the revised version of the official transcript.

[213] Quote by Andrus Ansip as provided by Kuusik, I. (2012, August 14). *Ansip: kõigepealt tuleb ESM ratifitseerida, siis räägime detailidest* (Ansip: First the ESM must be ratified, then we can discuss the details). Postimees. http://majandus24.postimees.ee/939704/ansip-koigepealt-tuleb-esm-ratifitseerida-siis-raagime-detailidest.

[214] Dissenting Opinion of SC Justices Jõks, Järvesaar, Kergandberg, Kivi, Kull and Laarmaa to SCebj 12.07.2012, 3-4-1-6-12.

possible negative consequences for Estonia arising from the application of Art. 4(4) of the Treaty'. Dissenting Justice Luik added along the same lines:

> Now it is time to ask: what is/will be left of the *Riigikogu*'s financial sovereignty besides a merely formal competence to decide on the ratification of the Treaty in question and on the post-ratification obligation to establish a legal environment necessary for the fulfilment of the financial obligation assumed irrevocably and unconditionally, and to reserve 1,153,200 million euros to ensure the satisfaction of a claim filed at any given time? Perplexed, I place three question marks here.

The narrow majority of the SC concluded that Art. 4(4) of the ESM Treaty does not breach the Constitution of Estonia. The Court confirmed that the ESM Treaty affected the financial competences of Parliament, including those of future parliaments and thereby also the financial sovereignty of the state. The Court recognised that budgetary powers are one of the core competences of Parliament. The essence of this competence is the right and duty of Parliament to decide on the revenue and expenditure of the state. It added that, 'the state must use public assets in a manner which enables the performance of the duty … to guarantee the protection of fundamental rights and freedoms'.[215] The Court decided that the interference with the parliamentary powers was justified.

The Court expressly excluded the possibility that the seriousness of the interference could be derived from the fact that it constitutes a vast financial obligation.[216]

Differently from the German *Bundesverfassungsgericht*, which relied on the fact that the *Bundestag* remains in control of decision-making, the Estonian court accepted the reduction of the powers of Parliament in order to provide financial stability. The SC decided that 'the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia become a euro area Member State'.[217] According to the Court,

> [e]conomic stability and success ensure the planned receipt of state budget revenue. Incurring necessary expenditure ensures constitutional values. The obligation to guarantee fundamental rights arises from § 14 of the Constitution. Extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.[218]

The Estonian decision was very much focused on the close connection between fundamental rights and having the necessary finances available to secure their existence.

While the ESM Treaty is not considered as EU law,[219] in an *obiter dictum* the Court considered it necessary to point out potential constitutional limitations for further EU integration (see Sect. 1.3).

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[215] SCebj 12.07.2012, 3-4-1-6-12, para. 139.

[216] Ibid., para. 190.

[217] Ibid., para. 163

[218] Ibid., para. 166.

[219] As was confirmed later by the CJEU in Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

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2.7.2 There has been no substantial discussion about the constitutionality of other proposed measures, such as Eurobonds and the Banking Union, from the point of view of the potential of exposing the country's citizens and residents to unlimited liability for bank failures in other European countries.

2.7.3 Not applicable; Estonia has not been subject to a bailout programme.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 We have no information of any cases where the applicants would have challenged the validity of secondary EU law via the preliminary ruling procedure. It is possible that such arguments have arisen within the context of national proceedings, but there have been no references for a preliminary ruling that pose such questions.[220] However, the possibility to invoke EU regulations against individuals was addressed in the so-called 'sugar saga' vis-à-vis rules regulating the imposition of financial duties on excess stocks at the time of EU accession (see Sect. 2.6).

2.8.2 It is the impression of the Experts that there seems to be a discrepancy between the strict application of the principle of proportionality to the legislation of the Member States when compared to the methodology applied when reviewing the legality of secondary EU law. In the context of the free movement of goods, for example, it is not uncommon for the CJEU to point to an abundance of more lenient alternatives available to the legislator as sufficient grounds to declare national measures illegal. In judicial review of secondary EU law, however, such an approach is rarely to be seen, and the Court focuses more narrowly on issues such as the existence of a proper legal basis for the measure. Accordingly, the author would suggest that a stricter standard of judicial review of EU measures could be argued for. For example, the CJEU could in fact exercise a stricter review of concepts such as subsidiarity. Although subsidiarity is a core concept of EU law that is prominently displayed in the first chapters of any respectable EU law textbook, one has to look carefully to find any cases where it has been considered by the CJEU in the context of review of EU legislation. As a rare example, in *Vodafone*, referring back to *Imperial Tobacco*,[221] the CJEU analysed the conformity of an instrument of secondary EU law with the principle of subsidiarity, confirming that the measure's objective could best be achieved at EU level.[222]

The rarity of such review has in fact led to statements such as echoed by the spokesperson of the European Commission, stating that '[t]he issue here is that

[220] A full list of references from Estonia can be found on the page *Eesti kohtute eelotsusetaotlused* (available in Estonian) http://www.riigikohus.ee/?id=872.

[221] Case C-491/01 *Imperial Tobacco* [2012] ECR I-11453.

[222] Case C-58/08 *Vodafone* [2010] ECR I- 04999, paras. 72–79.

subsidiarity is a political concept rather than a judicial one. Every proposal we make, we believe, respects subsidiarity'.[223] This may be interpreted as a sign of confidence that subsidiarity is something for the Commission to assess without fear of judicial review.

2.8.3 In Estonia, the SC is rather open towards review of constitutionality/legality of legislation, regulatory acts of the executive branch and administrative action. Judgments of the CRCSC establishing the unconstitutionality of national laws and regulations are quite regular.[224] By way of recent examples, in June 2014 the SC declared legislative measures regarding pensions for judges to be unconstitutional.[225] In January 2014, the court declared unconstitutional a law establishing differentiated state fees depending on whether an applicant used digital means to address the court.[226] In many cases, the annulment of a law has been based on fundamental principles of law, such as legitimate expectations, equal treatment and proportionality.

2.8.4–2.8.5 In its 25 April 2006 ruling (in the case related to the effects of the Polish challenge to the excess stock rules), the SC recognised the exclusive competence of the European Court to decide on the invalidity of secondary Community law, as was established in *Foto-Frost*, and the obligation of a domestic court to make a reference, where doubts as to such validity arise.[227]

The SC has accepted that in the case of a contradiction between Estonian and EU law, the Estonian law should be disapplied without initiating constitutional review proceedings.[228] It is not clear what the approach of the SC would be should a contradiction with the fundamental principles of Estonian constitutional law arise. The Court has so far not adopted a position similar to that in the German Constitutional Court's *Solange II* judgment[229] or the ECtHR's *Bosphorus* judgment[230] that would assume that the EU standard of protection of rights is equivalent

[223] Quoted in Mahony, H. (2012, May 29). National parliaments show 'yellow card' to EU law on strikes. EU Observer. http://euobserver.com/social/116405.

[224] In the period 1993–2004 the CRCSC declared an act or a provision unconstitutional in 75.5% cases (68 out of 90 cases), see Aaviksoo 2005, pp. 295–307. According to another source, in the period 2010–2013, the SC declared a norm or absence of a norm unconstitutional on 72 occasions. See information provided by the SC in 2014, (available in Estonian) http://www.riigikohus.ee/vfs/1712/Lisa%202_PS%20jarelevalve%20lahendite%20taitmine.pdf. In 2014, the SC heard 48 constitutional review cases and in 23 cases declared the relevant provisions unconstitutional, see: Teeveer et al. 2014, (available in Estonian) http://www.riigikohus.ee/vfs/1885/Kohtute%20aastaraamat%202014.pdf.

[225] SCebj 26.06.2013, 3-4-1-1-14.

[226] SCebj 21.01.2014, 3-4-1-17-13.

[227] ALCSCo 25.04.2006, 3-3-1-74-05, para. 21; Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR I-04199.

[228] ALCSCo 07.05.2008, 3-3-1-85-07, para. 38.

[229] *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 37, 271 (*Solange* I); BVerfGE 73, 339 (*Solange* II).

[230] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

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to the ECtHR or national standard, unless the applicant proves a significant fall of standards.

2.8.6 In Estonia, the issue of reverse discrimination has not been reflected in case law.

2.9 Other Constitutional Rights and Principles

In Estonia, discussions regarding constitutional rights and the rule of law in relation to EU law, beyond the issues explored in the preceding sections, are overall rather scarce.

One example would be the issue of imposing duties on traders for excess stocks accumulated up until the time of accession of Estonia to the EU. The Estonian SC has a long line of case law confirming the principle that taxes can only be imposed by a law enacted by Parliament. A constitutional issue could have arisen vis-à-vis the question of whether regulations such as Commission Regulation (EC) No. 1972/2003 of 10 November 2003 on transitional measures relating to accession of new Member States could in fact impose financial obligations on individuals. The question is further complicated considering that the regulations could not traditionally produce effects in states that were not yet in the EU (e.g. the day before accession). However, the issue remained undecided in the context of the 2004 enlargement, as the possibility to apply the regulations against individuals was excluded by the CJEU on other grounds, namely that they had not been published in the Official Journal in Estonian.

The issue of whether the suspension of large parts of the Constitution by the SC[231] was a good solution[232] or not[233] has been the subject of a passionate debate. Supporters of the SC's approach argue that it would be pointless and useless for the constitutional court of any Member State to have constitutional review competence with regard to EU law. They warn that a deviation from the primacy of EU law in a particular case could lead to a withdrawal from the EU by the Member State in question or even to a collapse of the EU.[234] Critics argue that the material amendment of the entirety of the Constitution that was claimed by the SC lacks a mainstay in the text of the Constitution as well as the relevant will of the people to abandon sovereignty. On the contrary, a clear intention not to abandon sovereignty can be identified in the explanatory memorandum to the CREAA.[235] Furthermore, such an interpretation is an imperative neither from the point of view of the

[231] See Sect. 1.3.4.

[232] Laffranque 2009, p. 483 et seq.; Kalmo 2008, p. 583 et seq.

[233] Mälksoo 2010, p. 132 et seq.; Lõhmus 2011, p. 15 et seq.; Ernits 2011, p. 35 et seq.; Ernits 2012, p. 137 et seq.

[234] Cf. the discussion in Ernits 2011, p. 46 et seq.

[235] Explanatory Memorandum to the CREAA.

Constitution nor because of the primacy of EU law. There are weighty reasons supporting the thesis that the SC did not act on the basis of the competence conferred on it by the Constitution. Neither the Constitution nor any other act confers on the SC competence to rule on the validity of constitutional provisions.[236] On the contrary, the Constitution provides the legal basis for the existence of the SC itself, and gives it the task and the competence to act as the Constitutional Court. If the SC does not perform this function, it endangers not only its own existence but also the continuity of the entire Constitution.[237] This situation has been referred to as the 'erosion of the Constitution' by Uno Lõhmus.[238]

2.10 Common Constitutional Traditions

2.10.1 The SC relied on the central importance of the practice of the EU in determining the principles of law long before Estonia's accession to the EU. Already in September 1994, the SC declared that general principles of law developed by European institutions are incorporated into the fundamental principles of Estonian law.[239] According to the SC,

> [i]n developing the general principles of Estonian law, in addition to the Constitution, the general principles of law developed by the institutions of the Council of Europe and the European Union must also be considered. These principles have their origin in the general principles of law of the highly developed legal systems of the Member States.[240]

A contradiction with those principles would constitute a violation of the Constitution.[241] A norm contrary to the Constitution will be declared null and void by the SC. Such semi-automatic extension of the vast catalogue of general principles of law represents a strong willingness to develop the Estonian legal system in harmony with the European legal system. It may be seen as a demonstration of the general openness and trust of the SC towards European institutions.

As arguments of interpretation, general principles of law provided an impetus for the SC to develop the following principles in the 1990s: legality, non-retroactivity, legitimate expectations and legal certainty more broadly, and the principle of equality.[242] In a certain sense the general principles of law served as a catalyst for a constitutional leap from a post-communist transformation society to a modern democratic rule-of-law-based state of Western European character.

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[236] Lõhmus 2011, p. 18.

[237] Ernits 2011, pp. 44, 62 and 69 et seq.

[238] Lõhmus 2011, p. 24.

[239] CRCSCj 30.09.1994, III-4/A-5/94; 17.02.2003, 3-4-1-1-03.

[240] CRCSCj 30.09.1994, III-4/A-5/94.

[241] Cf. Ernits 2011, p. 11 et seq.

[242] ALCSCo 24.03.1997, 3-3-1-5-97, para. 4.

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Accordingly, we consider it likely that 'common constitutional traditions' may indeed exist among the Member States of the EU as well as within the EU itself. It is of course difficult to come up with a list that could claim universal legitimacy.

As an example of the practical difficulties, one can take the different positions adopted by the German *Bundesverfassungsgericht*[243] and the Estonian SC in their respective ESM cases. In the German case, the Court focused on the importance of the fact that Parliament remains the central decision-maker over the budget and that it retains a veto over the decisions of the ESM with Germany's shares. In the Estonian case, the court accepted the need to limit the budgetary autonomy of Parliament for the greater good of having the ESM functional.[244] However, it is our hypothesis that the fundamental principles, even budgetary autonomy, should essentially have a very similar substance throughout the 28 Member States of the EU. There may be differences in the value attributed to each and every one of the principles depending on local geographical, ethnic, religious, cultural or other reasons. For example, the value attributed to the protection of small languages such as Estonian or Gaelic may well be different due to the need to take into account the very real risk of these languages diminishing.

From the Estonian perspective, we would indeed argue that many principles could be regarded as a part of the 'common constitutional traditions', such as the principle of the democratic legitimation of policy-makers, *nulla poena sine lege*, the right to be heard, access to courts, judicial independence, etc. We believe that the Estonian constitutional interpretation would support the interpretation of the German Constitutional Court in the Data Retention Case, and would conclude that it is part of the constitutional identity that the citizens' enjoyment of freedom may not be totally recorded.

2.10.2 It would certainly facilitate identification of the common constitutional traditions if the courts highlighted the long-standing constitutional rights or safeguards for the rule of law in the national constitutions, along with comparative case law on the established standards in different Member States (as suggested separately by Torres Perez and Albi, cited in the Questionnaire).

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

We appreciate the controversy surrounding the approach adopted by the court in the *Melloni* case and the wording of Art. 53 of the Charter.[245]

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[243] BVerfGE 131, 152, 194 ff.

[244] For the relevant discussion, see Ginter 2013, pp. 335–354.

[245] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras. 59 and 63.

In the case of Estonia, we do not foresee any substantial controversy concerning the standard of protection of fundamental rights at the national and EU level.[246] The reason for this can be found in the very pro-European approach to interpretation of national constitutional principles by the SC and in the existence of social rights in the Constitution. Already in September 1994, only a year after its establishment, the SC declared that general principles of law developed by the Council of Europe and EU institutions are incorporated into the fundamental principles of Estonian law. A contradiction with those principles would constitute a violation of the Constitution. Such semi-automatic extension of the vast catalogue of general principles of law represents a strong willingness to develop the Estonian legal system in harmony with the European legal system. The pro-European approach of the SC is further evidenced by its willingness to refer to European sources even in cases where the substance of the case is not directly based on European law. For example, the ambiguous legal status of the Charter did not prevent the SC from referring to the Charter several times even before Estonia's accession to the EU.

On 17 February 2003, the SC referred to the Charter as one of the most recent international documents on fundamental rights evidencing the existence of the general principle of good administration.[247] Other pre-accession references to the Charter include the principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable,[248] and that the EU recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.[249] Since EU membership, references to the Charter have included the right to bequeath property (Art. 17).[250] On 28 March 2006,[251] the SC referred to Art. 1 of the Charter when confirming that human dignity is inviolable, the basis for all of the fundamental rights of the individual and the goal of protecting fundamental rights and freedoms.[252]

A clear parallel between the practice of the SC and that of the CJEU in establishing pan-European fundamental rights can thus be seen. Accordingly, we do not predict that the Charter or practice of the CJEU would lead to a lowering of the existing constitutional guarantees vis-à-vis fundamental rights. However, for discussion on some areas where the standards under the Estonian Constitution may be higher, see Sect. 2.1.3 (the judicial protection of the rule of law, especially legitimate expectations); Sects. 2.5–2.6 (excess stocks cases in the context of the publication of laws, legitimate expectations and property rights), and Sect. 2.2 (judicial protection in the *Piirsoo* and *Laurits* cases).

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[246] Ginter 2008.

[247] CRCSCj 17.02.2003, 3-4-1-1-03, para. 15.

[248] SCebj 17.03.2003, 3-1-3-10-02.

[249] CRCSCj 21.01.2004, 3-4-1-7-03, para. 20.

[250] SCebj 22.02.2005, 3-2-1-73-04.

[251] ALCSCj 28.03.2006, 3-3-1-14-06, para. 11.

[252] Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-07079.

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2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 The adoption of the European Arrest Warrant was not surrounded with substantial scholarly debates; the debate primarily emerged in 2012 after some problematic cases were highlighted in the media. The explanatory memorandum to the implementing law briefly dealt with the constitutional conflict concerning the prohibition of extradition of Estonian citizens. According to the document, as accession to the EU was approved by a referendum in 2003 and the EAW system was foreseen in the existing *acquis*, the Constitution must be interpreted taking into account this obligation of Estonia arising from EU law.[253] Thus, the conclusion that the adoption of the EAW Framework Decision was marked by 'the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject' (see the Questionnaire) is fully applicable also to Estonia. The same applies to the adoption of the EU Data Retention Directive.

There have been no cases where important constitutional issues have arisen and have been referred to the SC at the stage of implementing EU law. The case relating to the implementation of the ESM Treaty is excluded here, as the treaty was considered to be non-EU law.

2.12.2–2.12.3 Considering the long line of case law of the CJEU referring to the system of protection of fundamental rights on the EU level being related to the common constitutional traditions of the Member States, if important constitutional issues have been identified by a number of constitutional courts, it would be appropriate for the application of the questioned measure to be suspended and a review of the measure initiated on the EU level.

The authors have differing opinions in regard to the recommendation to recognise, as a defence on the part of the Member State in an infringement procedure, that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the one hand, there are some cases where the need for more effective protection of fundamental rights, also in the face of EU law, is hard to deny.[254] In such cases the Estonian system of control of constitutionality would be in a position to grant the necessary protection properly and responsibly. Furthermore, as long as the Member States remain the only genuine bearers of sovereign power in the EU, the supremacy of the fundamental principles of their constitutions and the sovereignty of their interpretation by national constitutional courts are also hard to deny.[255] If an infringement procedure were initiated in a case like *Piirsoo* or *Laurits* because of a refusal to deliver the person to another Member State on the grounds that the delivery would violate at least one of the fundamental

[253] Explanatory memorandum to the amendment of the Code of Criminal Procedure (RT I 2004, 54, 387).

[254] Cf. e.g. the *Piirsoo* and *Laurits* cases in Sect. 2.2.

[255] Cf. Ernits 2011, p. 60 et seq.

principles of the Constitution (e.g. the rule of law), it would seem to be a good solution to allow the state to defend itself with the argument that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the other hand, we see the danger of undermining the uniform application of EU law that could at one point lead to a fragmentation of the EU along national lines. From this point of view, a procedure whereby the validity of the EU measure is checked by the CJEU with reference to a potential breach of common constitutional principles would be preferable.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.2 It is extremely difficult to provide an accurate conclusion regarding whether or not there has been an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. In our opinion the balance would inevitably have to take into account the significant positive impacts of EU law in the fields of free movement, non-discrimination, gender equality and other areas noted in the Introduction to Part 2 in the Questionnaire. It is perhaps appropriate to refer to the English idiomatic proverb, 'you can't have your cake and eat it'. Accordingly, we have to consider the concept of trade-offs.

For instance, the internal market freedoms regarding free movement of persons or goods provide a considerable benefit to the persons exercising those freedoms. In exchange, the risk of cross-border crime inevitably increases. Accordingly, as a trade-off, a measure is needed which in the case of cross-border crime appears e.g. in the form of the European Arrest Warrant. Thus if one were to examine the concept of the arrest warrant in a vacuum, one could establish a significant reduction in the protection of constitutional rights by the national court. However, considering it in context with a person's increased mobility, one could conclude that the reduction is proportional to the increased opportunities for the person and the increased impact of his or her activities in the jurisdictions of other Member States.

It is likely that in some areas a reduction in the level of protection of constitutional rights has taken place. At times, this has been inevitable given the objectives of European integration, and at times this may have resulted from a lack of wider awareness and debate given issues such as the complexity of multilevel governance.

In the light of e.g. the decision of the CJEU in the EU Data Retention case, we are of the opinion that the CJEU is in principle equipped to deal with issues relating to the guarantee of a higher level of protection of fundamental rights. We do not consider that EU accession to the ECHR would significantly increase the level of protection of fundamental rights within the EU, as it is common knowledge that the ECtHR is overburdened with cases and has difficulty providing decisions in due time as it is.

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2.13.3 An increased dialogue between the national constitutional courts and the CJEU in cases dealing with fundamental rights could provide a potential improvement. If the CJEU, when faced with the need to decide on a matter of interpretation of fundamental rights, were able to engage the national constitutional courts by asking for an opinion on the matter, the legitimacy of the interpretations provided might be increased.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 There is no explicit provision in the Estonian Constitution nor does the Constitution regulate the general transfer of powers to international organisations. Indirectly, however, § 123(1) of the Constitution states that Estonia may not enter into international treaties which are in conflict with the Constitution. If laws or other legislation of Estonia are in conflict with an international treaty ratified by the *Riigikogu*, the provisions of the international treaty shall apply (§ 123(2)). If, however, an international treaty is not in accordance with the Constitution, § 65, clause 4, of the Constitution gives the *Riigikogu* the right to denounce the treaty. It follows that the limit to the delegation of powers is the Constitution itself – no international treaty may be in conflict with constitutional norms.

The procedures concerning international treaties are regulated in detail in the *Välissuhtlemisseadus*[256] (Foreign Relations Act (FRA)). According to § 6(1)2) FRA, the *Riigikogu* has the competence to ratify treaties by passing Acts concerning accession, approval, acceptance, ratification or other Acts, and to denounce ratified treaties by passing Acts concerning the denunciation of, withdrawal from or termination of the agreement or other Acts. The Ministry of Foreign Affairs (MFA) has the right to initiate the conclusion of a treaty. The MFA shall review the materials specified in § 14 submitted thereto for compliance with legislation (§ 15 (1) FRA). If the materials of a treaty contain deficiencies, the MFA shall set a reasonable term for the elimination of deficiencies (§ 15(2) FRA). A treaty prepared for conclusion has to be approved by the Government (§ 16 FRA). According to § 121 of the Constitution, ratification by the *Riigikogu* is required if (1) state borders are altered by the treaty; (2) the implementation of the treaty requires the passage, amendment or repeal of Acts of the Republic of Estonia; (3) the Republic of Estonia joins an international organisation or union according to the treaty; (4) the Republic of Estonia assumes military obligations by the treaty; (5) by the treaty, the Republic of Estonia assumes proprietary obligations in relations in public law for the performance of which no funds have been designated in the state budget, or which

[256] RT I 2006, 32, 248; RT I, 21.06.2014, 10.

exceed the limits for proprietary obligations established by the state budget within which the Government of the Republic is authorised to conclude the treaty; (6) ratification is prescribed in the treaty.

The instrument of agreement of a treaty ratified by the *Riigikogu* shall be signed by the President of the Republic. The instrument of agreement of a treaty concluded by the Government of the Republic shall be signed by the Prime Minister or the Minister of Foreign Affairs (§ 21 FRA).

3.1.2 Not applicable.

3.1.3 No amendments concerning international law and global governance have been made or debated on the parliamentary or Governmental level.

3.1.4 See Sect. 1.5.3.

3.2 The Position of International Law in National Law

3.2.1 The Constitution contains a special section (§ 123) with two paragraphs addressing the applicability of treaties and their relationship in domestic law. The first paragraph provides that '[t]he Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution'. This provision is usually understood to mean that in the domestic hierarchy of legal sources, the Constitution takes the highest position. In practice, it requires the authorities to analyse the constitutionality of a treaty in the course of its preparation and conclusion. The Constitution does not explain what happens if there is a collision between the Constitution and a treaty in force. Such collisions are overcome, to the extent possible, by interpretation. As the Constitution cannot release Estonia from its international obligations, the courts should adopt an international law friendly approach in this regard. The Constitution does not provide for the judicial review of treaties; however the CRCPA authorises the SC to verify the conformity of international agreements with the Constitution.

Within the Constitution, § 123(2) provides: 'If laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply'. The status of treaties depends on whether they have been approved by Parliament or some other state organ. In the former case, the Constitution confirms that the treaties are directly applicable domestically, provided that they are able to regulate domestic relations and are detailed enough for that purpose. Parliament does not rewrite treaties into domestic legislative acts, which means that treaties remain connected to their international 'background' (e.g. text, interpretation, practice), which consequently affects their application. If a domestic legislative act is in conflict with a treaty, it is not unconstitutional and does not become null and void. Instead, the treaty is applied as a practical solution. When it comes to treaties approved by other state organs (e.g. agreements between ministries), such treaty may be directly applicable, although its

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position in the domestic hierarchy of legal sources depends on the state organ which concluded the treaty.

3.2.2 Estonia is often considered monistic, as the Constitution and the practice of the different state organs are international law friendly. The supporters of the monistic approach point to the fact that treaties are not rewritten into domestic legislative acts, meaning that their original texts are applied, i.e. international law is applied domestically. However, as was explained above, this logic applies fully only to treaties which have been approved by Parliament. The monistic view is also supported by § 3(1) of the Constitution, which provides that '[g]enerally recognised principles and rules of international law are an inseparable part of the Estonian legal system'. Regardless of the actual wording, this section refers to customary international law and general principles of law. It should be noted that the Constitution does not similarly provide that treaties form an inseparable part of the Estonian legal system.

3.3 Democratic Control

3.3.1 Estonian law entrusts the primary responsibility for initial international negotiations to the Government, first and foremost to the Ministry of Foreign Affairs. According to § 9(3) FRA, the MFA initiates the conclusion of treaties, participates in negotiations concerning treaties, prepares or approves and submits to the Government draft treaties or the texts of treaties adopted, and organises the preparation, signing and exchange or submission to the depositary of the instruments of agreement.

The competency of the *Riigikogu* and its Foreign Affairs Committee (FAC) primarily relates to the procedure of ratification. However, the FAC regularly discusses foreign policy, discusses the report from the Government on the foreign policy of the state and presents its report at a plenary sitting of the *Riigikogu*, and also discusses the bases of security policy and the principles of development co-operation and humanitarian aid presented by the Government.

The detailed procedure is regulated in the RRPA. Section 115 RRPA provides that drafts concerning international treaties undergo two readings in the *Riigikogu,* if the leading committee does not propose otherwise.

Subsequent involvement in scrutinising an international organisation beyond the initial ratification of a related treaty has not been regulated in detail. The MFA is, however, obliged to regularly inform the President, the President of the *Riigikogu*, the Prime Minister and the FAC of the implementation of foreign policy. Also, once a year the MFA prepares a report of the Government on foreign policy.

3.3.2 The ratification and denunciation of international treaties may not be subjected to a referendum as stems from § 106(1) of the Constitution. Thus, the referendum on amending the Constitution and accession to the EU was in this respect constitutionally debatable.

3.4 Judicial Review

The competence of the SC to review treaties and measures adopted under international law derives from § 2 clause 2 and § 4(1) CRCPA. Further, the Chancellor of Justice may submit a request to the SC to declare an international agreement which has been signed or a provision thereof to be in conflict with the Constitution.[257] The SC further may, on the basis of a reasoned request of a participant in the proceedings or on its own initiative, suspend, with good reason, the enforcement of a contested legislative act or a provision thereof or the enforcement of an international agreement until the entry into force of the judgment of the SC.

In the adjudication of cases, the SC may declare an international agreement which has entered into force or has not yet entered into force or a provision thereof to be in conflict with the Constitution (§ 15(1) No. 3 CRCPA). Further, § 15(3) CRCPA adds that if an international agreement or a provision thereof is declared to be in conflict with the Constitution, the body which entered into the agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a manner which would ensure its conformity with the Constitution; an international agreement which is in conflict with the Constitution shall not be applied domestically.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 The social state dimension is mentioned in § 10, whereas the general social right is embedded in § 28(2) of the Constitution.[258] According to the SC, the social state is a fundamental, core principle of the Constitution.[259] The SC stated in 2004:

> The concepts of a social state based on social justice and the protection of social rights contain an idea of state assistance and care to all those who are not capable of coping independently and sufficiently. The human dignity of those persons would be degraded if they were deprived of the assistance they need for satisfaction of their primary needs.[260]

[257] The SC *en banc* held that § 6(1)4) CRCPA gives the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after ratification, i.e. by way of *ex-post* review. The SC held that the competence arising from § 6(1)4) CRCPA is in accordance with the Constitution, see SCebj, 12.07.2012, 3-4-1-6-12.

[258] 'An Estonian citizen has the right to state assistance in the case of … need.' According to § 28 (2), citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law.

[259] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14; 05.05.2014, 3-4-1-67-13, para. 49.

[260] CRCSCj 21.01.2004, 3-4-1-7-03, para. 14.

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The SC has declared a number of laws unconstitutional on the ground of social rights, and has stressed that 'the right to receive state assistance in the case of need is a subjective right, in the case of violation of which a person is entitled to go to court, and the courts have an obligation to review the constitutionality of an Act granting a social right'.[261] However, the SC has stressed several times: '[u]pon ensuring social rights, the legislator has an extensive right of discretion and the courts must not make social policy-related decisions in lieu of the legislator. The exact extent of social fundamental rights also depends on the state's economic situation'.[262]

The potential impact of the policies of global institutions on the social state has not been a matter of discussion in Estonia.

However, the concern of the dissenting judges that the financial commitments undertaken under the ESM Treaty may undermine the social state are outlined in Sect. 2.7.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

There are many further theoretical constitutional issues arising in the context of constitutional rights and values in global governance, e.g. the transfer of a part of sovereign powers to the International Criminal Court. However, due to the space restriction, they shall not be addressed here.

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[261] CRCSCj 21.01.2004, 3-4-1-7-03, para. 16; reiterated in CRCSCj 05.05.2014, 3-4-1-67-13, para. 31.

[262] E.g. SCebj 07.06.2011, 3-4-1-12-10, para. 58.

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The Constitution of Latvia – A Bridge Between Traditions and Modernity

Kristīne Krūma and Sandijs Statkus

Abstract The Latvian constitutional system is based on the principle of State continuity after the Soviet occupation, and this is reflected in the reinstatement of the 1922 Constitution (*Satversme*). Unlike other constitutions in the post-communist area, it is characterised as a laconic and predominantly procedural constitution. However, important amendments were introduced in 1996 and 1998, establishing the Constitutional Court and introducing a catalogue of fundamental rights. The constitutional culture has been influenced by German traditions in constitutional jurisprudence, and the adjudication of legislation on substantive grounds has been stringent. This is particularly evident in the annulment of about 40% of measures reviewed in the context of the economic crisis (2009–2011). Of particular interest is the constitutional adjudication of the IMF-mandated drastic austerity measures, including a law that envisaged a notable 70% cut in the payments to pensioners. The Constitutional Court stood out by virtue of strong protection of fundamental rights and the principle of legitimate expectations, with similarities to the approach subsequently taken by the Portuguese Constitutional Court. Additionally, the Constitutional Court underlined that taking international loans is an important matter of public life which must be decided by the legislator, and that the government cannot restrict fundamental rights by assuming international obligations. However, measures such as the European

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Arrest Warrant or Data Retention Directive have not been subject to a constitutional debate. The Constitution contains a range of EU amendments.

Keywords The Constitution of Latvia · Constitutional amendments regarding EU and international co-operation · The Latvian Constitutional Court Constitutional review statistics and grounds · Fundamental rights and general principles of law · European Arrest Warrant · Data Retention Directive IMF austerity programmes · The principle of legitimate expectations and social rights · Parliamentary reservation of law · The role of courts in EU law to ensure compliance · Referendum · Sovereignty · Supremacy

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1–1.1.2 The role of the *Satversme* (the Constitution; hereinafter the Latvian word *Satversme* will be used) in the Latvian legal order is twofold. First, it has a strong symbolic role. It was adopted in 1922 and regained *de facto* force upon the restoration of independence.[1] The backbone of the *Satversme* has had only minor amendments. However, it has been supplemented with several important articles. For instance, in 1996, a provision on the Constitutional Court; in 1998, Chapter 8 which includes human rights and freedoms; and in 2003, amendments on EU membership were inserted in the *Satversme*.

Secondly, the *Satversme* is the fundamental document that addresses primary institutional and procedural issues. The key elements of the *Satversme* can be summarised as follows: protection of the fundamental principles and values of democracy and the rule of law; the functioning of the parliamentary democracy; guarantees for national sovereignty;[2] protection of fundamental rights and

[1] The *Satversme* was drafted at the time when the authoritarian regime of Czarist Russia was collapsing. The independence of Latvia was proclaimed on 18 November 1918, just one month before the end of the First World War. There was an ongoing civil war in Russia in 1918, and part of Latvia was occupied by Germany. The complex geo-political situation allowed for the people of Latvia to claim their right to self-determination. At the time, the drafters were inspired by the constitutions of France, Switzerland, Finland, the UK, the US and other states. However, the main example was the Weimar Constitution (*Weimarer Verfassung*), which was in force in Germany from 1919–1933. References were also made to Russian imperial regulations and legal practice. See the Decisions of the Administrative Department of the Senate from 1922.

[2] See also Constitutional Court Judgment in Case No. 2008-35-01 of 7 April 2009, para. 14.

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freedoms;[3] and the functioning of the division of powers[4]. In terms of the constitutional priorities in practice, it should be noted that more than 80% of all cases reviewed by the Constitutional Court have concerned provisions of Chapter 8 on fundamental rights.

The Constitutional Court has recognised that the *Satversme* is essentially a short and laconic yet complex document, i.e. no provision, part or even single word of the *Satversme* may be regarded as superfluous, because such an interpretation would compromise its structure.[5]

During the initial years after its establishment in 1996, the Constitutional Court relied extensively on a comparative approach to rulings of other constitutional courts. Since regaining independence, Latvia's constitutional culture has been influenced by German traditions in constitutional jurisprudence. The Constitutional Court has also referred to the constitutional provisions and case law of Poland, Canada, USA, Lithuania, the Czech Republic, Slovenia, Finland, Spain and Portugal.[6] However, this practice has recently changed.

The Court now takes a more careful approach when invoking different international treaties and, when referring to the practice of international courts, attention is paid to the facts of the case, with special caution taken when referring to soft law instruments. For instance, in a case relating to the Civil Procedure Law, the Court stated:

> In resolving various issues in the Latvian legal system, the legal regulation of other states cannot be applied directly, except if the law so explicitly provides. Comparative analysis always requires that the different legal, social, political, historical and systemic context be taken into account.[7]

At the same time the Court has remained open to other international law sources, such as the European Convention on Human Rights (ECHR).[8]

According to the *Satversme*, the Parliament (*Saeima*) is vested with the most power. Only the people of Latvia have the right to vote for dissolution of the *Saeima* upon the initiative of the President. In the context of this project it is important to note that legislative power is vested in the *Saeima* (Art. 64 of the *Satversme*) and the people. According to Chaps. 2 and 5, the *Saeima* is the main institution in relations with other constitutional bodies. This means that the *Saeima*

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[3] According to the Constitutional Court, the provisions of Chap. 8 establish a threefold obligation: to respect, to protect and to fulfil individual rights.

[4] The Constitutional Court has derived this principle by interpreting Art. 1 of the *Satversme*. This principle ensures balance and mutual control which fosters temperance of power. Judgment in Case No. 03-05(99) of 1 October 1999, para. 1.

[5] Judgment in Case No. 2005–12–0103 of 16 December 2005, para. 17.

[6] See Cases No. 2009-11-01; 2007-01-01; 2002-08-01; 2002-08-01; 2002-21-01; 2002-20-0103.

[7] Judgment in Case No. 2012-06-01 of 1 November 2012, para. 13.3.3. See also Judgments of the Constitutional Court in Cases No. 2007-01-01 of June 2007, para. 24.1., and No. 2010-51-01 of 8 June 2007, para. 17.

[8] For details see Mits 2010, pp. 127–188.

is the body that is directly democratically legitimised to take decisions on the most important issues for Latvia. No other institution can limit the powers of the *Saeima*, which has many instruments at its disposal to influence other institutions.

1.2 The Amendment of the Satversme in Relation to the European Union

1.2.1–1.2.4 Amendment procedure and constitutional amendment referendums The rules on amendment of the *Satversme* are established in Art. 76, which provides: 'The *Saeima* may amend the *Satversme* in sittings at which at least two-thirds of the members of the *Saeima* participate. The amendments shall be passed in three readings by a majority of not less than two-thirds of the members present.'[9]

Further, Arts. 74 and 79 of the *Satversme* provide that the electorate has direct legislative power if at least a one-half of the voters who participated in the last parliamentary elections vote in a referendum. Art. 78 of the *Satversme* provides that voters comprising not less than one-tenth of the electorate have the right to submit a fully elaborated draft of an amendment to the *Satversme* or of a law to the President, who shall present it to the *Saeima*. If the *Saeima* fails to adopt such draft without amendments as to its content, the draft shall be submitted to a national referendum. The draft is deemed to be adopted if at least one-half of those who participate vote in favour. Thus, both the *Saeima* and the people are the main decision-makers when there is a need to amend the *Satversme.*

There are several provisions of the *Satversme* which cannot be adopted without the consent of the people of Latvia. According to Art. 77 of the *Satversme*, if the *Saeima* amends, *inter alia*, Arts. 1, 2, 6[10] or 77, the amendments come into effect only if confirmed by a referendum. According to Art. 79, an amendment to the Constitution submitted to a referendum shall be deemed adopted if at least one-half of the electorate votes in favour. This means that the fundamental principles of democracy enshrined in Art. 1 as well as the principle of sovereignty provided for in Art. 2 of the *Satversme* are afforded particular protection.[11]

EU amendments The fundamental articles of the *Satversme* (i.e. Arts. 1, 2, 3, 4, 6 and 77) have not been amended, neither upon accession to the EU nor subsequently upon amendment of the EU Treaties. The remaining text of the *Satversme* has been amended on two occasions, with regard to three subject areas in order to comply with EU law: in 2003 upon accession to the EU, and in 2004 to comply with the European Arrest Warrant (EAW) and to ensure the electoral rights of EU citizens.

[9] For this and further quotes, the official translation of the *Satversme* is used. Available at http://www.vvc.gov.lv.

[10] 'The *Saeima* shall be elected in general, equal and direct elections, and by secret ballot based on proportional representation.'

[11] See also the next Section below.

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Questions pertaining to the EU in the constitutional context have also been debated at least twice, at the time of the draft Constitutional Treaty and ratification of the Lisbon Treaty as well as when accession to the eurozone was approaching, in connection with the stronger role provided for the EU on the basis of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.[12]

The first amendments were introduced in the *Satversme* on 8 May 2003. Article 68 of the *Satversme*, which provided that '[a]ll international agreements, which settle matters that may be decided by the legislative process, shall be ratified by the *Saeima'*, was supplemented with the following provisions:

> Upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competences to international institutions. The *Saeima* may ratify international agreements in which a part of State institution competencies are delegated to international institutions in sittings in which at least two-thirds of the members of the *Saeima* participate, and a two-thirds majority vote of the members present is necessary for ratification.
>
> Membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the *Saeima*.
>
> Substantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the *Saeima*.

Article 79 which provides for the procedure for approving amendments to the *Satversme* by referendum[13] was also supplemented to provide for a special requirement in the case of accession to the EU or subsequent EU Treaty amendments:

> An amendment to the *Satversme* submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. A draft law, decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted for national referendum shall be deemed adopted if the number of voters is at least half of the number of electors as participated in the previous *Saeima* election and if the majority has voted in favour of the draft law, membership of Latvia in the European Union or substantial changes in the terms regarding such membership.

When amending the *Satversme*, the drafters also had to take into account the provisions of Art. 73, which provides:

> The Budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, declaration and commencement of war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations may not be submitted to national referendum.

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[12] The treaty entered into force on 1 January 2013. See, http://www.eurozone.europa.eu/euro-area/topics/treaty-on-stability,-coordination-and-governance-(tscg)/. See also Sect. 2.7.

[13] The general rule is included in Art. 76, which provides that the *Satversme* can be amended by the *Saeima* in sittings attended by two-thirds of the Members of Parliament. Amendments must be adopted in three readings by a two-thirds majority of those present.

Therefore, the *Satversme* does not allow for a referendum to be held on an international treaty. Nevertheless, Arts. 68(4) and 7(2), which allow for a referendum in the case of substantive changes in EU membership, can be qualified as *lex specialis* in relation to Art. 73.

The amendments to the *Satversme* of 8 May 2003 and the subsequent further amendments of 23 September 2004 were adopted in accordance with the procedure envisaged in the above-mentioned Art. 76 of the *Satversme* (i.e. by the *Saeima*). The amendments to the *Satversme* of 8 May 2003 were adopted by an affirmative vote of 88 Members of Parliament (MPs) out of 100 (there were no votes against or abstentions). The amendments of 23 September 2004 were adopted by 74 MPs voting in favour (there were no votes against and only one abstention).

By way of a summary of the amendments, first, Art. 68 allows for the delegation of competences only 'with the purpose of strengthening democracy'. Therefore, a delegation of competences to another state or a non-democratic international institution would be contrary to the *Satversme*. In this context it is important to establish to what extent competences are delegated or exercised, and whether Latvia remains entitled to withdraw from arrangements which no longer correspond to the initial delegation. The competence to control the compatibility of any delegation with the *Satversme* lies with the Constitutional Court.[14]

Secondly, Art. 68(2) provides that international treaties providing for delegation of competences should be confirmed by the *Saeima* with a qualified majority in sittings where at least two-thirds of the MPs participate.

Thirdly, Art. 68(3) states that people have the right to decide not only on joining the EU but also on withdrawal from it. Moreover, the procedure for withdrawal should be identical to the procedure for joining the EU. The three paragraphs of Art. 68 viewed together clearly formulate that a referendum on Latvia's participation in any other international organisation is not necessary. Such membership can be decided by the *Saeima* alone.

Fourthly, according to Art. 68(4), the people can decide on significant changes in the conditions of membership in the EU if so requested by at least one-half of the *Saeima* MPs. This allows for it to be established whether the people think that the constitutional structure of the EU is being significantly changed. At the same time, it ensures that referendums are held on substantively important EU issues only.[15]

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[14] Judgment of the Constitutional Court in Case No. 2008-47-01 of 28 May 2009, para. 11. The Court referred, inter alia, to the Preamble of the 2001 Framework Decision of the Council of the European Union 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, in which the Council, noting that serious forms of crime increasingly have tax and duty aspects, calls on Member States to provide full mutual legal assistance in the investigation and prosecution of this type of crime, and further recalls that money laundering is at the very heart of organised crime and should be rooted out wherever it occurs. The Court also referred to the Preamble of Directive 2005/60/EC and Directive 2006/70/EC.

[15] See annotation to the draft law on amendments to the *Satversme*, Reg. No. 158, submitted to the *Saeima* on 31 January 2003. http://helios-web.saeima.lv/saeima8/reg.likprj. See also Judgment of the Constitutional Court in Case No. 2008-35-01 of 7 April 2009, para. 19.4.

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Thus, procedurally, it is the responsibility of the *Saeima* to decide on the significance of further amendments to the Treaties for the membership of Latvia in the EU. Article 68 requires a significant threshold for a positive decision in the *Saeima*. Through the textual, historical and systemic interpretation of Art. 68(4), the Constitutional Court has concluded that a referendum on substantive changes to EU membership is non-obligatory, i.e. it depends on the affirmative vote in the *Saeima*.[16] The Constitutional Court has noted that although such exercise of the rights of the people provides for certain procedural pre-conditions, the Constitutional Court may not reassess the constitutionality of certain norms of the *Satversme* because such assessment does not fall within its jurisdiction.[17] According to the annotation to the amendments, Art. 68(4) does not allow for a referendum to be called in the case of insignificant amendments to EU membership conditions or in the case of transposition of EU legislative acts other than treaties (e.g. directives, regulations and decisions).[18] However, since accession to the EU, MPs have not requested that a referendum be called on the grounds of significant changes in EU membership requirements.

The second set of amendments was adopted on 23 September 2004 and concerned Arts. 98 and 101 of the *Satversme*. Article 98 was supplemented with a sentence to bring the *Satversme* in line with the commitments undertaken in relation to the EAW. This Article now provides that '… A citizen of Latvia may not be extradited to a foreign country, except in the cases provided for in international agreements ratified by the *Saeima* if by the extradition the fundamental human rights specified in the Constitution are not violated'.

The amendment of Art. 98 was based on Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.[19] Since Art. 98 of the *Satversme* prohibited extradition, it was necessary to adopt amendments to comply with EU law. Since the amendments were adopted in the Constitution, there has been no opportunity for the Constitutional Court to express its views on the constitutionality of this Article. Moreover, the Constitutional Court has repeatedly held that it should not be considered as the Court entitled to review the interpretation and application of the law by ordinary courts. Therefore, the only potential avenue for judicial contestation of a ruling of an ordinary court for a person facing extradition is the European Court of Human Rights (ECtHR).[20]

[16] Judgment in Case No. 2008-35-01 of 7 April 2009, para. 19.

[17] Ibid., para. 17.

[18] Supra n. 15.

[19] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[20] See Sect. 2.3.

Article 101 of the *Satversme* was supplemented to provide for the right of EU citizens to participate in local elections. It now provides as follows:

> Local governments shall be elected by Latvian citizens and citizens of the European Union who permanently reside in Latvia. Every citizen of the European who permanently resides in Latvia has the right, as provided by law, to participate in the work of local governments. The working language of local governments is the Latvian language.

The amendments were based on Art. 22(1) TFEU [Art. 19 TEC], which provides that every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that state.[21]

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 There have been no amendments that directly address the supremacy and direct effect of EU law. The rules on these matters have been spelt out in the Law of Administrative Procedure and further dealt with by the Supreme Court and Constitutional Court.

The Constitutional Court has stated as follows in relation to the EU:

> Upon ratification of the Treaty on Accession of Latvia to the European Union, European Union law became an integral part of the Latvian legal system. Therefore, legal acts of the European Union and interpretation provided by the case law of the European Court of Justice must be taken into account when applying national law.[22]

Thus, the *Saeima* cannot adopt legal acts which are contrary to its international obligations, including EU obligations. If the *Saeima* establishes that its international obligations do not comply with obligations under EU law, it must do all that is necessary to remedy the situation. Thus, EU law has become an integral part of the Latvian legal system.

The Constitutional Court has pronounced that Art. 68 of the *Satversme* prescribes that Latvia must implement its international obligations. According to the *Satversme*, the Law on International Agreements of the Republic of Latvia and the 1969 Vienna Convention on the Law of Treaties, in any specific case where there is a conflict between international obligations undertaken by Latvia and national norms, international norms must be applied. Upon accession, Latvia delegated part of the competences of its institutions and undertook obligations derived from the

[21] Annotation to the draft law 'Amendments to the *Satversme* of the Republic of Latvia', reg. No. 571, submitted 20 May 2004, available at http://helios-web.saeima.lv/saeima8/reg.likprj.

[22] Judgment of the Constitutional Court in Case No. 2004-01-06 of 7 June 2004, para. 7 and in Case No. 2007-11-03 of 17 January 2008, para. 24.2.

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EU Treaties. These obligations, *inter alia*, require the application of EU law in the Latvian legal system. In addition, international obligations which have been confirmed by the *Saeima* are also binding on the *Saeima*, which therefore must not adopt legal acts which contradict such international obligations.[23]

All in all, the application of EU law is essential for the successful functioning of the EU and stems from the Art. 4(3) TEU principle of sincere co-operation to which Member States have adhered. Alongside the rhetoric through which they threaten to declare that EU law is not applicable, the constitutional courts often facilitate better compliance with EU law by placing the legislative and constitutional amendments necessary to guarantee full application of EU law, in compliance with the constitution, on the agenda of political bodies.[24] Notwithstanding the *Simmenthal* mandate, constitutional courts are comfortable with subjecting the full application of EU law to constitutional reservations, based on concerns regarding fundamental rights protection, *ultra vires* action by the EU institutions and respect for constitutional identities. These are articulated as warnings according to which the full application of EU law might be limited in cases where EU measures contravene fundamental constitutional principles. These, however, have remained at the level of *obiter dicta*.[25]

In the case of Treaty amendments, the approach adopted by the Constitutional Court is based on a three step test: (1) whether the international treaty involves the delegation of competences; (2) whether there has been an infringement of fundamental values at the constitutional level; (3) whether a constitutional procedure for legitimisation of the amended Treaty within the national legal order has been observed.

1.3.2–1.3.3 The approach adopted by the Constitutional Court to the delegation of sovereignty is as follows:

> The Constitutional Court recognises that the State of Latvia is based on fundamental values such as human rights and fundamental freedoms, democracy, the sovereignty of the State and its people, the division of powers and the rule of law. The State is obliged to guarantee these values and they cannot be infringed by amending the *Satversme* by law. Therefore, the delegation of competencies cannot violate the rule of law and the basis of an independent, sovereign and democratic republic. Likewise, the EU cannot affect the rights of citizens to decide upon the issues that are essential to a democratic State. Article 2 of the *Satversme* provides not only for the right to 'the final say' but also for an obligation to assess the membership conditions of an international organisation as such. In this context, the right to 'the initial say' seems even more important.[26]

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[23] Judgment of the Constitutional Court in Case No. 2004-01-06 of 7 June 2004, para. 7.

[24] Piqani 2012, p. 147.

[25] Ibid., pp. 155–156.

[26] Judgment in Case No. 2008-35-01 of 7 April 2009, para. 17. The case was brought by a group of voters claiming that the ratification of the Lisbon Treaty should be subject to a referendum. They claimed that the fact that the *Saeima* refused to organise a referendum violated their rights provided in Art. 101 of the *Satversme*. The applicants also argued that Art. 2 of the *Satversme* was infringed. The Court's judgment includes a detailed discussion of a number of provisions introduced by the Lisbon Treaty within the context of Art. 2 of the *Satversme*. See paras. 16 and 18.1 of the Judgment. The Court noted: 'Already prior to World War II, in international law analysis of the

Therefore, it can be argued that the very notion of sovereignty itself has not been re-interpreted. Sovereignty has always been associated with the capacity to exercise external and internal powers subject to sovereign values. Values attach a normative character to sovereignty reflecting the views dominant in society.

1.3.4 There is no provision in the *Satversme* providing for its supremacy *expressis verbis*. However, this can be inferred from the practice of the Constitutional Court and Supreme Court as well as from the legal doctrine.

Neither the Constitutional Court nor the Supreme Court have dealt with any case where the supremacy of EU law has been addressed in relation to the *Satversme*. It is therefore difficult to construct such a theoretical case. However, since the *Satversme* is predominantly a procedural constitution, no apparent conflicts with EU law arise. Specific cases of newly delegated competences (abstract control) in the case of Treaty amendments or violations of individual rights (individual or abstract control procedure) might give rise to issues of supremacy in the Constitutional Court.

The Constitutional Court has declared that with regards to domestic acts (including ratified treaties), the place of a particular provision in the legal hierarchy is determined by its legal force, which depends on the institution that has adopted it and the procedure that was followed. The higher the democratic legitimacy of the institution and the higher the required majority for adoption, the higher the rank of the provision. A higher threshold has been set for the cases for which the *Satversme* was amended.[27] Therefore, laws adopted pursuant to the procedure prescribed in Arts. 77 and 79 of the *Satversme* have a higher legal rank than ordinary laws.[28]

1.4 Democratic Control

1.4.1 Democratic control of EU matters is primarily exercised by the *Saeima* and its European Affairs Committee. The *Saeima* participates in EU decision-making pursuant to the Law on Procedure of the *Saeima*. Chapter VII[1], 'Participation of the *Saeima* in the EU', provides that the European Affairs Committee is responsible for participation in EU affairs, except in cases where the *Saeima* has decided otherwise. For instance, the European Affairs Committee reviews the positions of Latvia prepared by the Cabinet of Ministers. The Commission is also entrusted with

legal consequences that arise when a State undertakes international obligations, sovereignty was treated as the exercise of sovereign rights rather than a restriction thereof. The Permanent Court of International Justice rejected the view that the conclusion of any such treaty according to which a State undertook to perform or refrain from performing certain acts would mean this State's abandonment of its sovereignty. At the same time, the right of entering into international engagements is an attribute of State sovereignty (Affaire du Vapeur "Wimbledon", CPJI Ser A 01 15, 1923, 25)'.

[27] See above in relation to the amendment procedures established in Arts. 76 and 79.

[28] Judgment of the Constitutional Court in Case No. 2007-10-0103 of 29 November 2007, para. 56.

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notifying the EU institutions of the Latvian position on legislative proposals and with transferring documents to other *Saeima* Committees. There are no other formal rules on the participation of the *Saeima* in EU affairs. In practice, the procedure is decided by the Committee at the time a new *Saeima* is elected. The Latvian Members of the European Parliament as well as experts are invited to attend meetings of the Committee. The European Affairs Committee relies on its own information as well as on information from the Cabinet of Ministers. Co-operation is most active when a long-term budget of the EU is debated.

1.4.2 The rules on referendums regarding constitutional amendments and EU membership have been outlined in Sect. 1.2. The EU referendum was not a constitutional amendment referendum, but rather a referendum relating to membership in the EU under the fourth paragraph of the amended Art. 68. Two observations can be made about the results of the referendum. First, since 1990 there have been eight referendums in Latvia.[29] The referendum in 2003 was the only referendum on EU issues. Of all the referendums held since 1990, the referendum on EU membership had the highest rate of participation, at 71.49% of all eligible voters.[30] Secondly, the polarisation between the voters participating was also the highest: EU membership was supported by 66.97% of voters, but 32.26% voted against (0.77% votes invalid). In five of the other referendums, more than 94% of the voters voted for the submitted proposal.[31] The most controversial was the referendum of 1998 on liberalisation of the Citizenship Law, in which 44.98% of voters voted against liberalisation and 52.54% were in favour.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 The amendments to the *Satversme* before accession to the EU were subject to wide public and political debate, which was followed by a pre-referendum campaign. The debate focused on different aspects of the accession. For instance, questions on the need to amend Art. 2 of the *Satversme* (on sovereign powers being vested in the people) were posed not only by voters but also by

[29] In 1998 on amendments to the Citizenship Law; in 1999 on amendments to the Law on State Pensions; in 2007 on amendments to the Law on National Security and Law on State Security Institutions; in 2008 on amendments to the *Satversme* and amendments to the Law on State Pensions; in 2011 on dissolution of the *Saeima*; in 2012 on amendments to the *Satversme* (concerning Russian as a state language). See http://cvk.lv/pub/public/27094.html.

[30] For instance, the turnout in the 1998 referendum was 69.16%; in 2007 – 42%; in 2008 – 42% (for amendment of the *Satversme*) and 22.9% (on the Law on State Pensions); in 2011 – 44.73%, but in 2012 – 71.13%. For comparison, in the elections to the European Parliament, the turnout was 41.43% of eligible voters (2004) and 53.69% (2009).

[31] In 1999 – 94.17% voted for repeal of the Law; in 2007 – 96.49% voted for repeal of the Law; in 2008 – 96.78% voted for amendments to the *Satversme* and 96.44% voted for adoption of the amendments of the Law; in 2011 – 94.3% voted for dissolution of the *Saeima*.

scholars.[32] Different views were also expressed in the legal doctrine on the notion of sovereignty and on the content of Art. 2 of the *Satversme* in relation to EU membership.[33] The dominant view was that sovereignty had not been lost or lessened; quite the opposite – by becoming a member of the EU, Latvia had exercised its sovereignty.

However, there were also other proposals. For instance, professor Ineta Ziemele suggested that the amendments that were introduced to Art. 68 of the *Satversme* might not be sufficient because they did not ensure parliamentary control over EU activities. She argued that the lack of control might raise problems in the context of division of powers and the legitimacy of the laws applicable in Latvia. The alternative proposal was that all international treaties and EU legislative acts which address legislative issues should be approved by the *Saeima*. Thus, not only would EU law be recognised explicitly in the Latvian legal system but also the *Saeima* would preserve parliamentary control. Ziemele also suggested adding Art. 117 to the *Satversme*, which would provide that '[t]he state protects the rights of EU citizens in accordance with the legislative acts of the EU'. It was argued that this would mean that lawmakers would not have to make amendments to Chapter 8 of the *Satversme*, even though the rights of EU citizens are constantly increasing and developing.[34] None of the proposals were adopted.

The political argument was raised that Latvian independence can be properly ensured only by accession to the EU.[35] Moreover, based on the results of pre-accession monitoring, there were hopes and worries that non-citizens might potentially be granted the status of EU citizen.[36]

Already in 2003, the position of the Constitutional Court towards EU accession was that EU norms are compatible only with a national legal system that corresponds to the requirements set for a democratic state based on the rule of law.[37] In this sense the Court signalled adherence to the so-called *reverse-Solange* approach.

The role of constitutions will be discussed further in the final section of the report (Sect. 4), with the suggestion that greater focus ought to be on redefining sovereignty and democracy at the transnational level.

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[32] Buka 2000; Meļkisis 2000; Pleps 2003.

[33] Various proposals were debated in two well-attended conferences of lawyers and experts organised by the Institute of Public Law, on 'The place of EU law in the Latvian legal system and solutions in cases of collision of norms' (2006) and 'The core of constitutional sovereignty' (2007). Conference materials are on file with the authors and available only in Latvian.

[34] Ziemele 2004, pp. 69–70.

[35] See the speech of the Latvian President Vaira Vike-Freiberga on 29 May 2003 during the parliamentary debates. http://www.am.gov.lv/lv/Jaunumi/Runas/2003/2714/.

[36] Krūma 2004, pp. 33–53.

[37] Judgment in Case No. 2002-18-01 of 5 March 2003, para. 6. Latvia concluded an association agreement and received an official invitation to join the EU. Therefore, the laws should be brought in line and political reforms implemented to ensure that Latvia can integrate into the EU. In relation to the elections to the European Parliament, the common principles set out in the EC Treaty should be observed.

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2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1; 2.1.3 Chapter 8 on human rights consists of twenty-seven articles on civic and political rights as well as social, economic and cultural rights. Moreover, other human rights can be derived from other articles of the *Satversme*.[38]

General principles have not been codified in the *Satversme* as such. However, there are a considerable number of judgments of the Constitutional Court in which the Court has derived constitutional principles on the basis of the term 'democratic republic' enshrined in Art. 1 of the *Satversme*. Over the years, more than thirty principles have been declared to have a constitutional rank. For instance, the concept 'rule of law' is not *expressis verbis* mentioned in the *Satversme*. However, it has been identified by the Constitutional Court as one of the principles enshrined in Art. 1 of the *Satversme* under the term 'democratic republic'. Other principles include the division of powers, proportionality, legal certainty (legal expectations) and good governance.

The rights enshrined in the *Satversme* as well as the principles derived from it are directly applicable, i.e. any court can rely on the provisions of the *Satversme* irrespective of the provisions of the specific law. The Supreme Court has in administrative cases and civil cases acknowledged that the *Satversme* should be directly applicable.[39] For instance, if a person considers that his or her rights of defence envisaged in Art. 92 have been breached, the person has a right to claim compensation by submitting a claim to the court of general jurisdiction.[40]

It can be argued that democratic control is exercised also by the judicial institutions to which individuals and legal persons can submit complaints. In the case of the regular courts, such complaints have resulted in preliminary rulings to the Court of Justice of the European Union (CJEU) or cases referred to the Constitutional Court. Individuals have also turned to the Constitutional Court directly to contest, inter alia, either the constitutionality of a provision of law or other act transposing a directive, or non-compliance with the rules of EU law.[41]

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[38] Judgment of the Constitutional Court in Case No. 2002-08-02 of 23 September 2002, and in Case No. 2002-18-01 of 5 March 2003. Judgment of the Constitutional Court in Case No. 2009-111-01 of 22 March 2010, para. 19.

[39] For instance, Department of Civil Cases of the Supreme Court, SKC 12/2009, 29 April 2009 (not publicly available) and Department of Administrative Cases of the Supreme Court, SKA-68/2013, 22 February 2013, para. 9, available at http://www.tiesas.lv/februaris-10.

[40] Judgment of the Constitutional Court in Case No. 2001-07-0103 of 5 December 2001, para. 1.

[41] In other cases, the Court has adopted a usual fundamental rights test: (1) whether the provision has been adopted by law; (2) whether it has a legitimate objective; (3) whether it complies with the principle of proportionality (necessary to achieve the legitimate aim; appropriate to achieve that aim and whether there are alternative, less burdensome measures to achieve the aim in an equally

2.1.2 Article 116 allows for limitations to individual rights. It provides:

> The rights of persons set out in Articles ninety-six, ninety-seven, ninety-eight, one hundred, one hundred and two, one hundred and three, one hundred and six, and one hundred and eight of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. On the basis of the conditions set forth in this Article, restrictions may also be imposed on the expression of religious beliefs.

However, this norm covers only one-third of the fundamental rights enshrined in the *Satversme*. Indeed, there are certain fundamental rights which are not subject to restrictions, e.g. the prohibition of torture and inhuman and degrading treatment (Art. 95), the prohibition of censorship (Art. 100), the prohibition of forced labour (Art. 106) and the prohibition of racial discrimination.

At the same time this does not mean that other fundamental rights that are not mentioned in Art. 116 cannot be limited. The Constitutional Court on a number of occasions has acknowledged that although the *Satversme* does not explicitly provide for cases in which other rights not mentioned in Art. 116 can be restricted, this does not mean that they are absolute. The provisions of the *Satversme* must be interpreted systematically. This means that if Art. 116 were not applied, this would jeopardise the rights of other persons. The assumption that fundamental rights not mentioned in Art. 116 cannot be subject to restrictions would be contrary to both the rights of other persons enshrined in the *Satversme* as well as other provisions of the *Satversme*.[42]

As will be seen in Sect. 2.6, the Constitutional Court has clarified that it assesses the validity of restrictions of civil and political rights as well as social rights on the following criteria: the restrictions must be determined by law, pursue a legitimate aim and comply with the principle of proportionality.[43]

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 No specific issues with regard to the balancing of fundamental rights and economic freedoms have arisen in Latvia. Neither the Constitutional Court nor the Supreme Court have dealt with any cases where the supremacy of EU law has been addressed in relation to the *Satversme*. Therefore, it is difficult to construct such a theoretical case. By reference to values common to Latvia and the EU, e.g. the rule of law, democracy and human rights, such a collision between the *Satversme* and

effective way). For instance Case No. 2008-34-01 of 13 February 2009, paras. 16–24 and Case No. 2009-85-01 of 30 March 2010, para. 17.

[42] Judgment of the Constitutional Court in Case No. 2002-04-03 of 22 October 2002, para. 2 and in Case No. 2004-10-01 of 17 January 2005, para. 7.2.

[43] Mits 2013, p. 19.

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EU law is difficult to imagine. It has been accepted that the human rights chapter of the *Satversme* cannot provide for lower protection in comparison to internationally binding legal acts. Any conclusion to the contrary would run counter to Art. 1 of the *Satversme* and the rule of law it enshrines.[44]

As was shown in Sect. 1.3.1, the Constitutional Court has in general developed and strengthened interpretation to the benefit of EU law. It has been acknowledged that EU legal acts and CJEU interpretation, as far as they do not encroach upon the fundamental principles of the *Satversme*, should be taken into account in order to prevent conflicts between Latvian and EU law. When interpreting Latvian law, EU law and its interpretation by the CJEU must be taken into account.[45]

For instance, in a case on the Freeport of Riga in which substantial financial interests were involved, the EU's environmental standards were invoked to declare that territorial planning which aimed at business promotion in certain areas would be in breach of Latvia's obligations under EU law. The Constitutional Court declared that '[w]hen assessing a legitimate objective, it is necessary to take into consideration the obligations of Latvia as an EU Member State'. The Constitutional Court also stated:

> Moreover, upon ratification of the Treaty on Accession of Latvia to the European Union, European Union law has become an integral part of the Latvian legal system. Therefore, legal acts of the European Union and interpretation provided by the case law of the European Court of Justice must be taken into account when applying national law. The same applies to laws on land use planning and protection of the environment.

and

> … Latvian law must be interpreted so as to avoid any conflicts with the obligations of Latvia towards the European Union, unless the fundamental principles incorporated in the Satversme are affected.[46] [emphasis added]

For instance, in a case concerning application of the 1965 Convention on Facilitation of International Maritime Traffic, the Constitutional Court pronounced:

> Thus it follows from the above laws and international obligations, undertaken by the Republic of Latvia when ratifying the Vienna Convention, that in each particular case, if there arises a discrepancy between international legal norms, ratified by the *Saeima* and national legal norms of Latvia, the international legal norms shall be applied. Moreover, the

[44] Judgment of the Constitutional Court in Case No. 2005-02-0106 of 14 September 2005, para. 10. See also Sects. 2.6 and 2.7.

[45] See, for instance, Judgment of the Constitutional Court in Case No. 2007-11-03 of 17 January 2008, para. 25.4 and No. 2011-17-03 of 2 May 2012, para. 13.3. In these cases the Court interpreted copyright and environmental assessment regulation on the basis of provisions of Directive 2001/29/EC and Directive 92/43/EEC as well as the case law of the CJEU.

[46] See Judgment of the Constitutional Court in Case No. 2007-11-03 of 17 January 2008, paras. 24.2. and 25.4., available at http://www.satv.tiesa.gov.lv/upload/judg_2007_11_03.htm. Thus, also with regard to the *Natura 2000* territories, the requirements of the directives transposed by Latvia and the interpretation of the directives established in the case law of the European Court of Justice should be observed.

> international obligations, undertaken by Latvia on the basis of international agreements, confirmed by the *Saeima*, are binding also on the *Saeima* itself. It may not adopt legal acts, which contravene the above obligations. … Any person applying legal norms, including a court, when establishing a discrepancy between an international legal norm and a national legal norm of Latvia, shall apply the international legal norm. … When applying the legal norms of the European Union (Community) the institution and the court shall take into consideration the jurisprudence of the European Court of Justice.[47]

Similarly, according to Art. 15(4) of the Law on Administrative Procedure, EU law is applicable according to the hierarchy of normative acts. When applying EU law provisions, the relevant institution or court must observe the case law of the CJEU. The Supreme Court has held that CJEU rulings must be applied when interpreting provisions through historical and systemic interpretation.[48] The same approach has been adopted by the Supreme Court in civil law cases. It has for example interpreted labour law in accordance with Directive 91/533/EEC in relation to the obligation to inform an employee of termination of a contract in writing.[49]

At the same time, in a case concerning the prevention of laundering of the proceeds from crime and financing terrorism and the interpretation of the Directive 2005/60/EC and Directive 2006/70/EC, the Constitutional Court has stated that the Court should verify whether interpretation of the CJEU is indispensable:

> [E]ven if the Court of Justice were to conclude that Directive 2005/60/EC requires refraining from the execution of transactions for a certain period after the persons subject to the law have reported to the Control Office, this would not affect the outcome of the case because the Constitutional Court should verify compliance of the established procedure with the *Satversme*.[50]

Systems might overlap but be capable of compatibility. This is even more true since the adoption of the EU Charter of Fundamental Rights as a legally binding instrument. Consequently, the overlapping systems develop over time through the process of judicial discourse and without predetermined finality.[51]

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[47] See Judgment of the Constitutional Court in Case No. 2004-01-06 of 7 July 2004, paras. 6 and 7 of reasons, available at http://www.satv.tiesa.gov.lv/?lang=2&mid=19.

[48] Judgment of the Supreme Court in Case No. SKA-216 of 23 November 2004, para. 10. Judgments and decisions of the Department of Administrative Cases of the Supreme Court of the Republic of Latvia, Riga: *Tiesu namu Aģentūra*, 2005, pp. 571–579; Judgment of the Supreme Court in Case No. 162/2007 of 10 May 2007, para. 8.

[49] Civil Department of the Supreme Court, Judgment in Case No. SKC-388/3012 of 4 April 2012, para. 11. Not published.

[50] Judgment of the Constitutional Court in Case No. 2008-47-01 of 18 May 2009, para. 15.2. The English translation is available at the Court's website at http://www.satv.tiesa.gov.lv/upload/judg_2008_47_01.htm.

[51] Krūma 2009, p. 155.

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2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1–2.3.6 There has been no public debate on the European Arrest Warrant Framework Decision or the EU Data Retention Directive[52] in Latvia. A few articles have been published on the EAW, but they have been quite positive. Moreover, the amendments to the *Satversme* (see Sect. 1.2) might be why the EAW has never been contested before the Constitutional Court.

The provisions of Art. 92 of the *Satversme* have served as a basis for the Constitutional Court to identify principles such as *nullum crimen, nulla poena sine lege* and *ne bis in idem, ubi ius ibi remedium* in the domestic context in areas not related to the EAW.[53] The articles providing for defence rights in the Latvian Constitution are as follows:

> Article 92
>
> Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law. Everyone, where his or her rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.
>
> Article 94
>
> Everyone has the right to liberty and security of person. No one may be deprived of or have their liberty restricted, otherwise than in accordance with law.

The more detailed regulation arising from Framework Decision 2002/584/JHA is enshrined in Chaps. 65 and 66 of the Law on Criminal Procedure. According to Art. 714(4) of the Law, a person cannot be extradited if the crime in question is not punishable in Latvia or has not been committed in the state which requests extradition. A person also cannot be extradited to a country which does recognise the behaviour in question to be criminal.

According to defence lawyer Aldis Alliks, there are insufficient guarantees in Art. 715($3^{(1)}$) of the Law, which does not allow for sufficient protection for a person convicted in another EU Member State *in absentia*. The provision allows a convicted person to become acquainted with the ruling but does not provide the right to defence. Alliks has also noted that when adopting this Article, Latvia did not make use of the freedom of action envisaged in Art. 2 of Framework Decision 2009/299/TI amending decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/

[52] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[53] Judgments of the Constitutional Court in Cases No. 2008-09-0106 of 16 December para. 4.2., No. 20120-02-0106 of 18 October 2012, para. 11.2., No. 2004-06-01 of 11 October 2004, para. 21.

JHA and 2008/947/JHA.[54] Aside from this there have been no major problems in applying the EAW.[55]

The Public Prosecutor has informed the Experts that Latvia does not verify the evidence in an EAW case but only requests a comprehensive description of the crime committed. There are also on-going debates on the need to ensure the assistance of a lawyer before a person is extradited and to compensate a person for expenses related to his or her return trip home if the person is found innocent.[56]

Latvia provides consular assistance, which is an obligation derived not only from the *Satversme* but also from the Vienna Convention on Consular Relations. This assistance is evidenced by the practice of the consular institutions.[57]

The effectiveness of the EAW largely depends on mutual trust between the courts and the EU Member States regarding the judicial systems and the protection of the fundamental rights of persons who are extradited when they are in custody.[58] Latvia has had differing experiences in this respect. For instance, a number of Latvian citizens have been subject to trials in the UK and Ireland for serious crimes. At the same time, an Austrian court refused to extradite a Latvian citizen who had been accused of serious crimes. He was placed under arrest in Latvia and subsequently released and ordered not to leave the country. Nevertheless, he fled to Austria, which refused to extradite him on the grounds of his health.[59]

Since all EU Member States are parties to the ECHR and the EU is about to accede to the ECHR, the application of the EAW could be based on the principles established by the ECtHR.[60] Moreover, implementing fundamental rights monitoring as suggested by the European Commission and the Council of Ministers in '[a]n EU internal strategic framework for fundamental rights: joining forces to achieve better results' could help increase mutual trust and streamline fundamental rights practices.[61]

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[54] OJ L 81/24, 27 March 2009.

[55] Information provided by defence lawyer Aldis Alliks, 2 September 2014. Issues related to the EAW were discussed by judges during a conference in 2013. See Plaksins 2013.

[56] An e-mail exchange between the Experts and Ms. Una Brenča, Chief Prosecutor of the Division of International Co-operation, Department of Functional Analysis and Management, 30 September 2014.

[57] CARE, Citizens Consular Assistance Regulation in Europe. Report on Latvia http://www.careproject.eu/database/browse_euc.php# and consolidated report available at http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf. This contains information on Latvian practice on consular assistance to Latvian citizens and non-citizens abroad.

[58] See Decision of the Chamber of the Constitutional Court on Applications 72/2013, 73/2013, 74/2013 on 31 May 2013, 138/2013 on 31 July 2013, as well as Judgment of the ECtHR *Čalovskis v. Latvia*, no. 22205/13, 24 July 2014.

[59] For details see http://www.tvnet.lv/zinas/kriminalzinas/495427-kukuldosana_apsudzetais_vaskevics_joprojam_arstejas_austrija.

[60] See, for instance, Judgment of the ECtHR in *Čalovskis v. Latvia*, supra n. 58, paras. 129–133 and 155–158. The case has been appealed to the Grand Chamber.

[61] See European Union Agency for Fundamental Rights (FRA) Annual Report 2013. Luxembourg 2014. http://fra.europa.eu/sites/default/files/annual-report-2013-focus_en.pdf.

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2.4 The EU Data Retention Directive

2.4.1 Issues related to the Data Retention Directive have not been discussed in Latvia, and there is no information on any related court cases. The implementation of the Directive has also not been contested in the Constitutional Court. In terms of the constitutional provisions, Art. 96 provides that '[e]veryone has the right to inviolability of his or her private life, home and correspondence'.

2.5 Unpublished or Secret Legislation

2.5.1 No issues regarding unpublished or secret legislation have arisen in Latvia. The Constitutional Court has discussed the issue of unpublished documents serving as a basis for austerity measures and the unavailability of the records of the negotiations with the IMF and the EU.[62] However, since legislation implementing the agreed measures was adopted in accordance with the required legislative procedure, there are no grounds to delve further into this issue (see in greater detail Sect. 2.7).

If there were a case involving unpublished or secret legislation, the Constitutional Court would have to pronounce that the norm had not been established by law and was *ultra vires*, as an important aspect of the principle of the rule of law.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

General principles of law are applied on the basis of the same methodology as written norms. However, if an individual applies to the Constitutional Court, he or she must show that there has been a prima facie breach of a fundamental right provided in Chap. 8 of the *Satversme*. According to the Law on the Constitutional Court, a case cannot be initiated on the basis of an individual application solely based on a principle derived from Art. 1 of the *Satversme*. In more than one-half of such cases (that refer to Art. 1), reference has been made to the principle of legitimate expectations in combination with a fundamental rights provision. The main objective of the principle of legitimate expectations is to protect the rights of a person in cases where provisions of law might potentially cause a deterioration of the situation of the individual.[63]

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[62] Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, paras. 26 and 30.1.

[63] Judgment of the Constitutional Court in Case No. 2006-04-01 of 8 November 2006, para. 21. Another article on the basis of which several principles have been derived is Art. 92 (right to a fair trial).

The principle of legitimate expectations was central to the pensions cases concerning cuts imposed due to the financial crisis, which will be explored in Sect. 2.7.

It may be worth noting that in the Estonian Sugar case mentioned in the Questionnaire, the Latvian government intervened and supported some of the claims regarding the breach of the general principles of law by the imposition of the EU fine. The Latvian Government in particular raised the issue of the breach of legitimate expectations[64] and the breach of defence rights in contesting the EU fine calculations,[65] and pointed out that the objective of EU Regulation 60/2004, rather than burdening the state budgets of the new Member States, was to burden the budgets of undertakings that had bought sugar for speculative purposes. Upon examining how the Commission calculated the subsequent fine set out in Regulation 832/2005, the Latvian Government was concerned that it was impossible to achieve the objectives of Regulation 60/2004.[66]

However, EU law has enhanced the protection of property rights in cases concerning bank insolvency where EU law has played an important role. For instance, in a case on protection of the property rights of minority shareholders, the Constitutional Court had to address the principles derived from Directive 77/911/EEC.[67] The Court noted that EU membership does not mean that norms included in the directive will in all cases influence the scope of the fundamental rights included in the *Satversme*. It further stated:

> In the present matter, it is necessary to take into account the special character and place in commercial law of Directive 77/91/EEC as an instrument establishing minimum standards for protection of shareholders' rights. Article 25 and Article 29 of the above mentioned Directive have been elaborated taking into account the protection of the fundamental rights of shareholders effected in the Member States.

and

> It has already been indicated that Article 105 of the *Satversme* shall be interpreted in conjunction with the obligations of Latvia as a Member State of the EU and particularly in conjunction with Directive 77/91/EEC. The Constitutional Court has already concluded that there is no appeal against judgments of the Constitutional Court; therefore the Constitutional Court will verify whether the Court of Justice has already interpreted the above mentioned issue, whether that which has been established in the Directive is clear enough not to cause any reasonable doubt, and whether it is necessary to request a preliminary ruling from the CJEU.[68]

[64] Paragraph 28; Case T-324/05 *Estonia v. Commission* [2009] ECR II-03681, paras. 351–352.

[65] Ibid., para. 349.

[66] Ibid., para. 345.

[67] Judgment of the Constitutional Court in Case No. 2010-71-01 of 19 October 2011.

[68] Judgment of the Constitutional Court in Case No. 2008-47-01 of 28 May 2009, paras. 13.3 and para. 24, with reference to several CJEU rulings including in Case C-441/93 *Pafitis and others* [1996] ECR I-01347, paras. 24, 38 and 39.

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At the same time the Constitutional Court concluded that international norms do not prohibit the Member States from establishing a higher level of protection of rights in their constitutions, and there is no need to ask for a preliminary ruling.

Thus, application of EU law and its principles occurs in specific contexts, but the Constitutional Court has repeatedly emphasised that national standards can offer higher protection.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 Austerity programme In 2009, Latvia was hit by an economic crisis, which was partly exacerbated by the bankruptcy of a systemically important bank in Latvia that had significant external exposure.[69] In addition there was extensive use of bank loans and overspending of public funds in different areas of governance. In the aftermath of the crisis, the Constitutional Court was flooded with a number of constitutional claims, which have been labelled as 'crisis cases'. During 2009–2011, the Constitutional Court adopted more than 25 such judgments.[70] These cases concerned a wide variety of issues, such as the reduction of pensions,[71] indexation of pensions during the crisis,[72] reduction of benefits for parents of new-born children,[73] reduction of food rations for inmates,[74] the sale of pledged immovable

[69] For a discussion of the economic crisis and its escalation see Mits 2013 and Aslund and Dombrovskis 2011. On the role of the bankruptcy of a major systemic bank in Latvia with significant external exposure as a reason facilitating economic crisis, see http://www.reverta.lv/files/PDF%20finansu/2008_parskats/2008_5_lv.pdf.

[70] See n. 69. During that time, the financial deficit of the consolidated state budget reached 643 million EUR or approximately 3.5% of the Gross Domestic Product, and the prognosis was that the deficit might reach 1.8 billion EUR or approximately 9.5% of the Gross Domestic Product by the end of 2009. As a consequence, both the performance of the functions of the state and the possibility of economic recovery in the foreseeable future were put at risk. The state was compelled to turn to international institutions in order to obtain loans for the stabilisation of the economic situation and the financial system of the Republic of Latvia. The loans were conditional on a reduction of state budget expenditures by more than 700 million EUR. Consequently, the budget for the year 2009 had to be modified, reducing expenditures in this amount. Other alternatives for cutting expenditure, such as devaluation of the national currency, were regarded as unacceptable. With the adoption of the impugned provisions, the planned social insurance special budget for the year 2009 was more than 88 million LVL.

[71] Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009. See also Case No. 2009-76-01 of 31 March 2010, Case No. 2009-88-01 of 15 April 2010, and Case No. 2009-86-01 of 21 April 2010. See also Judgment in Case No. 2010-29-01 of 18 February 2011.

[72] Judgment of the Constitutional Court in Case No. 2009-08-01 of 26 November 2009.

[73] Judgment of the Constitutional Court in Case No. 2009-44-01 of 15 March 2010.

[74] Judgment of the Constitutional Court in Case No. 2009-69-03 of 9 March 2010.

property at auction,[75] state aid to producers of bio-fuels,[76] review of compensation in cases of invalidity,[77] reduction of subsistence benefits for children,[78] introduction of a capital gains tax for deposits in banks and private pension funds,[79] reduction of compensation for workers in cases of insolvency,[80] support for credit institutions in cases of crisis[81] and the reduction of judges' remuneration.[82] To summarise, most of the cases related to the reduction of payments from the state budget, and problems triggered by the crisis related to differences in the formerly applicable rules and the new rules adopted in reaction to the crisis.[83]

In the context of the 'crisis cases', the Constitutional Court reviewed more than sixty laws adopted by the *Saeima* or regulations adopted by the Cabinet of Ministers with regard to their compliance with the Constitution. However, only 40% were declared unconstitutional. This is the same percentage as, for instance, during 2011–2015.[84] This can be explained by the fact that in crisis situations, the legislature and executive are given more freedom of action in relation to measures which aim to stabilise the financial situation. The overall aim of such measures is to ensure the well-being of the society at large. Even in the cases in which a regulation was declared unconstitutional, the Court gave the legislature a considerable time limit to remedy the situation, considering the financial consequences of its rulings. For instance, in Case No. 2009-43-01, it was acknowledged that withheld pensions should be compensated for within five and a half years after the adoption of the judgment.[85] In Case No. 2010-12-03, it was established that producers of bio-fuels should receive compensation within four years after adoption of the judgment.[86]

At the same time it should be mentioned that the financial consequences of some of the judgments were important for the state budget.[87]

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[75] Judgment of the Constitutional Court in Case No. 2010-08-01 of 24 November 2010.

[76] Judgment of the Constitutional Court in Case No. 2010-12-03 of 27 October 2010.

[77] Judgment of the Constitutional Court in Case No. 2010-17-01 of 29 October 2010.

[78] Judgment of the Constitutional Court in Case No. 2010-18-01 of 10 January 2011.

[79] Judgment of the Constitutional Court in Case No. 2010-59-01 of 13 April 2011.

[80] Judgment of the Constitutional Court in Case No. 2010-69-01 of 10 June 2011.

[81] Judgment of the Constitutional Court in Case No.2010-71-01 of 19 October 2011 and Case No. 2010-60-01 of 30 March 2011.

[82] For instance Judgment of the Constitutional Court in Case No. 2009-11-01 of 18 January 2010 and Case No. 2009-111-01 of 22 June 2010.

[83] Skudra 2010, pp. 41–43.

[84] As of 20 December 2011, the Court has reviewed 82 norms in 50 cases. Of these norms, 32 were declared unconstitutional (39%).

[85] Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 35.3. See Sect. 2.6.

[86] Judgment of the Constitutional Court in Case No. 2010-12-03 of 27 October 2010, para. 17.

[87] For instance, to apply the Judgment in Case No. 2009-43-01 of 21 December 2009, approximately 105 million EUR were required from the state budget. See http://www.apollo.lv/zinas/saeima-nolemj-ietureto-pensiju-dalu-atmaksat-aprili/440829. This constituted about 2% of the income planned for the 2010 budget.

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Pensions cases One case that should be described in detail is the leading case on the reduction of pensions, which was linked to issues of global and EU financial governance. The petitions in this case affected a very large segment of the population. These cases also stood out due to the interpretation of the Court regarding the justiciability of economic and social rights, and decisions on international loans.[88] The case was prompted by the Law on Disbursement of State Pensions and State Allowances in the Period 2009–2012. According to the Law, the total amount of payments to be paid out to pensioners had to be cut by 10%, which resulted in a notable 70% cut in the payments to pensioners who continued to work.[89] The Constitutional Court dealt with the constitutionality of the law in the light of Arts. 1 (democracy and legitimate expectations), 91 (principle of equality), 105 (property rights) and 109 (social security rights) of the *Satversme*.[90] The main question was to what extent the contested provisions fell within the scope of Art. 109 of the *Satversme* and its social guarantees. Article 109 of the Constitution provides that '[e]veryone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law'. The Court noted that the principles derived from Art. 1, i.e., legitimate expectations and proportionality, might have a different meaning depending on the area of regulation. This might limit the control exercised by the Constitutional Court and the freedom of action exercised by the *Saeima*.[91] The same applies in relation to Art. 91, with regard to which the Constitutional Court has repeatedly stated that when ascertaining whether any legal provision of the Law on State Pensions contradicts the principle of equality, one has to take into account the area that the impugned provision falls into. The principle of equality usually applies along with other fundamental rights, especially because often a case cannot be adjudicated on the basis of this principle alone. The rights established in Art. 91 of the Constitution are 'relative'. Namely, although they stipulate equal treatment, they do not reveal the nature of such treatment.[92]

Although the Constitutional Court has stated that the right to receive a pension is deemed a property right, when determining whether a legal provision complies with Art. 105, one has to take into account whether the case falls rather into the area of social rights (Art. 109). In cases involving social rights, Art. 105 does not offer the same protection as in cases involving the restriction of property rights in their 'classic' sense.[93] The Constitutional Court acknowledged that a wide freedom of

[88] Mits 2013, pp. 13 and 11–53. See also Sects. 2.7 and 3.5.

[89] Article 9 of the Disbursement Law obliged the Cabinet of Ministers to reconsider the validity of the disbursement restrictions stipulated by this law twice a year and to submit to the *Saeima* either a report concerning the continuation of the restrictions, or, in the case of need, a draft law concerning their full or partial revocation accordingly.

[90] See Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009.

[91] See for instance Judgment of the Constitutional Court in Case No. 2006-04-01 of 8 November 2006, paras. 15.2 and 15.3.

[92] Judgment of the Constitutional Court in Case No. 2005-08-01 of 11 November 2005, paras. 5 and 6.1 and Judgment in Case No. 2006-04-01 of 8 November 2006, para. 15.

[93] Judgment of the Constitutional Court in Case No. 2007-01-01 of 8 June 2007, paras. 20 and 21.

action should be granted to the state in respect of property rights in the area of social rights. The Constitution does not guarantee a specific amount of pension. However, Art. 109 of the Constitution provides for more guarantees in the social field.

The Court referred to the international commitments of Latvia.[94] Among others, the Court referred to Art. 9 of the International Covenant on Economic, Social and Cultural Rights[95] and the ECHR.[96] It concluded that the reduction of the pension disbursement amount prescribed by the impugned legal provisions had to be considered in the context of the principles derived from Art. 1 of the *Satversme* and Protocol 1, Art. 1 of the ECHR, taking into account both the protection of property rights and the Latvian pension system.

The methodology applied by the Court was the same as applied to determine the validity of restrictions of civil and political rights: the restriction must be determined by law, pursue a legitimate aim and must comply with the principle of proportionality.[97]

At the same time, the Constitutional Court acknowledged that the political dimension of decisions taken by the state concerning the enactment of social rights is usually significant. Decisions in this area are made not so much following legal considerations as political ones.[98] In the area of social rights, it is not always possible to draw an exact dividing line between legal and political considerations, and the Constitutional Court should refrain from judging political matters, for this is primarily the area of authority of a democratically legitimated legislator.[99]

The Court acknowledged that on the one hand, the implementation of fundamental rights depends on the resources at the disposal of the state and society. The state should be allowed wide freedom of action when deciding matters relating to

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[94] Judgment of the Constitutional Court in Case No. 2007-03-01 of 18 October 2007, para. 11. Article 89 of the Constitution, stating that the State shall recognise and protect fundamental human rights in accordance with the Constitution and international agreements binding upon Latvia. This article clearly shows the constitutional legislator's intention to harmonise the constitutional provisions concerning human rights with the international regulation of human rights; Judgment of the Constitutional Court in Case No. 2007-24-01 of 9 May 2008, para. 11.

[95] UN Committee on Economic, Social and Cultural Rights, General Comment No. 19. The right to social security, E/C.12/GC/19 4 February 2008, para. 11. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Commission on Human Rights, U.N. ESCOR, 43d Sess., U.N. Doc. E/CN.4/1987/17. Even if a country has a substantial deficiency of financial resources, it is obliged to protect the weakest members of the society (see UN Committee on Economic, Social and Cultural Rights, General Comment No.3). The nature of States parties obligations, E/1991/23 14 December 1990, para. 12; UN Committee on Economic, Social and Cultural Rights, General Comment No. 6. The economic, social and cultural rights of older persons, E/1996/22 8 December 1995, para. 17.

[96] The ECtHR adjudicates on matters pertaining to social security and social assistance in the light of property rights as they are interpreted in Protocol 1, Art. 1 of the Convention. See ECtHR Judgment in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *Moskal v. Poland*, no. 10373/05, § 61, 15 September 2009.

[97] Mits 2013, p. 19.

[98] Judgment of the Constitutional Court in Case No. 2006-04-01 of 8 November 2006, para. 16.

[99] Ibid.

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social rights. In certain cases, an economic crisis can develop to the point where freedom of action must be granted to the legislator to enable the implementation of remedial measures – even if the latter might infringe on the fundamental rights established by the *Satversme*.[100] The impugned provisions were adopted in circumstances of rapid economic decline in Latvia. State budget revenues were decreasing and unemployment was growing, bringing about an increase in social insurance expenditure. In the second quarter of 2009, Latvia underwent the most rapid economic decline in the European Union.[101] The austerity measures hit many sectors, and public expenditure was cut by 25%, including wages in the public sector. Latvia had to borrow some 7.5 billion EUR.

However, on the other hand, the state is not entitled to refuse to enact measures to protect the core rights related to social protection in the Constitution. In this case the rights are not just declaratory, and their protection has a constitutional value in Latvia.[102] The Constitutional Court pointed out that even if the state reduces the pension disbursement amounts for a period of time in a situation of rapid economic recession, there is still a definite body of fundamental rights from which the state cannot derogate. In this context, it is essential to determine whether the substance of the right of pension recipients to social security has been infringed.[103] In its judgments, the Constitutional Court has repeatedly adjudicated the constitutional compliance of legal provisions pertaining to social rights, affirming that the state is responsible for the system of social and economic protection and its

[100] In this context, the Court referred to the concurring opinion of judge Thomassen in *Kjartan Ásmundsson v. Iceland*, no. 60669/00, ECHR 2004-IX.

[101] Thus, for instance, the revenues of the consolidated state budget during the first six months of 2009 were 15% lower than those of the same time period in 2008. The Ministry of Welfare indicated that the actual expenditures of the social insurance special budget were approximately 122 million EUR higher than revenues during the first six months of 2009. At the same time, the rapid increase of wages during the preceding years had brought about an increase in the expenditures of the social insurance special budget. At the same time, the expenditures of the consolidated state budget during the first six months of 2009 were 7.2% higher than those of the same time period in 2008. The drop in the Gross Domestic Product in comparison with the first six months of 2008 was 18.7%. Concerning the need to balance the revenues and expenditures of the social security system, the *Saeima* indicated that, as a result of the economic crisis, wages had decreased and unemployment increased. Consequently, the social insurance special budget revenues dropped. The number of socially insured persons had also decreased by 12.3%. The drop in revenues persisted also in the third quarter of 2009, reaching 18.4%. See http://www.csb.gov.lv/csp/content/?cat=244. The projected amount of the Government's external debt for the second half of 2009 was approximately 33.2% of the Gross Domestic Product, and it had increased by approximately 70% over 2008, see http://ec.europa.eu/economy_finance/pdf/2009/autumnforecasts/lv_en.pdf. See also Sect. 2.7.

[102] Judgment of the Constitutional Court in Case No. 2000-08-0109 of 13 March 2001.

[103] See Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 31, and ECtHR Judgment in *Kjartan Ásmundsson v. Iceland*, supra n. 100, para. 39. See also notes 73–75.

maintenance.[104] When altering the social security system, the legislator is bound by constitutional guarantees. The Court noted that the haste in the preparation and adoption of the impugned provisions, as well as the fact that the public had not been duly and timely informed prior to the adoption of these provisions, should be viewed negatively.[105]

The Constitutional Court held that a pension disbursement reduction can have a legitimate end – to solve financial problems in the social budget. There is a need to preclude a deficit in the state pension budget as well as a need to ensure that pension disbursements continue in the future.[106] The Court noted that the sustainability of the pension system is closely related to the overall economic situation in the state. Thus, in circumstances of major economic recession, the legislator should act as swiftly, concertedly and decidedly as possible. However, the economic situation in the state, or the need to reduce the budget deficit, in the absence of other legitimate ends, cannot serve as an overarching justification for the state to restrict rights that have previously been granted.[107] Therefore, the task of the Court was to determine whether the impugned provisions were reasonable and brought about a short-term or long-term satisfaction of needs as well as whether the provisions in question were transparent and had been made public.[108]

The *Saeima* and the Cabinet of Ministers repeatedly referred to the liabilities to international creditors as one of the reasons for the adoption of measures to reduce pensions. On 19 December 2008, a Stand-By Agreement was made between Latvia and the IMF. On 20 January 2009, a Memorandum of Understanding between the EU and Latvia was concluded, which was followed by a Loan Agreement between the EU, Latvia and the Bank of Latvia.[109] However, the information presented to the Court was contradictory on the question of to what extent international creditors had specifically asked for pensions to be cut.[110]

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[104] Judgment of the Constitutional Court in Case No. 2001-11-0106 of 25 February 2002, para. 1 and Case No. 2005-19-01 of 22 December 2005, para. 9.

[105] Judgment of the Constitutional Court in Case No. 2009-08-01 of 26 November 2009, para. 17.2.

[106] Judgment of the Constitutional Court in Case No. 2001-12-01 of 19 March 2002, para. 2. Judgment of the Constitutional Court in Case No. 2005-08-01 of 11 November 2005, para. 8 and Case No. 2009-43-01 of 21 December 2009, para. 27.2.

[107] Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 27.2. The decrease of budget expenditures reached by means of the impugned provisions was approximately 17.4% or one-sixth of the total reduction of the consolidated state budget.

[108] Ibid., para. 29.2. See also Langa 2009, p. 33.

[109] See also Mits 2013, pp. 14–15.

[110] See Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 30.2.2. The Ministry of Welfare explained that the Disbursement Law Draft had to be drawn up in a limited period of time, and it was not possible to consider alternatives due to a lack of time. The Cabinet of Ministers, in turn, explained that debates concerning the required reduction of the state budget of over 700 million EUR were extremely difficult. Other alternatives to the reduction of pensions were considered in these debates. Yet, as a result, an agreement was reached only with regard to one specific solution. Moreover, it would not be rational to discuss other solutions during

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The Constitutional Court established that the original documents related to the receipt of the international loans did not contain information that could be associated with a requirement to adopt the impugned provisions.[111] Although the international creditors prescribed the main goals to be achieved by the state, the choices of the most suitable and appropriate means for attainment of these objectives were left to the state's own discretion. Moreover, the obligations undertaken by the Government with respect to the international creditors as such did not justify the adoption of provisions in breach of fundamental rights.

The Court noted that the budget deficit was associated with excessively generous parental allowances and inappropriately regulated sickness benefits (leading to overcompensation in some cases). Moreover, there had been an outflow of large amounts of social security funds to social groups that cannot be deemed as disadvantaged or low-income.

The Court did not discuss the nature of the Stand-By Arrangement and Memorandum of Understanding and avoided qualifying them as international treaties. It rather focused on the constitutional division of powers.[112]

In relation to the competence to conclude agreements on state loans, the Court noted:

> [The] principle of separation of powers delimits the authority of the Cabinet of Ministers. In accordance with this principle, the Constitution confers the lawmaking powers – namely, the powers to decide the most important matters for the state – to the *Saeima* in particular, and, in individual cases, to citizens of the Republic of Latvia. … Although the Cabinet of Ministers is entitled to adopt regulatory enactments, the latter are not permitted to contain such provisions that cannot be deemed as aids for the implementation of the provisions of the law.[113]

> Thus, the *Saeima* is obliged to decide all the most important matters of the State and public life by itself through legislation. Furthermore, the first part of Article 68 of the Constitution prescribes that all international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the *Saeima*.[114]

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the drafting of the Disbursement Law also because the budget deficit reduction had to be settled immediately. However, the Court established that other alternatives existed. See n. 98.

[111] See Judgment of the Constitutional Court in the Case No. 2009-43-01 of 21 December 2009 para. 30.1. At the same time, in para. 7.2 of the Supplementary Memorandum of Understanding between the European Community and the Republic of Latvia of 13 July 2009, Latvia pledged to reduce the pension expenditure by 10% for non-employed pensioners and by 70% for employed pensioners. With reference to the commitment between the IMF and the Republic of Latvia, the same pledge was included in the Economic Stabilisation and Growth Revival Programme for Latvia adopted by the *Saeima* on 16 June 2009 (para. 5.2). No evidence that the specific law was required by the IMF and the EU – for instance, in the negotiation minutes – was submitted to the Constitutional Court.

[112] See Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009 para. 30.1. See Mits 2013, pp. 28–29 for a more detailed analysis. See also Sects. 3.5 and 3.6 of this report.

[113] Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 30.1.

[114] Ibid.

Therefore, according to the Court, the budget is among the most important areas in which the *Saeima* exercises its parliamentary control over actions of the Government. Other institutions can take decisions that decisively affect the state budget only in the cases provided in the *Satversme* or if consent is given by the *Saeima* and the fundamental principles of a democratic state are observed.[115]

The Constitutional Court recognised that the matters dealt with by the Cabinet of Ministers in order to enter into the respective commitments with the international creditors were sufficiently important for the state and public life to be decided through legislation by the *Saeima*.[116] The Constitutional Court maintained that the fundamental decision to take an international loan and the terms and conditions thereof are to be deemed as an important and significant matter of state and public life, and that, in accordance with the procedure established by the *Satversme*, they must be decided by the legislator. According to the Court, the Cabinet of Ministers cannot restrict fundamental rights enshrined in Art. 109 of the Constitution by assuming international obligations. The *Saeima* is still under an obligation to provide authorisation for the Government in matters of such fundamental importance. This authorisation can be given *post factum*. A decision of the *Saeima* is only required if an agreement is recognised as an international treaty in the meaning of Art. 68(1) of the *Satversme*. In other cases the *Saeima* is free to choose the form of authorisation.[117]

The Constitutional Court established that neither the Cabinet of Ministers nor the *Saeima* had conducted an objective and well-weighed analysis regarding the consequences of the adoption of the impugned provisions or regarding other, less restrictive means for the attainment of the legitimate end. The annotation to the Draft of the Disbursement Law also indicates that no consultations with experts ever took place.

This led the Court to conclude that no alternatives were properly considered, for it was simply impossible to draft other adequate proposals in such a short period of time. Similarly, it was impossible to give careful and detailed consideration to such major issues as the potential economic effect and social consequences of these alternative solutions within the space of a few days.[118] Consequently, the

[115] Judgment of the Constitutional Court in Case No. 2011-11-01 of 3 February 2012, para. 10.

[116] See, however, the Letter of the Minister for Justice of the Republic of Latvia to the European Commission, Annex 3 to the Loan Agreement between the European Community and the Republic of Latvia of January 2009. In his letter the Minister formally noted that the commitments entered into by Latvia are taken in accordance with the *Satversme*. http://ec.europa.eu/latvija/documents/pievienotie_faili/29.01.09.la.doc.

[117] Mits 2013, p. 30. This interpretation has been subsequently confirmed by the *Saeima*. The Court itself remains very general in the judgment about the form of authorisation required, with Mits describing the alternatives that the *Saeima* can use according to guidelines provided by the Court. These are an announcement indicating the international lenders' restrictions on the amount of the loan and its spending, or a report by the Minister of Finance explaining the provisions of the loan.

[118] It is acknowledged in the legal doctrine that delay, unpredictability and inconsistency in the exercise of state power prove that measures carried out and implemented by the state have led to a

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Constitutional Court had no grounds to deem the alternative solutions – which lacked the necessary justification and analysis of economic and social consequences – to be sufficiently well-considered alternatives to the impugned provisions.[119]

The ESM Treaty There was debate whether a referendum was needed for ratification of the Treaty Establishing the European Stability Mechanism (ESM Treaty), in which experts were involved.[120] The experts concluded that the role of the European Commission had been strengthened but that it had not been accorded new competences and its powers were limited to making recommendations and suggestions. Further, the competences of the CJEU did not exceed those set out in the TEU and TFEU. Experts also concluded that Latvia had already transferred competences to the EU in the area of economic policy upon ratifying the Lisbon Treaty. Moreover, Art. 2 of the ESM Treaty provides that it is applicable in line with EU Treaties.[121] Therefore, the experts found that there were insufficient arguments to conclude that the ESM represents substantive changes in the conditions of Latvia's membership in the EU and, consequently, the *Saeima* could ratify the Treaty without calling for a referendum. Ultimately, a political compromise was reached with the opposition parties, and the Treaty was ratified according to Art. 68(2) of the *Satversme*. No further debates have taken place.[122]

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1–2.8.6 The Constitutional Court has never requested a preliminary ruling from the CJEU. Nevertheless, the Constitutional Court has referred to EU law and the case law of the CJEU often, especially in environmental cases. It can be argued that the position of the Court is that the different systems can overlap and interact,

violation of the principle of proportionality – see Harris et al. 2009, p. 676. The ECtHR has also stated that 'uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner' (*Broniowski v. Poland* [GC], no. 31443/96, § 151, NS 184, ECHR 2004-V.

[119] Constitutional Court Judgment in Case No. 2009-43-01 of 21 December 2009. See also the Amendment to the Law on State Pension and State Allowance Disbursement in the Period from 2009 to 2012 adopted on 17 September 2009 and the annotation to this draft law http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/CDF73564B79BB4E3C225761F004BE61E?OpenDocument.

[120] See Opinion of the Council of Independent Experts on International and European Law on the question of the Treaty on stability, co-ordination and management in economic and monetary union from the point of view of EU law and the *Satversme*, 20 March 2012. Available in Latvian at http://www.mfa.gov.lv/nep-atzinums%20nr%201-20-mar-2012.pdf.

[121] It should be noted that the expert analysis was to a large extent similar to the analysis by the CJEU in Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756.

[122] See also Sect. 3.5.

without mutual hierarchical subordination.[123] On two occasions the Court has verified the necessity to submit a request for a preliminary ruling to the CJEU. In case No. 2008-47-01, the Court acknowledged that the provisions of Directive 2005/60/EC (the Third Money Laundering Directive) are sufficiently clear and there are no doubts about their interpretation (*acte clair*). In case No. 2010-71-01, the Court concluded that the outcome of the case would not depend on the interpretation of the Directive in question.[124]

However, both the Administrative and Civil Law Departments of the Supreme Court have asked for preliminary rulings on a number of occasions. According to the Ministry of Justice, as of 25 August 2014, Latvian courts have requested 32 preliminary rulings. Most of the cases have concerned the following areas: co-operation in civil matters, customs, Justice and Home Affairs, taxes (including the activities of the State Revenue Service – 16 cases) and social policy. In addition, the Government has intervened in several cases such as the Sugar Saga cases, a case on notaries and cases on EU citizenship.

The general position of the Constitutional Court is that: (a) Latvia should observe its international obligations and (b) Latvia is allowed to offer a higher standard of protection of fundamental rights.

In terms of data regarding constitutional review by the Latvian Constitutional Court, in total 246 judgments have been adopted by the Court from its establishment in 1996 until 21 August 2014. As noted above, about 80% of the case law of the Constitutional Court of Latvia concerns Chapter 8 on fundamental rights. One of the main grounds for review is the right to a fair trial (access to justice) set out in Art. 92 of the *Satversme*. The constitutionality of a norm in relation to Art. 92 has been reviewed in 48 Constitutional Court judgments as of 21 August 2014. Only Art. 91 (equality and non-discrimination) has served as a basis more frequently, in 81 judgments. The third most frequently invoked ground is Art. 105 (property rights), which has been under consideration in 45 cases. Further, as noted above, in more than one-half of the individual applications that refer to Art. 1, reference has been made to the principle of legitimate expectations in combination with some other fundamental right.

The question remains to what extent the accession of the EU to the ECHR would affect national case law. The precise conditions for the EU's accession to the ECHR remain uncertain, especially in the context of the division of competences between the CJEU and the ECtHR. Therefore, it is difficult to come up with a conclusive answer on whether the governments acting within the EU framework would be under a shield. Moreover, one should also closely follow further developments initiated by the Commission on extensive fundamental rights monitoring in all EU Member States.[125]

[123] MacCormick 1993, p. 9.

[124] Judgment of the Constitutional Court in Case No. 2008-47-01 of 28 May 2009, para. 15.2 and No. 2010-71-01 of 19 November 2011, para. 24.

[125] European Commission presents a framework to safeguard the rule of law in the European Union, 11 March 2014, IP/14/237. Available at http://europa.eu/rapid/press-release_IP-14-237_en.htm.

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As argued by Nollkaemper, to the extent that international law becomes part of the European legal order, the application of 'Europeanised' rules of international law is no longer only a function of the combination of weak principles of international law and constitutional law, but becomes a matter of EU law proper, notably with a view to its uniform application and interpretation.[126]

This raises doubts whether national courts are the best agents to transpose European values in the domestic legal order. Nollkaemper suggests that a preliminary problem for considering national courts as an institutional force that can help to secure compliance is the fact that these courts are organs of the very critics that they are to control.[127] Instead, in EU law the primary task for the courts is to ensure compliance, which should be distinguished from implementation and enforcement.

2.9 Other Constitutional Rights and Principles

2.9.1 No further significant issues have arisen in Latvia with regard to constitutional rules and EU law.

With regard to systemic aspects in the protection of fundamental rights and the rule of law in the EU Member States, the following further observations are of relevance. The procedurally limited possibilities to apply Art. 2 TEU and Art. 7 TEU as well as Art. 51 of the Charter of the Fundamental Rights to purely internal situations raises the role of the national courts especially in areas that do not fall within EU competence but where there is a risk of violation of fundamental rights.

The question remains to what extent the EU is entitled to carry out such human rights monitoring. The EU remains procedurally ill-equipped to monitor respect of the fundamental values on which it prides itself on being based.[128] As argued by Sarooshi, it is true that a state that transfers its powers to an international organisation does not confer its powers *in toto* on the organisation. The precise degree is difficult to measure.[129] The difficulty in finding the right balance lies in finding the right relationship between the EU institutions, the CJEU and national constitutional courts.

The comparative studies conducted so far reveal that although the procedural powers, modes of legal reasoning and conceptions of the role of the judiciary in the constitutional system vary, the judiciaries of various EU Member States have so far reacted similarly to the reforms of the EMU, by significantly expanding their powers to review and even to pronounce certain measures as void.[130] Therefore,

[126] Nollkaemper 2012, p. 159.

[127] For a critical assessment see Nollkaemper 2012, pp. 162–168.

[128] Editorial Comments, 'Fundamental rights and EU membership: Do as I say, not as I do!' (2012) CML Rev. 49, 481–488, 487–488.

[129] Sarooshi 2007, pp. 69 and 120–122.

[130] Fabbrini 2014, pp. 103–104.

there is no risk that the new measures adopted under the intergovernmental approach might affect the competence of national judiciaries.

At the same time, some scholars claim that judicial involvement in the fiscal domain raises a number of constitutional concerns. Federico Fabbrini argues that political branches have greater expertise and instrumental capacity than courts to make decisions in fiscal matters. Political process is better able to represent the voice of the people. Although the EU needs to improve its legitimacy and democracy, this requires elaborating the accountability of the EU political process, rather than increasing review and interference by courts.[131]

Other authors claim that the crisis which hit the EU was not only financial but, most importantly, it touched upon the functioning principles of the Union as set out in Art. 2 TEU, including the principle of the rule of law. For instance, Cesare Pinelli convincingly argues that the values mentioned in Art. 2 TEU are based on the presumption that they are common to the Member States and constitute the foundation of the EU.[132] Commentators attribute great importance to weakness in the rule of law for the extent of the economic crisis. Due to endemic corruption, weak institutional capacities or insufficient resources at the administrative or judicial levels, compliance with EU standards is seriously questioned.[133] Commentators have addressed the issue of systemic deficiency in the rule of law. Public authorities must act in accordance with constitutional norms, including fundamental rights, and general rules that have been laid down by superior organs, usually a parliament. The deficient rule of domestic law automatically translates into a deficient rule of EU law.[134] In this context, creating a mechanism for establishing the concept of systemic deficiency neither creates new obligations for the Member States nor expands the EU's field of action.[135]

There have already been a number of proposals tabled for appropriate mechanisms, such as reinvention of the 'Copenhagen Criteria',[136] and introducing a more comprehensive co-operation and verification mechanism, following the practice of

[131] Ibid., pp. 104–105.

[132] Pinelli 2012, p. 8.

[133] Von Bogdandy and Ioannidis 2014, pp. 59 and 75. See also (2013, October 4) EU seeks greater role in policing national democracies. The Oxford Analytica Daily Brief; and Butler 2012.

[134] Von Bogdandy and Ioannidis 2014, pp. 63–64.

[135] See von Bogdandy and Ioannidis 2014, pp. 63–64 and 67, and von Bogdandy et al. 2012, pp. 507–508. In certain cases domestic fundamental rights violations would come within the ambit of Union law. Those would be cases where violations would affect the 'substance of EU citizens' rights', thus depriving the substance of its practical meaning (substance of rights according to C-34/09 *Ruiz Zambrano* [2011] ECR I-01177).

[136] See Ralli, E. (2014, January 14). Proposal for a new 'Copenhagen mechanism' to ensure compliance with EU values and accession criteria. New Europe. http://www.neurope.eu/article/meps-set-enhance-protection-human-rights. See European Union Agency for Fundamental Rights, Annual report 2013, 'An EU internal strategic framework for fundamental rights: joining forces to achieve better results', pp. 7–20. http://fra.europa.eu/sites/default/files/annual-report-2013-focus_en.pdf and supra n. 125. For critical remarks on the lack of ongoing human rights monitoring, see Albi 2009, p. 47.

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the World Bank and the IMF which make access to their funds contingent upon building more efficient state institutions, and which would be capable of generating confidence in the rule of law.[137]

As noted by Oscar Schachter, the critical fact is that so far, states alone have provided the structures of authority needed to cope with the claims of competing societal groups and to provide the public justice that is essential to social order and responsibility.[138] In general, there is a deficit of common institutions which could ensure equal protection of the law above the national level. Therefore, there is an inevitable need for multi-issue transnational regulation in the EU.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 The Constitutional Court has referred to common constitutional traditions on several occasions. For instance, in a case on elections, it referred to the Code of Good Practice in Electoral Matters adopted by the Venice Commission. The notion has further been used to interpret Art. 101 of the *Satversme*.[139]

The Constitutional Court has also referred to common EU values in environmental cases. For instance, it has stated that:

> According to European Union law, obligations of Latvia regarding conservation of the environment are a part of the common responsibility of the Member States, because the nature of Latvia is a part of the common heritage of the entire European Community. Latvia has no legal basis to make alterations to these territories, because this would hinder attainment of the objectives established in the directives of the European Union … .[140]

For the purposes of this project it may be noted that the independence of the judiciary is a general principle of law, as all major legal systems appear to formally embrace the principle.[141] Respect for this principle is also crucial for ensuring that the principle of the rule of law is preserved at both EU and national level.

It should be noted that there are differences between the constitutional traditions of EU Member States. Even where common terminology is used, the meaning of the terms may be different. Moreover, rulings of the ECtHR have demonstrated that there may be conflicts between national courts and the ECtHR. Therefore, the broad

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[137] Von Bogdandy and Ioannidis 2014, pp. 63–64 and 87–88. Something resembling this is currently provided in the European Financial Stability Facility and the European Stability Mechanism.

[138] Schachter 1998, pp. 22–23.

[139] See Judgment of the Constitutional Court in Case No. 2009-45-01 of 22 February 2010, para. 9. See also http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev-e.

[140] Judgment of the Constitutional Court in Case No. 2007-11-03 of 17 January 2008, para. 25.4, with extensive references to CJEU case law in this field.

[141] Nollkaemper 2012, p. 167.

concepts enshrined in Art. 2 TEU represent a challenge for the EU in terms of finding exact definitions in the future.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As noted above in Sect. 2.7, the Constitutional Court has concluded that international norms do not prohibit the establishment of a higher level of protection at the national level.

According to Art. 89 of the *Satversme*, the state protects human rights in accordance with the *Satversme*, laws and international treaties binding for Latvia. The Court has concluded that this provision aims at achieving harmony between the provisions of the *Satversme* and international human rights obligations.[142] The protection offered by the *Satversme* cannot be lower than that derived from international instruments, as this would violate the principle of the rule of law enshrined in Art. 1 of the *Satversme*. Therefore, when interpreting the *Satversme*, a harmonious solution should be sought.[143] In addition, it should be borne in mind that the *Satversme* can provide a higher protection of human rights than international human rights instruments.[144]

The possibility of conflicts between norms under different regimes is inevitable. The EU Treaties form a special regime in international law, and they are subject to a generally accepted principle that when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.[145] The role of national courts in this context appears to be that of agents of compliance. This is best developed in the so-called transnational legal process theory, which in its explanation of compliance attributes considerable weight to the extent to which international law is incorporated in domestic legislation and given effect in the domestic courts. Apart from EU law, internal focus is particularly present with regard to human rights law.[146]

It should also be noted that in certain cases, the EU offers a higher level of protection than national courts or the ECtHR. According to the Treaties, the CJEU

[142] For instance, Judgments of the Constitutional Court in Cases No. 2003-04-01 of 27 June 2003, para. 1; and No. 2004-10-01 of 17 January 2005, para. 7.1.

[143] Judgment of the Constitutional Court in Case No. 2004-18-0106 of 13 May 2004, para. 5.

[144] Judgments of the Constitutional Court in Cases No. 2001-06-03 of 22 February 2002, para. 3; and No. 2005-02-01-6 of 14 September 2005, para. 10.

[145] For definitions and groupings of special regimes see Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, International Law Commission, 58th session (13 April 2006) UN Doc A/CN.4/L.682, 65-101. and Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006), UN Doc A/61/10, para. 251.

[146] Nollkaemper 2012, pp. 164–165.

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should ensure that it preserves its role as the core guardian ensuring observation of the rule of law in the EU. In this context, for instance cases related to citizenship and immigration show the potential of EU law to address issues in a more efficient way.[147] The same can be said about market-related cases where service providers and companies move across borders.[148]

In the context of the protection of fundamental rights, the national context should also be taken into account. For instance, from the Latvian perspective, at least two rulings of the ECtHR have been doubtful due to their insensitivity to the national legal situation. The courts should remain mindful of the specific circumstances of the cases before them from a historical and legal point of view.[149]

Therefore, international courts not only face the problem of establishing their standards, but they should remain mindful of national and historical circumstances when evaluating each particular case. This makes the task of identifying common traditions and standards even more difficult.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 Debates on constitutional values took place recently when the *Saeima* adopted the Preamble to the Constitution in 2014.[150] Although the Preamble mentions respect for human rights and the rights of minorities, it also emphasises that the Latvian identity has since ancient times been shaped by Latvians and Livs, and includes the Latvian language and human and Christian values. It also mentions freedom, equality, justice, work and family as the foundations of society. Reference to democratic development in Europe is also included.

If it were to happen that serious constitutional rights and values were affected by EU law, the Constitutional Court would have several options to reconcile any infringement of the *Satversme* with the risk of sanctions under the EU regime. First, the Court could request a preliminary ruling. Secondly, in our view, the Court could remedy the situation by interpretation and thirdly, it could rule that the national provision will lose its force at a future date.

In principle, the recommendation in the Questionnaire to suspend the application of EU measures if important constitutional issues have been identified by a number of constitutional courts, could be supported. However, the mechanism for

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[147] The EU citizenship cases are well established, from e.g. Case C-184/99 *Grzelczyk* [2001] ECR I-06193 to the more recent Case C-34/09 *Zambrano* [2011] ECR I-01177.

[148] For instance, Case C-341/05 *Laval* [2007] ECR I-11767.

[149] See also Sect. 2.13. In the Latvian context, see Case of *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X and Case of *Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009. For details see Krūma 2014, pp. 392–395.

[150] The debates were reported by the weekly legal journal *Jurista Vards*, 8 July 2014, and 22 October 2013.

implementation of such a recommendation remains unclear. Moreover, the very existence and competence of the constitutional courts and constitutions vary. If such a recommendation is proposed, it should be focused and limited.

As noted in the results of a project led by Ronald Inglehart, the identification of values requires a detailed analysis which illustrates that people's beliefs play a key role in economic development, the emergence and flourishing of democratic institutions, the rise of gender equality and the extent to which societies have effective government.[151] Therefore, if the EU is serious about identifying the content of the common constitutional values, a comprehensive exercise to determine the correct interpretation of the values mentioned in Art. 2 TEU is required.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1–2.13.4 The question on the overall standard of protection is complex for a number of reasons. As argued by De Witte, the CJEU may decide to privilege the right to property, whereas one or another national court may want to give greater weight to the opposed right to privacy (or vice versa), and it is impossible to decide which of the courts is then offering a higher protection to fundamental rights.[152]

In order to break away from domestic concepts, the best way forward for the Union would be to develop its own sovereign values that would be attached to the exercise of transferred sovereign powers.[153] In our opinion, the role of the EU should become stronger to ensure that the standard of protection of fundamental rights and the rule of law are not reduced in particular Member States. This has already incited a reaction from different EU institutions, including the CJEU, and academic literature. The focus is on the need to strengthen the EU's ability to intervene in purely internal situations in order to protect fundamental rights.

The most recent crisis situations in 2012 in different EU countries were not limited to the fields of employment or economic policies in general, but also concerned the political systems; social unrest, public protests, anti-migrant initiatives by political parties, decreasing trust in government or neighbouring states and violent expressions of extremist ideology were quite widespread.[154] There are areas in which some Member States have experienced setbacks in human rights

[151] See Values Change the World. World Values Survey. http://www.iffs.se/wp-content/uploads/2012/12/WVS-brochure-web.pdf.

[152] De Witte 2009, p. 44.

[153] Sarooshi 2005, p. 74. On the EU value system, see also Nijman and Nollkaemper 2007, p. 346.

[154] European Union Agency for Fundamental Rights (FRA), Fundamental rights: challenges and achievements in 2012, Annual Report 2012. Luxembourg 2013, pp. 19–22. See also (2013, October 4) EU seeks greater role in policing national democracies. The Oxford Analytica Daily Brief; and (2013, May 20) Hungary may prompt greater monitoring of democracy in EU. The Oxford Analytica Daily Brief.

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protection, such as the controversial treatment of Roma, limitations on media freedom, discrimination of migrants in some of the new Member States, growing radicalism in Europe and the like.[155] Neither the constitutional courts nor any other courts have been able to offer sufficient mechanisms to cope with these systemic problems.

It should also be noted that there are certain rights for which the EU provides much higher protection than the ECtHR. One area which stands out is the right to family reunification and the rights of third country nationals who are long term residents.[156]

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.4 The rules of the *Satversme* and the relevant procedures have been explained in Part 1. In addition, the rules on the ratification of international treaties have been spelt out in the Law on International Treaties, while the hierarchy of sources of law is provided for in the Law on Administrative Procedure.

It is commonly thought that one of the key differences between EU law and public international law is that while in public international law the effect of a norm in the national legal order is determined by national law instead of international law, in EU law such effect is a matter of EU law instead of national law.[157]

3.2 The Position of International Law in National Law

3.2.1–3.2.2 The classification of monism and dualism is not of major importance in Latvia. Scholars have rightly classified the Latvian case as *de facto* monism. The

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[155] In relation to Hungary, see Editorial Comments, 'Fundamental rights and EU membership: Do as I say, not as I do!' CML Rev. (2012) 49, 481–488, 486. Pinelli 2012, p. 5. In relation to migrant workers see articles in the volume Isin and Saward 2013. Useful information on different human rights violations is also available on the website of the European Commission against Racism and Intolerance, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp. In relation to the Cooperation and Verification Mechanism for Bulgaria and Romania, see FRA Annual Report 2012, n. 154, pp. 22–23. See also European Agency for Fundamental Rights (2013) Racism, intolerance, discrimination: learning from experiences in Hungary and Greece, FRA Thematic Situation Report. http://fra.europa.eu/en/publication/2013/racism-discrimination-intolerance-and-extremism-learning-experiences-greece-and. See also Nielsen, N.J. (2014, January 15) Radicalism on the rise in Europe, EU commissioner says. EU Observer. http://euobserver.com/justice/122735.

[156] See for instance, *Biao v. Denmark*, no. 38590/10, 25 March (appealed to the Grand Chamber).

[157] Nollkaemper 2012, p. 168.

Satversme does not deal with issues of hierarchy. Domestic laws refer to situations of collision between international and national law, but judges tend to prefer to apply international law.[158]

It should be noted that the general approach adopted by the Constitutional Court is one of consistent interpretation. The practice of consistent interpretation has great potential to secure compliance with European and international obligations.[159]

The Latvian Constitutional Court supports the principle that national law should be interpreted in line with Latvia's international obligations. This also corresponds to the requirements of international law. In certain cases the Constitutional Court has recognised the direct effect of norms of international law.[160] The Court has stated that the text of the ECHR and the practice of ECtHR serve as means of interpretation on the level of constitutional law to determine the content and the scope of fundamental rights and the principle of the rule of law.[161] The Court further has directly applied the International Convention on Elimination of Racial Discrimination, the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.

As argued by Nollkaemper, it appears that there remain fundamental differences between EU law and international law with respect to the principles that underlie the compliance-inducing role of national courts. The principles of EU law, with regard to supremacy, direct effect, consistent interpretation and state liability are more developed, more powerful and more embedded in national law.[162] In this context, the EU has strengthened international law by proclaiming that its rules are binding for the EU.[163] Therefore, even if the Member States have been reserved in the application of international law, the EU is bringing international law into its scope of application. In this context, as Nollkaemper argues, international law becomes Europeanised.

The provisions of treaties and decisions of international organisations that are part of the legal order of the EU can acquire direct effect as defined by EU law, not international law. However, treaties are not entirely equated to internal EU rules, and the principle of direct effect as it applies to treaties is not identical to the principle as it applies to internal rules.[164] The CJEU itself has proclaimed that EU law should be interpreted in conformity with international law.[165]

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[158] Mits 2006, p. 429.

[159] Nollkaemper 2012, p. 180.

[160] See Case No. 2004-18-0106 of 13 May 2005, para. 5. See also Nollkaemper 2012, pp. 178–179.

[161] See Judgment of the Constitutional Court in Case No. 2000-03-01 of 30 August 2000, para. 5 and Case No. 2001-08-01 of 17 January 2002, para. 3.

[162] Nollkaemper 2012, p. 188.

[163] See Case C-286/90 *Anjkagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-06019.

[164] Nollkaemper 2012, pp. 190–191. See also Case C-300/98 *Dior and Others* [2000] ECR I-11307, Case C-308/06 *Intertanko and Others*, [2008] ECR I-04057.

[165] Case 286/90 *Anjkagemyndigheden v. Poulsen and Diva Navigation*, supra n. 163.

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It has been noted that 'the cause of the weak position of general international law is a very significant diversity in the practices of states'.[166] This raises the question not only of the compatibility of national law with international and EU law, but also to what extent national law is capable of accommodating modern day realities, including the need of individuals to move and reside across borders.

3.3 Democratic Control

3.3.1–3.3.2 According to the *Satversme*, referendums on international treaties are not allowed. The role of the *Saeima* is important; however, in practice the executive branch has more competence and knowledge. The position of the Constitutional Court is cautious, depending on the case at stake.[167]

The question remains as to the form in which the delegation of powers takes place. In this context, there is a difference to be drawn between the inter-governmental and Community/Union methods. Under the first, national institutions still preserve substantive competence to authorise ratification.

3.4 Judicial Review

3.4.1 There have been no cases in which the Latvian courts have reviewed international measures directly. However, there have been cases where either the Constitutional Court or the legal doctrine have disagreed with the rulings of international bodies because they failed to respect national particularities.[168]

The Latvian Constitutional Court took the lead in ensuring a smooth accession and the interpretation of national law in accordance with EU law already before accession. Art. 32(3) of the Law on the Constitutional Court provides that a contested norm loses its force upon adoption of a ruling declaring the norm to be unconstitutional. The law also allows the Court to decide on the moment at which the norm will lose its force, for which reasons must be provided. The Court has pronounced that it should ensure that its rulings bring about legal stability and clarity.[169] This specifically applies in cases involving substantive financial resources.[170]

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[166] Nollkaemper 2012, p. 194.

[167] See, for instance, Judgment of the Constitutional Court in Case No. 2008-35-01 of 7 April 2009, available at http://www.satv.tiesa.gov.lv/upload/spriedums-2008-35-01_ENG.pdf.

[168] See for instance *Slivenko v. Latvia*, supra n. 149, and *Andrejeva v. Latvia*, supra n. 149. See also Communication No. 1621/2007, *Raihman v. Latvia*, CCPR/C/100/D/1621/2007, 30 November 2010.

[169] See Judgment of the Constitutional Court in Case No. 2009-43-01 of 21 December 2009, para. 35.1. and Judgment of the Constitutional Court in Case No. 2002-04-03 of 22 October 2002, para. 3.

[170] For instance, Judgment of the Constitutional Court in Case No. 2010-44-01 of 20 December 2010, para. 17, Case No. 2012-22-0103 of 27 June 2013, para. 19.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 The Latvian austerity programme can be considered an IMF success story. During the peak of economic growth in 2005–2008, the Government had taken a number of decisions to the detriment of long-term economic development. Even during the economic crisis, certain important structural reforms were not implemented, e.g. in the education, health, tax and other sectors. During the time of the crisis in 2008–2011, the IMF and the European Commission helped Latvia overcome the most immediate economic problems.[171] It should also be noted that international organisations gave Latvia a timely warning that its economic policies would raise the risk of poverty in Latvia and called for this problem to be dealt with as soon as possible.[172]

The main reason why the Constitutional Court questioned the IMF negotiation records, which was explored in greater detail in Sect. 2.7, was not because it was concerned about a lack of transparency on the IMF side, but rather because there was a lack of objective information from the Government on the scale of the crisis.

The Court referred to a number of studies which had indicated that there were shortcomings in the planning of state finances. The Court noted that several organisations had assessed the risk of poverty for the residents of Latvia.[173] Even during the time of economic growth, the funds allocated to social protection services were relatively scant in Latvia. Notably, the poverty risk among elderly people increased even during the time of economic growth.[174] However, the Court's mandate did not allow for it to intervene or to revise the macroeconomic approach and budget formation.

Thus, it has rightly been noted that the root causes of the crisis lay in unsustainable public finances. One of the main reforms adopted by both the Member States and the EU institutions since 2009 has been the introduction of tighter budgetary constraints. This approach was adopted already in the Stability and Growth Pact of 1997. The eruption of the euro crisis and the complex interconnection between sovereigns and banks revealed that it was easier on paper than in reality to let a country of the eurozone default without this producing a systemic

[171] It should be noted, however, that the economy started to grow from 2010, but the EU and the IMF finalised their supervision only in 2014.

[172] On the timely signals from the World Bank see http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/12/000020439_20070412105345/Rendered/PDF/384370LV.pdf. On IMF warnings earlier in 2012 see (2012, February 15) More people at risk of poverty – IMF report. The Baltic Times. http://www.baltictimes.com/news/articles/30601/.

[173] For example, Eurostat data of poverty risk groups due to old age for the year 2007 show that approximately 33% of persons over 65 are in the poverty risk group. See http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/data_overarching_en.xls.

[174] Survey of European Union Statistics on Income and Living Conditions (EU-SILC). http://www.csb.lv/csp/content/?cat=471&id=5762. See also Europe in Figures, Eurostat yearbook 2009, p. 256; Inequality of income distribution. http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdsc260.

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effect on the stability of the eurozone as a whole. Hence, the EU institutions and the Member States endowed themselves with new mechanisms to face this challenge.[175] It should also be noted that the new mechanisms are based in the so-called intergovernmental rather than Community method, and the European Stability Mechanism is modelled on the International Monetary Fund. Thus, the inter-governmental approach has shown that the IMF model is suitable for controlling budget planning by the Member States.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 No major issues beyond those discussed in other parts of the report have arisen in Latvia.

4 Concluding Remarks

Human rights, including the rights of EU citizens, form an increasingly significant element of the EU's legal architecture. Article 2 of the TEU proclaims that the EU is founded on the common values of the Member States, i.e. respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, including minority rights. This was further strengthened by the Charter of Fundamental Rights becoming an integral part of the EU Treaties.

The fact that either part of the sovereignty or part of the national competences of the Member States has been delegated to the EU is a truism. However, this has not yet been confirmed by all of the Member States' constitutions and there is also no answer as to what consequences this has for the institutions which claim to have acquired these competences. The search for a definition of democracy at the EU level is not a new endeavour.[176] The need for a re-definition of supranational democracy has also been highlighted by legal scholars. For instance, the dynamics of the EU suggest that nationalism could gradually be replaced by so-called constitutional patriotism as suggested by Habermas. This entails the facilitation of solidarity between strangers. Values rooted in culture and history on the one hand, and judicial and political values on the other, should be set in balance. The procedural order in the EU should remain neutral to national identity and morality. Habermas rightly considers that a European constitutional patriotism could grow

[175] Fabbrini 2014, pp. 68, 70–71 and 104.

[176] For instance, Fossum and Eriksen have offered three models, i.e. delegated democracy, federal democracy or cosmopolitan democracy. See Krūma 2009, p. 145.

out of the constitutional principles and traditions stemming from the European level.[177]

Yet another direction of research has been highlighting the growing need to facilitate rules on the responsibility of international organisations. As argued in The Economist:

> Some Europeans would like to put up carefully designed fences around the EU's still vast wealthy market. Others, including a growing number of populist politicians, want to turn their nations inward and shut out not just the world but also the elites' project of European integration. And a few – from among those same elites, mostly – argue that the only means of paying for Europe's distinctive way of life is not to evade globalisation but to embrace it wholeheartedly.[178]

Discussion is warranted whether the level of national constitutions is really best suited for bearing responsibility for the actions of international organisations because the states have created them and provided them with the relevant powers. Therefore, this raises the question whether the primary focus should be on the effectiveness of national constitutions or the potential of international mechanisms.

In this context the framing of the questions is important. Are we discussing the 'erosion' of constitutionalism and 'waning' constitutionalism? Or are we rather embarking on the process of re-defining the meaning of sovereignty and democracy in a supranational or transnational context? The way in which the question is posed might change the perspective for providing answers.

Community law is 'successful international law, and … is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward'.[179] The need for comprehensive monitoring of the human rights situation has been advocated since the beginning of 2000.[180]

The EU's Fundamental Rights Agency has correctly noted:

> Moreover, the political situation in the different EU Member States can no longer be seen as decoupled from that of their neighbouring states and the EU as a whole. Member States and the EU consist of an interdependent, semi-constitutional construction. In a system where judgments are handed down in one Member State but can automatically be executed in another, where asylum seekers are sent from state A to have their asylum procedure done in state B, or where persons are arrested in one Member State on the basis of an arrest warrant issued in another, the need for a shared set of core values is crucial in allowing all these mechanisms of exchange to be trustworthy. Against this backdrop, major challenges to the principles of democracy or the rule of law in one or more Member States are thus likely to have repercussions on the functioning of the EU as a whole.[181]

However, the question of the precise mechanisms and divisions of competencies remains. As long as Member States have a mistrust in the EU as an organisation

[177] Habermas 1995, pp. 255–281, as quoted by Guild 2004, p. 69.

[178] (2011, November 12) Starting into the abyss. The Economist, p. 3.

[179] Leben 1998, p. 298 as quoted by Nollkaemper 2012, p. 158.

[180] De Witte 2003.

[181] For details see FRA Annual Report 2012, supra n. 154, p. 21.

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capable of offering a proper standard of protection of fundamental rights and national agendas prevail over EU objectives, an effective system will not be in place. Therefore, the primary task is to build on mutual trust and respect for commonalities rather than to push forward national agendas. After all, the EU has been created to benefit Europeans rather than to create harm for national democracies and identities. In this sense the EU is better placed to do away with national sentiments which sometimes are deeply rooted in nationalism, local political agendas and an inability to cope with long-needed structural reforms of governmental management in the globalised world.

The Latvian case has illustrated that in certain cases external monitoring is exactly what is needed for a country to succeed in the long term. Local political agendas are not always capable of responding to global challenges in an adequate way. This was the case when Latvia was in the process of joining the EU in relation to the Citizenship Law, Language Law and Education Law, and this had been the case before Latvia had to opt for the austerity measures to fix its financial problems and shortcomings in the rule of law. The courts alone, without external expertise, would not have been capable of solving these problems.

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The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges

Irmantas Jarukaitis and Gintaras Švedas

Abstract The Lithuanian Constitution (1992) is described in the report as a typical revolutionary constitution, adopted after the collapse of a totalitarian regime. The Constitutional Court (CC) is a strong player both in terms of the protection of fundamental rights and as an arbitrator in political disputes. The report observes that due to their bitter historical struggle for statehood, Lithuanians have generally treated membership in the EU as a fundamental geopolitical choice. From this perspective, the Constitution is unique, as it was – in a self-standing constitutional act – extensively opened to the EU, whilst another constitutional act prohibits joining any union based on the former USSR. The CC has held that the Constitution establishes a constitutional imperative of EU and NATO membership. By and large, no critical constitutional debates have arisen in relation to EU and transnational law. Some exceptions include an (unsuccessful) request to hold a referendum on the adoption of the euro on the ground that the nature of the EMU had been changed by the ESM Treaty due to the extensive financial liabilities it might entail. The report notes that these discussions were overshadowed by events in Ukraine and geopolitical security concerns. The report also observes a lack of real discussion both in academia and in the public discourse concerning various issues decided at the EU

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level, which later have had a profound impact upon implementation at the national level (e.g. the Data Retention Directive), and calls for stimulating such discussion.

Keywords The Constitution of Lithuania · EU amendments in the Constitution
The Lithuanian Constitutional Court · Referendum · European Arrest Warrant and extradition statistics · Data Retention Directive · Adoption of the euro
ESM Treaty · Geopolitics and security · Lack of public and scholarly debate on EU issues · Parliamentary reservation of law regarding state loans · The principles of legal certainty, legitimate expectations and sound administration
Social rights and austerity · Property rights · *Sugar Stocks* cases · NATO

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Constitution of the Republic of Lithuania that is currently in force was adopted by way of a referendum on 25 October 1992. It was adopted after the re-establishment of the independence of Lithuania after fifty years of Soviet occupation. With the re-establishment of independence on 11 March 1990, there was an aspiration to emphasise the continuity of the Lithuanian state despite the Soviet occupation. Thus, when the Supreme Council of the Republic of Lithuania adopted the Act on the Re-establishment of the State of Lithuania on 11 March 1990, the next step was the adoption of the Law on the Reinstatement of the Validity of the Last Pre-war Constitution of the Then Independent Republic of Lithuania – the Constitution of 12 May 1938. Still, this was a purely symbolic act, since everybody understood that the political, legal and social environment was totally different than before World War II. Therefore, on the same day, the Supreme Council adopted a law which terminated the validity of the Constitution of 12 May 1938 and approved the Provisional Basic Law, which was applicable until the entry into force of the Constitution of 25 October 1992.

Thus, it might be said that there are certain symbolic elements of evolutionary character in the Constitution, especially given the fact that its Preamble explicitly mentions the Lithuanian Statutes (modern basic laws, adopted in the Middle Ages) and the earlier Constitutions of Lithuania[1] as sources of inspiration. However, in reality the Constitution of 25 October 1992 is a typical revolutionary constitution,

[1] It should be noted that the Lithuanian-Polish Commonwealth stood at the forefront of modern European constitutionalism with the first modern European Constitution – the Constitution of 3 May 1791 of the Lithuanian-Polish Commonwealth, which was amended by the Mutual Pledge of the Two Nations of 20 October 1791. Due to historic circumstances (the Third partition of the Commonwealth), the Constitution was renounced two years later. After the establishment of the independence of Lithuania on 16 February 1918, the Republic experienced a short period with its own constitutional tradition, starting with a temporary constitution adopted in 1918, and ending with the Constitution adopted on 12 May 1938.

adopted after the collapse of a totalitarian regime, similar to the constitutions of other Central and Eastern European states adopted after the fall of the Berlin Wall. It has a rigid, detailed legal character and establishes a constitutional court which plays a central role in ensuring the observance of the Constitution and the protection of constitutional fundamental rights. Furthermore, Art. 6 of the Constitution provides for its direct applicability.[2] Similarly to the constitutional courts in other Central and Eastern European states, the Constitutional Court of the Republic of Lithuania (CC) is a very strong player both in terms of the protection of fundamental rights and as an arbitrator in disputes between different branches of public (political) power.

The Constitution is also a very important legal tool for performing the judicial functions of the courts of general competence and the administrative courts of Lithuania. These courts are very active in questioning the legality of acts of the Parliament and of the Government and referring cases to the CC. By doing so they contribute to the establishment of a *de facto* decentralised system of constitutional review, although, of course, *de jure* and *de facto* the CC has the sole responsibility for scrutinising the constitutionality of acts of the Parliament, the President and the Government.

1.1.2 The Constitution performs the traditional functions accorded to it by the classic constitutional doctrine.[3] First of all, it is treated as a fundamental legal document, establishing the state of Lithuania. Chapter I of the Constitution ('the State of Lithuania') revolves around the notions of people's (national) and state sovereignty, democratic rule, limitation and separation of powers, supremacy of the Constitution and its direct applicability, the official state language (Lithuanian) and the symbols of the state. Chapter II ('The Human Being and the State') establishes the fundamental rights and freedoms of individuals, whereas Chapter III ('Society and the State') and Chapter IV ('National Economy and Labour') are reflections of the communal/societal aspects of the Constitution. The remainder (Chaps. V–XIII) deals primarily with the organisation and functioning of public power.

The jurisprudence of the CC and academic writings reflect the classic understanding of the Constitution: the Lithuanian people (nation) are the source of the Constitution, which is the supreme law of the land. The Constitution reflects the social contract – an imperative vision, a democratically accepted obligation by all of the citizens of Lithuania for the current and future generations to live according to the fundamental rules entrenched in the Constitution and to obey them in order to ensure the legitimacy of the governing power, the legitimacy of its decisions, as well as to ensure human rights and freedoms, so that harmony exists in society. The CC makes it clear that the Constitution is based on universal, unquestionable values, which are sovereignty belonging to the Nation, democracy, the recognition

[2] 'The Constitution shall be an integral and directly applicable act. Everyone may defend his rights by invoking the Constitution'. The English translation of the Constitution quoted in this report is available on the website of the *Seimas* at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=275302.

[3] Jarašiūnas 2001, pp. 103–130; Šileikis 2005, pp. 52–71.

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of and respect for human rights and freedoms, respect for the law and the rule of law, limitation of the scope of powers, the duty of state institutions to serve the people and their responsibility to society, public spirit, justice, and striving for an open, just and harmonious civil society and state under the rule of law.[4]

To sum up, the Constitution may be treated as a material reflection of the usual dimensions of constitutionalism:[5] constitutionalism as a limit to public power, constitutionalism as a polity expression and constitutionalism as deliberation or, using the notion proposed by J. Raz, a 'thick' constitution.[6]

As regards the centre of gravity among these dimensions of the Constitution, attention should be drawn to the fact that Art. 1 speaks of Lithuania as an 'independent democratic republic'. Thus, the independence of the state is placed before its democratic nature. Moreover, differently than in some other EU Member States, Chap. I of the Constitution is devoted not to fundamental rights, but to the state as a common good of the Lithuanian people. It seems that this sequence is not accidental given the bitter historic experience of the Lithuanian people and the fact that the Constitution was adopted at the time when the Soviet army was still in the country (the last Russian army troops left Lithuania on 31 August 1993). Given the very sovereignist *language* of the Constitution,[7] the jurisprudence of the CC as well as the political culture and the general mood among the public, it could be said that the Constitution first of all gravitates to the reflection of the continuing statehood of Lithuania, although this does not mean that the other dimensions of the Constitution are less important.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 Lithuania's membership in the EU has always been seen as more than participation in an economic union. Given their bitter experience and the struggle for the right to statehood over the last two centuries, Lithuanians have generally treated (and still treat) membership in the EU as a fundamental geopolitical choice between 'the East and the West'. From this perspective the Constitution of Lithuania is unique, since it establishes explicit provisions on both the negative[8] and the positive

[4] Rulings of 25 May 2004; 19 August 2006; 24 September 2009; 24 January 2014; Decisions of 20 April 2010; 19 December 2012. Here and subsequently, the translations quoted are the English translations of the rulings, conclusions and decisions of the CC available at www.lrkt.lt.

[5] For different dimensions of constitutionalism see, for example, Poiares Maduro 2004, Šileikis 2005, pp. 35–71 and Walker 2006.

[6] For the notion of a 'thick' constitution see, in particular Raz 1998, pp. 152–193.

[7] Albi 2001, pp. 437–440, Jarukaitis 2011, pp. 261–266.

[8] The Supreme Council adopted the Constitutional Act on the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions on 8 June 1992. The Act is a part of Lithuanian positive constitutional law and states, inter alia, that the Supreme Council shall resolve 'To develop mutually advantageous relations with each state which was formerly a component of the USSR,

geopolitical orientation (see further the Constitutional Act on Membership of the Republic of Lithuania in the European Union (hereinafter CA). The first hint of the positive geopolitical orientation was established on 20 June 1996 when Art. 47 of the Constitution was amended in order to ensure its compatibility with the Europe Agreement.[9]

Just one month before the entry into force of the Europe Agreement, the Board of the Parliament decided to form an expert group to evaluate the necessity of any constitutional amendments with regard to the prospective accession of Lithuania to the EU. The expert group concluded that although there was no conceptual/fundamental obstacle in the Constitution to joining the EU, constitutional amendments were necessary in order to ensure a proper constitutional basis for such membership, and proposed concrete draft amendments.[10] The Government officially submitted the proposed EU related amendments to the Constitution to the Parliament on 1 March 2001. However, in 2001 the Constitutional Amendments Commission decided that no constitutional amendments were needed, although it acknowledged that it might be necessary to return to the issue at a later date.[11]

The new impetus for renewing public discussions concerning the EU-related constitutional amendments was provided by the establishment of the European Convention and the result of its activities, the Treaty Establishing a Constitution for Europe, which prompted the Parliament to form several new working groups.[12] Finally, on 2 October 2003, the Constitutional Amendments Commission decided that constitutional amendments establishing a constitutional basis for Lithuania's

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but to never join in any form any new political, military, economic or other unions or commonwealths of states formed on the basis of the former USSR' (translation by the author).

[9] The Constitution adopted in 1992 totally precluded the right of foreigners to acquire land in Lithuania. However, once the Europe Agreement was signed in 1995, this prohibition was partially lifted and Art. 47 of the Constitution was supplemented with para. 2: 'Local governments (municipalities), other national entities as well as those foreign entities conducting economic activities in Lithuania which are specified by the constitutional law in compliance with the criteria of European and Transatlantic integration which the Republic of Lithuania has embarked on may be permitted to acquire into their ownership non-agricultural land plots required for the construction and operation of buildings and facilities necessary for their direct activities'.

[10] The text of the constitutional amendments proposed by the expert group may be found in: *Stojimas į Europos Sąjungą ir Konstitucija. Seminaro medžiaga 1999 06 29–30 d* (Accession to the European Union and the Constitution. Materials of the seminar of 29–30 June 1999). Eugrimas, Vilnius, 2000, pp. 23–25. Basically, the proposed amendments included provisions concerning transfer of part of the competences of state institutions to the EU and the incorporation of EU law into the national legal system. It should also be noted that these draft amendments were discussed during an international seminar which took place in Vilnius in 1999. The comments of Lithuanian and foreign experts may be found in the above-mentioned book. By way of a summary, the majority of participants in the seminar shared the opinion that constitutional amendments were necessary.

[11] The Report of activities of the Commission of 2001 at http://www3.lrs.lt/pls/inter/w5_show?p_r=894&p_d=14315&p_k=1.

[12] Before the European Convention started, the *Seimas* decided to establish several working groups of experts, which had the task of formulating various suggestions to the Lithuanian members of the Convention as regards the issues discussed at the Convention.

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membership within the EU were necessary. The Commission decided not to amend the main body of the Constitution but to proceed with a separate constitutional act, and agreed on the content of this constitutional act on 11 December 2003. A group of Members of Parliament formally submitted the draft amendments to the Constitution for deliberation in Parliament on 22 December 2003. Although several technical adjustments were made to the draft during the deliberations in Parliament, the form (a separate constitutional act), the structure (4 separate articles) and the essence of the content of the initial draft were retained. The Parliament followed the usual procedure (see Sect. 1.2.2) established in the Constitution for adoption of constitutional amendments and adopted the Law Supplementing the Constitution with the Constitutional Act on Membership of the Republic of Lithuania in the European Union and Supplementing Art. 150 of the Constitution on 13 July 2004.[13] The amendments took effect as of 14 August 2004.

[13] The Constitutional Act on Membership of the Republic of Lithuania in the European Union provides:
The Seimas of the Republic of Lithuania,
executing the will of the citizens of the Republic of Lithuania expressed in the referendum on the membership of the Republic of Lithuania in the European Union, held on 10–11 May 2003;
expressing its conviction that the European Union respects human rights and fundamental freedoms and that the Lithuanian membership in the European Union will contribute to a more efficient securing of human rights and freedoms,
noting that the European Union respects the national identity and constitutional traditions of its Member States, seeking to ensure a fully-fledged participation of the Republic of Lithuania in European integration as well as the security of the Republic of Lithuania and welfare of its citizens,
…
adopts and proclaims this Constitutional Act:
1. The Republic of Lithuania as a Member State of the European Union shall share with or entrust on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas as well as enjoy membership rights.
2. The norms of European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of European Union law shall be applied directly, while in the event of a collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.
3. The Government shall inform the Seimas of proposals to adopt acts of European Union law. As regards proposals to adopt acts of European Union law regulating areas which, under the Constitution of the Republic of Lithuania, are related to the competences of the Seimas, the Government shall consult the Seimas. The Seimas may recommend a position of the Republic of Lithuania in respect of these proposals to the Government. The Seimas Committee on European Affairs and the Seimas Committee on Foreign Affairs may, according to the procedure established by the Statute of the Seimas, submit to the Government the opinion of the Seimas concerning proposals to adopt acts of the European Union law. The Government shall assess the recommendations or opinions submitted by the Seimas or its Committees and shall inform the Seimas about their execution following the procedure established by legal acts.
4. The Government shall consider proposals to adopt acts of European Union law following the procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions for the adoption of which the provisions of Art. 95 of the Constitution are

There were discussions in Parliament on whether to adopt the CA by way of a referendum or to leave this to the Parliament. The latter option was chosen, although the adoption of the CA was preceded by a referendum with a question on whether Lithuania should accede to the EU.

Given the fact that the adoption of the CA *de facto* meant a revision of the entire Constitution (see Sect. 1.3.1), including its Chapter I (which may only be amended by way of a referendum (see Sect. 1.2.2)), one may wonder whether it would have been more appropriate to submit the adoption of the CA to a referendum.

It may be interesting to note that the CA was adopted and took effect after Lithuania's accession to the EU. The reasons for this delay are not clear, as both Lithuanian society in general and the political parties represented in Parliament widely supported Lithuania's membership in the EU. Academic writings have rightly pointed to the fact that the explicit constitutional basis for Lithuania's membership within the EU was missing for more than two months.[14] Realising the risk of uncertainty and devaluation of the CA, the CC pre-empted doubts about the constitutionality of, for example, the application of EU regulations between 1 May 2004 and 14 August 2004, and decided to correct the faults of the political process by stating that Lithuania's membership in the EU '… is *constitutionally confirmed* by the Constitutional Act of the Republic of Lithuania 'On Membership of the Republic of Lithuania in the European Union' [emphasis added].

Finally, in order to remove inconsistencies between certain provisions of the Constitution and EU law, Arts. 47 and 119 were amended before Lithuania acceded to the EU.[15]

1.2.2 The CC makes it clear that the Constitution is an integral act, and all provisions of the Constitution are interrelated to the degree that the content of some provisions of the Constitution determines the content of other provisions. The provisions of the Constitution constitute a harmonious system and no provision of the Constitution can oppose its other provisions, because the nature of the Constitution as an act of supreme legal power and the idea of constitutionality imply that there are not, nor can there be, any gaps or internal contradictions in the Constitution.[16]

On the other hand, the Constitution establishes different procedures and requirements as regards its amendment, thus establishing a certain *de facto* internal hierarchy of its provisions. These procedures are rather rigid and require wide

not applicable. (Some revisions have been made to the English translation available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=275302 by the author).

[14] Jarukaitis 2006a, pp. 395–396.

[15] In order to secure the right of foreign nationals to acquire land in Lithuania, Art. 47 of the Constitution was amended twice before accession: in 1996 and in 2003 in order to ensure its full compatibility with EU fundamental economic freedoms. With regard to the right of EU citizens to participate in municipal elections, Art. 119 of the Constitution was amended on 20 June 2002, because originally this right was reserved for Lithuanian citizens only. For more details see: Jarukaitis 2006a, pp. 396–397.

[16] Rulings of 25 May 2004; 13 December 2004; 28 March 2006.

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support both among the public in general and among the political parties represented in Parliament, ensuring that the constitutional amendment procedure is above the ordinary political process.

First of all, according to Art. 148(1), 'the provision of Art. 1 of the Constitution "the State of Lithuania shall be an independent democratic republic" may only be altered by referendum if not less than three-quarters of the citizens of Lithuania with the electoral right vote in favour thereof'. The CC has recently ruled that Art. 1 of the Constitution consolidates the fundamental constitutional values – the independence of the state, democracy and the republic – which are inseparably interrelated and form the foundation of the State of Lithuania, as the common good of the entire society consolidated in the Constitution; they must not be negated under any circumstances. Further, the Court ruled that the principle of recognition of the innate nature of human rights and freedoms should also be regarded as a fundamental constitutional value that is inseparably related to the constitutional values – independence, democracy and the republic – which constitute the foundation of the State of Lithuania as the common good of the entire society consolidated in the Constitution; the innate nature of human rights and freedoms may not be negated either. Given the constitutional imperative to ensure that no amendments of the Constitution violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them, the Constitution does not permit any such amendment that would deny at least one of the above-mentioned constitutional values underlying the foundations of the State of Lithuania as the common good of the entire society, with the exception of the cases where Art. 1 of the Constitution would be altered (by a referendum with a three-fourths majority).[17]

Amendments of the Constitution concerning other chapters of the Constitution must be considered and voted in the *Seimas* (the Parliament of Lithuania) twice (of course, it may decide to submit them to a referendum as well, since Art. 9(1) of the Constitution stipulates that the most significant issues concerning the life of the State and the Nation shall be decided by referendum). There must be an interval of not less than three months between the votes. A draft law on amendment of the Constitution shall be deemed adopted by the *Seimas* if, during each of the votes, not less than two-thirds of the Members of the *Seimas* vote in favour.

1.2.3–1.2.4 Alongside the above-mentioned constitutional reforms related to Lithuania's membership within the EU, Art. 125 of the Constitution was amended in 2006 by the Parliament. Before amendment, Art. 125 of the Constitution provided for the Bank of Lithuania's 'exclusive right to issue bank notes', which was not in line with the rights of the European Central Bank. The Law amending Art. 125 of the Constitution was adopted on 25 April 2006, and it simply abolished Art. 125(2) of the Constitution.

The CC declared that the Law amending Art. 125 of the Constitution was adopted in breach of the essential procedural requirements of Art. 147 of the Constitution and annulled the law by its ruling of 24 January 2014. Still, the Court

[17] Ruling of 24 January 2014.

pointed out in the ruling that the Constitution establishes a constitutional imperative of positive geopolitical orientation (that is, membership in the EU and NATO), whereas the Preamble of the CA expressly speaks about the '*fully-fledged* participation of the Republic of Lithuania in the European integration'. From this the Court deduced the constitutional obligation of Lithuania to participate as a fully-fledged Member State in the integration of the member countries into the EMU by adopting the common currency and conferring exclusive competence in the area of monetary policy to the EU.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The CA establishes explicit constitutional provisions concerning both the transfer (or trust, to be more precise) of part of the competences of state institutions to the supranational level (Art. 1 of the CA) and the incorporation of EU law into national law with (limited) recognition of its specific features (Art. 2 of the CA).[18] Without any doubt, these provisions should be viewed and understood in the context of ongoing discussions and disputes concerning the concept of sovereignty (see Sect. 1.3.2).

Article 1 of the CA establishes a clear constitutional basis for transfer of part of the competences of state institutions to supranational institutions. It may be treated as the exception to the general rule, established in Art. 5 of the Constitution, according to which the exercise of public powers in Lithuania is reserved only for Lithuanian institutions. Thus, it opens the national constitutional order and, alongside the horizontal division of public powers, legitimates the vertical distribution of powers.

It can be said that Art. 1 of the CA adopts a classic approach as regards the exercise of public powers by the EU. In this respect it speaks about 'sharing or entrust of competences' and by doing so emphasises several aspects. First of all, the clause embeds the principle of conferral on which the EU is based at the national constitutional level. The term 'entrusts' ('*patiki*' in Lithuanian) is to some extent a synonym of the term 'confers', but it is more subtle, since it demonstrates that such conferral is not irreversible and the ultimate source of authority rests at the national level.[19] In this regard, the provisions of Art. 1 of the CA are similar to the constitutional 'EU clauses' of those EU Member States which have chosen the so-called Belgo-German model, which refers to the transfer of competences instead of the limitation of sovereign powers (like, for example, the Constitution of Italy).

Article 1 of the CA performs several functions. First of all it should be related to the rationalising or defining function of the Constitution, since the Constitution

[18] For the wording of the Constitutional Act, supra n. 13.

[19] On the other hand, the Preamble of the CA (rec. 4) expressly recognises the necessity of membership in the EU, since it establishes a connection between the security and welfare of citizens and participation in the EU.

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organises and limits the exercise of public power. From this perspective the provisions of Art. 1 serve an integrative purpose, since they open the national constitutional order and allow the exercise of public powers by the EU institutions in the territory of Lithuania, which would not be possible without Art. 1. Of course, such constitutional permission triggers a mutation of other constitutional principles (like democracy (see Sects. 1.4.1 and 1.4.2), separation of powers, etc.).

At the same time, Art. 1 of the Act serves a defensive function. From this perspective it should be read in conjunction with the Preamble of the CA, which establishes certain basic presumptions and subtle constitutional imperatives or conditions for Lithuania's membership within the EU.[20] Attention should be drawn to the careful language of Art. 1. It speaks not about the renunciation or renouncement of public powers, but about Lithuania 'as a Member State' that 'shares and entrusts' certain competences. The object of such sharing and trust is not sovereignty *per se* or even 'sovereign powers', but only 'the competences of its State institutions'.[21] To sum up, the principle of sovereignty, which serves as a basis for Lithuania's membership within the EU (because it could became an EU Member State only because it is a sovereign state from the point of view of public international law), also serves as a conceptual limit to further EU integration: from the point of view of the Constitution of Lithuania, without amendments to Art. 1 of the Constitution, it would not be possible to accept claims on the part of the EU not 'only' to autonomy, which Art. 1 of the CA clearly reflects, but to statehood. Further, the provisions of the Preamble of the CA may be seen as material limits to the exercise of public power also at the EU level.

Article 2 of the CA incorporates EU law into the national legal system, thus to some extent recognising the *sui generis* nature of EU law.[22] Without any doubt from the point of view of the national Constitution, after the adoption of Art. 2 of the CA, the basis for the application of EU law rests, foremost, within the Constitution itself. This means that by adopting the CA the Parliament constitutionalised the principles developed by the European Court of Justice (ECJ), i.e. granting these principles special, constitutional treatment, but on the other hand, it rejected the idea that these principles stem from the nature of EU law itself, without the 'mediation' of the national Constitution. Consequently, the adopted CA makes the application of EU law and its specific features a matter of national constitutional

[20] According to the Preamble of the CA, the Parliament adopts the CA 'expressing its conviction that the European Union respects human rights and fundamental freedoms and that the Lithuanian membership in the European Union will contribute to a more efficient securing of human rights and freedoms' and 'noting that the European Union respects the national identity and constitutional traditions of its Member States'.

[21] See as well Šileikis 2005, pp. 49–51; Jarukaitis 2006b, pp. 25–26; Vaičaitis 2006, pp. 62–63; Jarukaitis 2010a, pp. 212–214.

[22] Such conclusion follows from the fact that Art. 138(3) incorporates ratified international treaties into the Lithuanian legal order and adopts a monist approach with regard to public international law. Consequently, if EU law were to be treated as part of public international law, the provisions of Art. 2 of the CA would be redundant.

law – which means that the Constitution instead of EU law by its very nature forms the basis for the application of EU law in Lithuania. This leads to some important consequences: EU law becomes part of the national legal system; all state institutions (national courts, other state institutions) have a duty to apply EU law and to interpret national law 'in the light' of EU law *as a matter of Lithuanian constitutional law* as well;[23] and the national courts have a constitutional right and duty to use the preliminary ruling procedure. At the same time, it serves a defensive function, since its mere existence rejects the idea of the absolute autonomy of EU law as developed by the ECJ. Moreover, the principle of primacy of EU law does not extend unconditionally over the Constitution of Lithuania (see Sect. 1.3.4).

1.3.2 With regard to sovereignty as a theoretical concept and legal principle, two preliminary remarks should be made. First, it is clear that legal commentators do not agree on the content of the concept of sovereignty. The statement that disagreement and conflict are constitutive elements of the concept of sovereignty, leading to its description as an *essentially contestable concept*, seems to be quite accurate.[24] Secondly, taking into account its historic origins and later developments, there is no basis to equate sovereignty and the actual powers performed by a political community. Thus, the author of this report supports the ideas of those who define sovereignty as a sufficiently effective claim to ultimate power in the context of the sovereignty discourse, but nothing more.[25] Viewed from this perspective, the claim that EU Member states are sovereign is not under challenge, whereas the EU itself has never made such a claim.

Lithuanian authors recognise the relative character of the concept of sovereignty. Even before World War II one of most prominent professors argued that neither the external nor internal aspects of state sovereignty can be treated as absolute, since externally a state is subjected to international law, whereas internally state powers are subject to people's needs.[26] Contemporary constitutional writings associate the concept of sovereignty with the following dimensions: the self-determination of the people of how to live and the right to establish their own state;[27] the right to make political *constitutional decisions* independently; the principal existence of the state as a member of the international community alongside other states;[28] as the

[23] The CC so far has not explicitly stated that the national courts have a constitutional duty to apply EU law; however, such duty can be clearly deduced from its recent ruling of 24 January 2014. The Supreme Court of Lithuania has taken this approach e.g. in Decision of 7 January 2008 in Case No. 3K-3-91/2008, and the SAC e.g. in Decision of 28 May 2007 in Case No. A6-238/2007 and Decision of 1 October 2010 in Case No. A858-1204/2010. For more details on the application of EU law in Lithuania see, for example, Jarukaitis 2010a, pp. 222–241; Jarukaitis 2010b, pp. 176–202.

[24] Besson 2004, pp. 15–16.

[25] For extensive analysis on the subject see, for example, Werner and De Wilde 2001; Walker 2003, pp. 19–32.

[26] Römeris 1995, p. 245.

[27] Jarašiūnas 2001, p. 496.

[28] Vadapalas 2002, pp. 14–15.

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discursive form, through which a political community permanently expresses claims to the supreme public powers; ensuring the continuous identity and independent status of that political community[29].

The CC has so far been laconic on the content of the principle of sovereignty;[30] however, its practice confirms a close link between the principles of people's sovereignty, state sovereignty and democracy. In its recent ruling of 24 January 2014, it provided a more detailed approach as regards Lithuania's membership within the EU and the content of the CA. The Court considers membership within the EU to be a reflection of the geopolitical choice of Lithuania, which at the same time is a value choice: the Preamble of the CA clearly reveals that Lithuania's accession to the EU is based on an assumption of the structural compatibility of the fundamental values established in the Constitution with those on which the EU is founded. Additionally, membership within the EU is based on the belief that such membership ensures better preconditions for attainment of the constitutional imperatives established by the Constitution. Further, the CC has expressly stated that the CA establishes, inter alia, the constitutional grounds for the membership of Lithuania in the EU and that if such constitutional grounds were not consolidated in the Constitution, Lithuania could not be a full member of the EU. In the ruling, the Court made it clear that Arts. 1 and 2 of the CA may be amended only by way of a referendum, and established certain material limits to integration, related to the basic values of the Constitution (see Sect. 1.3.3).

1.3.3 The fundamental limit to the transfer of powers to the supranational level is established in Art. 1 of the Constitution, i.e. Lithuania must remain an independent democratic republic. Recently, the CC ruled that an inseparable link exists between the independence of the state, democracy, the republic and the innate character of human rights and freedoms.[31] Therefore, the Constitution does not permit any amendments that would deny at least one of the above-mentioned constitutional values underlying the foundations of the State of Lithuania as the common good of the entire society. In order to overcome such a limitation, Art. 1 of the Constitution should be amended by a referendum as prescribed by Art. 148(1) of the Constitution.

Moreover, the sovereign (the people) is not absolutely free in exercising its powers to amend the Constitution. The CC stressed in its decision of 7 July 2014 that the principle of the rule of law is applicable to the procedure for amending the Constitution. The Court has deemed the *pacta sunt servanda* principle to be part of the constitutional principle of the rule of law, stating that the Constitution establishes the constitutional imperative to observe and fulfil international obligations

[29] Jarukaitis 2011, pp. 163–188.

[30] For example, in its ruling of 19 September 2002, the Court noted, that '[i]n Art. 1 of the Constitution the fundamental principles of the Lithuanian State are established: the Lithuanian State is free and independent; the republic is the form of governance of the Lithuanian State; state power must be organised in a democratic way, and there must be a democratic political regime in this country' (translation by the author).

[31] Decision of 19 December 2012; Ruling of 24 January 2014.

correctly. The Constitution must not have and does not tolerate any gaps or internal contradictions. Consequently, the Constitution does not allow amendments that go against obligations undertaken under international or EU law. In order to introduce such amendments in the Constitution, the international or EU obligations would have to be modified or renounced under the procedures provided by international or EU law. To sum up, theoretically, core constitutional values (including the peoples'/state sovereignty) may be overcome, but the threshold is extremely high.

1.3.4 Commentators are quite unanimous in stating that the primacy of EU law does not extend automatically over the Constitution.[32] Several arguments support such view. Article 7(1) of the Constitution provides that 'any law or other statute, which is contrary to the Constitution shall be invalid' and establishes the principle of supremacy of the Constitution over all other norms. Article 7 is in Chapter I of the Constitution, the provisions of which may be amended only by way of a referendum. The CA was not adopted by way of a referendum. Further, the *travaux préparatoires* of the draft CA and the deliberations in Parliament during the adoption of the CA point in the same direction.

It is also worth noting that there is no need to recognise the unconditional primacy let alone the supremacy of EU law over national constitutions, whether as a matter of the constitutional architecture of the EU[33] or as a matter of positive EU law, if one takes into account the constitutional identity clause in Art. 4(2) TEU.[34]

The practice of the CC confirms that it is not ready to accept the unconditional primacy of EU law over the Constitution. In its ruling of 14 March 2006, the Court stated:

> … the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes *with that established in an international treaty*, then *the international treaty* is to be applied, but also, *in regard of European Union law*, establishes expressis verbis *the collision rule*, which consolidates *the priority of application* of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union *compete with* the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), *save the Constitution itself* [emphasis added].

Although the ruling was interpreted by some authors as a declaration of the unconditional supremacy of the Constitution over EU law, such a conclusion is too extensive, since the Court did not rule explicitly on what the relationship between EU law and the Constitution *is*. It may be said that the Court simply decided to proceed on a case-by-case basis and to avoid any generalisations.

Such a thesis has been confirmed by the subsequent practice of the Court, which shows its readiness to ensure harmony between the Constitution and EU law. In its ruling of 21 December 2006, the Court took a step forward and, citing decisions of

[32] Kūris 2004a, p. 36; Šileikis 2005, p. 143; Abramavičius 2006, p. 313; Jarukaitis 2010a, pp. 225–234.

[33] See, for example, Poiares Maduro 2003, pp. 74–102.

[34] See, for example, Jarukaitis 2014, pp. 575–620.

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the Court of First Instance and the ECJ for the first time, noted that '[t]he Constitutional Court has stated several times that the jurisprudence of the European Court of Human Rights, as a source of legal interpretation, is important for the interpretation and application of Lithuanian law. *The same should be said about the jurisprudence of the Court of First Instance and the European Court of Justice*' [emphasis added]. This statement may be treated as an explicit recognition of the impact EU law has on national law, including on the Constitution. Of course, it does not eliminate all grounds for a potential conflict, but indicates the Court's willingness to do its best to avoid one.

A further step in developing a friendly approach to EU law was taken on 8 May 2007 when the Court made a reference to the ECJ for a preliminary ruling concerning the interpretation of an EU directive, being one of the few national constitutional courts that has ever used this procedure.

After Lithuania had acceded to the EU, the CC recognised that the adoption of the CA may trigger the need to reinterpret the Constitution; indeed, the CC has already started to re-evaluate its practice developed before accession and to identify areas where reinterpretation of the Constitution is needed.[35]

The ruling of 24 January 2014, in which membership within the EU was deemed to be a constitutional value and imperative based on the structural compatibility of the fundamental values of both the Constitution and EU primary law, should be viewed as a clear manifestation of a friendly approach to EU membership and obligations stemming from it. Furthermore, given the above-mentioned proviso '*save the Constitution itself*' in the ruling of 14 March 2006 along with the core principles enunciated in the ruling of 24 January 2014, one may speculate that similarly to other constitutional courts of EU Member States, the CC has slowly and implicitly accepted the existence of 'ordinary' constitutional rules, which are more prone to impact by EU law, and the constitutional nucleus, which is more resistant to the influence of EU law.

1.4 Democratic Control

1.4.1 Article 3 of the CA regulates the involvement of the *Seimas* in the EU decision-making process and parliamentary control of the Government when it acts at the EU level.[36] The provisions of Art. 3 of the CA aim at ensuring a balance between the necessity to have a close involvement of the Parliament when the Government participates in the EU Council with the need to leave enough flexibility for bargaining so the Government can react to what is going on in the EU Council.

[35] For example, Ruling of 26 September 2006. For a more detailed description of the CC practice vis-à-vis EU law, see: Jarukaitis 2010a, pp. 225–234; Jarukaitis 2010b, pp. 182–189.

[36] For the wording of the text, see supra n. 13.

Detailed provisions implementing these provisions are established in Chap. 27^1 of the Statute of the *Seimas*, which has the force of law.[37]
By way of a summary of the provisions, the Statute accords the main powers for parliamentary control to the European Affairs Committee and, in the field of the Common Foreign and Security Policy and other external issues, to the Foreign Affairs Committee, which are given the right to issue opinions on behalf of the Parliament. In some cases the Statute requires discussions to be held (for example, deliberations on the compliance of draft EU legal initiatives with the principle of subsidiarity) not in the European Affairs Committee but in the plenary session. The Government has a duty to inform the *Seimas* in writing of proposals to adopt EU legal acts and other relevant EU documents. Once the European Commission communicates its annual work programme, the specialised committees of the *Seimas* identify the priorities for the upcoming year in order to focus on the issues that are most relevant for Lithuania, and the finalised version of these priorities is submitted to the Government. The institution responsible for the preparation of the Lithuanian position concerning a proposal to adopt an EU legal act or other EU document has the obligation to submit the position to the *Seimas* immediately after its preparation, and no later than three days prior to the debate on this position in the EU institutions. At the executive level, the formation of the Lithuanian position is initiated and conducted through the LINESIS electronic platform, which records all the changes made in the Lithuanian position throughout its preparation.

Once received in the *Seimas*, the position is forwarded to the specialised committees and to the European Affairs Committee or the Foreign Affairs Committee. Having deliberated on a position, a specialised committee may either approve the position or propose amendments and review of the position; its position is communicated either to the European Affairs Committee or the Foreign Affairs Committee. The position is deliberated at a meeting of the European Affairs Committee or the Foreign Affairs Committee where the Prime Minister or the appropriate minister presents the position and answers questions; the conclusions of the specialised committees are presented and discussions on the position are held. The committee decides by consensus or by a vote whether it should, on behalf of the *Seimas*, state its opinion about the position. If so, the chair of the meeting proposes the wording of the opinion, and the opinion is adopted in a vote. Both committees may oblige a minister to maintain a parliamentary reservation during the deliberation of issues that are considered as highly relevant or relevant in the EU institutions. Art. 180^{17} establishes the obligation of the Prime Minister and ministers to submit an oral or written report on the fate of the Lithuanian position after the relevant meeting of the European Council or the EU Council.

Additionally, Art. 180^6 of the Statute establishes a subsidiarity control procedure, according to which draft EU legislation is scrutinised by the specialised committees and their positions are submitted to the European Affairs Committee or

[37] The English translation of the Statute is available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=473761.

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the Foreign Affairs Committee. If one of these Committees decides that a draft EU law does not respect the principle of subsidiarity, it prepares a draft *Seimas* resolution with a reasoned opinion. The resolution is debated by the *Seimas* sitting in accordance with the special urgency procedure. If adopted, the *Seimas* resolution regarding the reasoned opinion is forwarded to the Government.

To sum up, the system put in place seems to function rather effectively; there is quite a high degree of information exchange and harmonisation of positions between the Government and the Parliament. In practice, the Parliament's role in the EU decision-making process is quite important.

1.4.2 According to Art. 9 of the Constitution, the most significant issues concerning the life of the State and the Nation shall be decided by referendum. Article 4(5) of the Law on Referendums provides for a mandatory referendum concerning the participation of the Republic of Lithuania in international organisations 'should this participation be linked with the partial transfer of the scope of competence of Government bodies to the institutions of international organizations or the jurisdiction thereof'.

Needless to say, Lithuania's accession to the EU had a profound impact on the whole society, the state and the core constitutional principles of the national polity. Consequently, it was decided that a referendum would be held on EU accession once the Accession Treaty was signed. The referendum took place on 10–11 May 2003; a simple statement 'I am for Lithuania's membership in the European Union' was submitted to a vote. Of citizens with the right to vote, 63.37% participated in the referendum, of whom a notably high 90% voted in favour of Lithuania's accession to the EU. From the point of view of democratic legitimacy, the referendum was of utmost importance, especially because of the far-reaching consequences of EU membership.

This was the first referendum related to EU issues. There were calls to hold a referendum concerning the ratification of the Treaty establishing a Constitution for Europe; however, ultimately it was decided that the Treaty would be ratified by Parliament.

Two unsuccessful referendum initiatives related to EU membership were promoted in 2013–2014. One concerned a proposed amendment of Art. 47 of the Constitution, aimed at restricting the right of foreigners to buy land in Lithuania.[38] The second initiative concerned the proposed amendment of Art. 125 of the Constitution and Art. 1 of the CA. The initiators proposed amending the Constitution in order to re-establish the right of the Bank of Lithuania to emit bank notes. The Central Electoral Commission refused to register the initiative, arguing that such amendments would not be compatible with the Constitution. The Supreme Administrative Court of Lithuania (hereinafter SAC), after verifying with the CC whether the Central Electoral Commission had such authority under the

[38] The referendum took place on 29 June 2014 and failed, as only 14.98% of eligible voters participated (instead of the required 50%).

Constitution,[39] supported the findings of the Central Electoral Commission on 18 July 2014.[40] The Court, relying inter alia on the jurisprudence of the CC, concluded that Lithuania has the obligation, stemming both from the Accession Treaty as well as from the Constitution, to introduce the euro. Therefore, in order to introduce the proposed amendments to the Constitution, prior amendment of the Accession Treaty would be needed.[41]

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 It is obvious that the above-mentioned constitutional amendments related to Lithuania's membership in the EU were necessary, because otherwise such membership would not be compatible with the Constitution (this argument is first and foremost addressed to provisions establishing the constitutional basis for the transfer of part of the public powers to the supranational level). One of the main functions of the Constitution – the establishment, organisation and limitation of public power – means that only the exercise of public power sanctioned by the Constitution is legitimate. Before the adoption of the CA, the exercise of public powers was reserved for national institutions only. Therefore, to legitimise the transfer of vast public powers to the supranational level, which itself triggered fundamental changes to some core constitutional principles (democracy, separation of powers, the rule of law, the role of the Constitution and constitutional review, etc.) an appropriate constitutional authorisation was needed. Otherwise, the gap between the text of the Constitution and the 'real' Constitution (that is, the actual *modus vivendi* within a national polity) would have become too wide, leading to a sharp decrease in the legitimacy of public power. There was a near-unanimous agreement among legal scholars in Lithuania before accession to the EU that EU related amendments were necessary; the main discussions revolved around the optimal form and content of such amendments. The expert groups that drafted the constitutional amendments analysed and took into account the experience of some of the 'old' Member States, which at that time had similar constitutional provisions.

Moreover, the Constitution is an anti-majoritarian act, established to protect the fundamental rights and liberties of the individual; therefore, given the overall

[39] Ruling of the CC of 11 July 2014. The argument was presented, in the proceedings before the SAC, that Lithuanian law does not give the right to the Central Electoral Commission to refuse to register a referendum initiative, since such refusal would unduly restrict the constitutional right of self-determination. Therefore, the SAC decided to clarify this aspect and to refer the issue to the CC. The CC rejected this argument in its ruling and decided that the law establishing such right of the Central Electoral Commission does not contravene the Constitution of Lithuania.

[40] Ruling of the SAC of 18 July 2014 in Case No. R-858-11-14.

[41] Lithuania joined the eurozone on 1 January 2015.

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constitutional architecture of the EU (Art. 4 of the TEU in particular), the Constitution should be treated as the guarantor of those rights despite the transfer of public powers to the supranational level.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 One of the primary functions of the Constitution is to protect the fundamental rights and freedoms of individuals. According to Art. 18 of the Constitution, human rights and freedoms are innate. Although Art. 18 of the Constitution is not technically in Chapter I of the Constitution, which may be amended only by way of a referendum, the CC has ruled that the innate nature of fundamental rights and freedoms is inseparable from the other fundamental provisions of the Constitution established in Art. 1 (the independence of the state and democracy). Therefore, according to the CC, Art. 18 may be amended only by a referendum in which the supermajority envisaged for amendments to Art. 1 of the Constitution is required.[42] Chapter II of the Constitution establishes traditional civil and political rights in detail. Pursuant to Art. 6(2) ('Everyone may defend his rights by invoking the Constitution') and Art. 30(1) ('[Any] person whose constitutional rights or freedoms are violated shall have the right to apply to [a] court'), constitutional rights and freedoms are directly enforced by the Lithuanian courts.

Although the principle of the rule of law (in Lithuanian '*teisinės valstybės principas*') and its various manifestations (like legal certainty, legitimate expectations, etc.) are not explicitly enshrined in the Constitution (apart from the Preamble of the Constitution, which speaks of the Lithuanian nation 'striving for an open, just, and harmonious civil society and State under the rule of law'), the practice of the CC clearly confirms that the rule of law is a core structural principle penetrating all aspects of the Constitution and, as such, is justiciable in the courts (see Sect. 2.1.3).

2.1.2 The Constitution does not contain any specific provisions establishing general conditions under which restrictions of fundamental rights and freedoms may be imposed. However, different articles of the Constitution establish various grounds for derogation, for example, Art. 20 ('No one may be deprived of his freedom otherwise than on the grounds and according to the procedures which have been established by law'); Art. 22 ('Information concerning the private life of a person may be collected only upon a justified court decision and only according to the law'); Art. 25 ('Freedom to express convictions, to receive and impart information may not be limited otherwise than by law, if this is necessary to protect the health,

[42] Ruling of 24 January 2014.

honour and dignity, private life, and morals of a human being, or to defend the constitutional order'), etc. The CC has in its practice developed a general standard for limitations of fundamental rights and freedoms. According to the Court, under the Constitution, the restriction of fundamental rights and freedoms is permitted if all the following conditions are met: the limitation is imposed by a law adopted by Parliament; these restrictions are necessary in a democratic society in order to protect the rights and freedoms of other persons as well as the values established in the Constitution together with constitutionally important objectives; the restrictions must not deny the nature and essence of the rights and freedoms; and the constitutional principle of proportionality is observed.[43]

2.1.3 The rule of law (a state governed by law) is treated as the cornerstone principle of the entire national constitutional system. Although not expressly established in any particular article of the Constitution, the principle transfuses many core provisions of the Constitution. These include Art. 1, ('The State of Lithuania shall be an independent democratic republic'); Art. 5(2) ('The scope of power shall be limited by the Constitution'); Art. 6(1) ('The Constitution shall be an integral and directly applicable act'); and Art. 7 ('Any law or other act, which is contrary to the Constitution, shall be invalid. Only laws which are published shall be valid').

Lithuanian authors are unanimous in treating the rule of law as an independent (constitutional) legal principle, which co-ordinates and determines the whole (constitutional) legal system; various elements of the principle are among the most important factors ensuring the proper unfolding of the Constitution.[44]

The CC consistently points out that the principle of the rule of law is a universal legal principle upon which the whole Lithuanian legal system as well as the Constitution itself are based, and that the content of the principle is revealed in various provisions of the Constitution. It is construed as inseparable from striving for an open, just, and harmonious civil society and law-governed state, as promulgated in the Preamble of the Constitution. Along with other requirements, the principle also pre-supposes that human rights and freedoms must be ensured, that all state institutions exercising state power and other state institutions must act on the basis of and in compliance with the law, that the Constitution has supreme juridical force and that all legal acts must be in conformity with the Constitution.[45]

The CC has in its practice identified different elements of the rule of law, which include the following: rules of general application must be established by laws passed by the Parliament; the supremacy of laws and hierarchy of different legal acts, which are all subordinated to the Constitution; the accessibility of legal provisions; legal certainty and the integrity of law; *nullum crimen, nulla poena sine lege*; natural justice; due process of law; the independence and impartiality of

[43] See e.g. Ruling of 14 March 2002.

[44] Kūris 2001, pp. 241–254; Šileikis 2005, pp. 198–210.

[45] For example, the Rulings of 23 February 2000, 11 January 2001.

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judges and courts; legitimate expectations; proportionality; and the constitutional imperative to observe the public international law principle *pacta sunt servanda*.

As one may see, the principle has extensive content. The CC treats the principle as one of utmost importance for the systemic interpretation of various constitutional provisions, even if it has not been singled out as one of the core constitutional principles that can only be renounced under the Art. 148(1) procedure.[46] Furthermore, the principle itself is justiciable and applicants may challenge legal provisions as regards their compatibility with the principle. Recently, the CC went so far as to say that the rule of law binds the sovereign (that is, the people) itself in that it does not allow for the introduction of constitutional amendments that would contravene Lithuania's international obligations or obligations stemming from EU law. In order to introduce such constitutional provisions, international or EU obligations would have to be renounced or modified in a way that would not contradict the proposed amendments.[47]

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 No constitutional issues have so far been raised in Lithuania with regard to the impact of EU economic freedoms on constitutional civil, political or social rights in court practice or in academic writings.

In the Expert's view, the ECJ has so far been careful to give the Member States wide discretion in this field (see, for example, the *Schmidberger*, *Omega* and *Dynamic Medien* judgments).[48] The *Laval* and *Viking Line* cases[49] are very specific and on their own should not be treated as a confirmation of the ECJ's approach that EU economic freedoms should generally be given priority over social rights. The Member States which intervened in these cases had very different views on the subject. It seems that at least in the *Laval* case, the outcome was to some extent predetermined by the existence of *Lex britannia* (i.e. the Swedish court practice, according to which there is no 'peace' if a collective agreement is concluded with a non-Swedish trade union) and the opaqueness of the negotiation process, especially for the economic entities that were not used to operating in the Member State in question. Further, the comparison of balancing economic with other rights at the national level and balancing EU economic freedoms with other rights at the EU

[46] Some authors argue that the rule of law is inseparable from other core constitutional principles: Šileikis 2005, p. 199.

[47] Ruling of 11 July 2014.

[48] Case C-112/00 *Schmidberger* [2003] ECR I-05659; Case C-36/02 *Omega* [2004] ECR I-09609; Case C-244/06 *Dynamic Medien* [2008] ECR I-00505.

[49] Case C-345/05 *Laval un Partneri* [2007] ECR I-11767; Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

level to some extent is not appropriate, since EU economic freedoms have an integrative function, thus by definition they seek to remove certain national restrictions. Finally, when the Lisbon Treaty came into force the legal landscape changed completely, with Art. 3(3) TEU explicitly noting the social orientation of the EU market economy, and the Charter of Fundamental Rights of the EU (Charter) covering social rights as well.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The Presumption of Innocence

2.3.1.1 Article 31 of the Constitution states that '[e]very person shall be presumed innocent until proved guilty according to the procedure established by law and declared guilty by an effective court judgment'. A similar rule is contained in Art. 44 of the Code of Criminal Procedure (CCP): 'Anyone charged with a criminal offence shall be presumed innocent until proved guilty in accordance with a procedure prescribed by this Code and established by an effective court judgment.' In addition, Art. 2 of the CCP prescribes that '[e]very time when elements of a criminal act are discovered, the prosecutor and the institutions of pre-trial investigation shall, within the limits of their competence, take all measures provided for by law to conduct a pre-trial investigation and ascertain that the criminal act has been committed'.

The content of the presumption of innocence has been analysed in detail and in various contexts in the jurisprudence of the CC. For example, the presumption of innocence has a much broader content and cannot be attributed solely to criminal legal relations.[50] A further dimension of this principle, which was identified in the jurisprudence of the CC, is that

> [i]t is especially important that state institutions and officials follow the presumption of innocence, that public persons should in general restrain from referring to a person as a criminal until the guilt of the person in committing the crime is proven [pursuant to] the procedure established by the law and [the person is found] guilty by an effective court judgment, otherwise, human honour and dignity could [be] violated and human rights and freedoms could be undermined.[51]

On the other hand, the constitutional principle of the *presumption of innocence* has never been analysed by the CC in the context of the European Arrest Warrant (EAW).

Various aspects of the principle of the presumption of innocence (for example, 'the burden of proof lies with state officials'; 'any doubts are treated in favour of the

[50] Rulings of 29 December 2004 and 25 November 2011 of the CC.

[51] Ruling of 16 January 2006.

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defendant'; 'a conviction cannot be based on assumptions', etc.) have been analysed in the jurisprudence of the European Court of Human Rights,[52] the jurisprudence of the Supreme Court of Lithuania[53] and the theory of Lithuanian criminal procedure[54]. On the other hand, according to the doctrine of Lithuanian criminal procedure, the content of the principle of presumption of innocence is not precise and determined, and there is no exhaustive list of cases and situations in which this principle has implications for making legal decisions.[55] At the same time, it should be emphasised that the compatibility issue between the EAW and the principle of the presumption of innocence (as well as other aspects of the constitutionality of the EAW) have not been mentioned either in the jurisprudence of the Supreme Court of Lithuania or in legal commentary in Lithuania. As the author of this part of the report has noted elsewhere, one of the reasons why the question of the constitutionality of the EAW has never been raised in the constitutional jurisprudence or judicial practice of Lithuania is that Lithuania did not participate in the drafting, development or adoption of the Framework Decision on the EAW,[56] but was required to implement it in national law in order to join the European Union.[57]
It is worth noting that there are some cases in Lithuanian jurisprudence where the advocates of the accused, against whom an EAW was issued, have appealed the extradition arguing that the presumption of innocence has been violated.[58] However, there are no court decisions refusing to surrender a person to a requesting state specifically because of violation of this principle.

In the opinion of the Expert, it is not as of yet possible to provide an accurate answer to the question whether the principle of the presumption of innocence can no longer fully be granted the same level of protection as prior to the entry into force of the EAW Framework Decision (EAWFD). Moreover, a court decision (concerning an EAW) is essentially a procedural decision that does not solve the question of the guilt of the surrendered person. The Expert has elsewhere expressed the opinion that 'the executing Member State should not control the procedural safeguards and respect for the rights of defence in the issuing Member State because all Member States are parties to the European Convention on Human Rights (ECHR). Moreover, such control would in some sense defy the spirit of the

[52] See ECtHR decisions *Butkevicius v. Lithuania*, no. 48297/99, ECHR 2002-II (extracts) and *Daktaras v. Lithuania,* no. 42095/98, ECHR 2000-X.

[53] Rulings of the Supreme Court of Lithuania in criminal cases No. 2K-218/2010; 2K-374/2010; 2K-393/2010; etc.

[54] Švedas and Merkevičius 2013, pp. 440–441; Goda et al. 2011, pp. 50–52; Jurka et al. 2009, pp. 106–115.

[55] Goda 2003, p. 92.

[56] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[57] Švedas 2008, p. 66.

[58] The Court of Appeal of Lithuania ordered that the allegations in the EAW were 'sufficiently clear and … without prejudice to the presumption of innocence'. See the Ruling of Court of Appeal of Lithuania of 26 October 2010, No. 1N-67/2010.

EU, as only such states, which inter alia ensure and safeguard human rights and freedoms, can become members of the EU'.[59]

2.3.1.2 It should be noted that review of EAW requests is much more complex in Lithuania. First of all, the review of an EAW is carried out by a prosecutor from the Prosecutor General's Office. This review includes a systematic assessment of the following categories of information: (1) that the form of the EAW is properly constructed in that it bears the appropriate signatures and seals; (2) that the facts of the offence(s) in section (e) of the form are adequately completed; (3) that the facts and legal description of the offence(s) correspond to the double criminality requirement or that the offence set out is properly included in the FD list of 32 categories of crimes; (4) that the sentences mentioned (in a conviction under an EAW) match those handed down by the court; (5) that the identification evidence/information is deemed to be adequate; and (6) whether grounds for mandatory or optional refusal are apparent from the facts disclosed.[60]

Additional *ad hoc* enquiries can be made by the prosecutor with regard to individual cases. For example, the Prosecutor General's Office has reported[61] that it has on two occasions made enquiries of fact to the issuing Member States in two cases of an alleged alibi.[62] In one case the issuing Member State, having reviewed the case and discovered that there was merit in the claim, withdrew the EAW. In the other case, the issuing Member State found the alibi to be false and the surrender proceeded.

Once a prosecutor from the Prosecutor General's Office verifies that an issued EAW meets all the listed requirements, the prosecutor submits an application regarding the requested person's surrender to the Regional Court of Vilnius in accordance with Art. 73 of the CCP.

Normally the courts follow the principle of a high level of confidence between Member States. For example, the Court of Appeal of Lithuania in ruling No. 1N-36/

[59] Švedas and Mickevičius 2009, p. 350.

[60] Article 9^1 of the Criminal Code has provided for some additional grounds for non-execution, which are not explicitly included in the FD: (a) a mandatory human rights clause; (b) an optional ground 'where the information contained in the EAW is insufficient to decide the surrender and the issuing judicial authority fails to provide it within the prescribed time limit'; (c) some listed grounds for refusal have been implemented more broadly than they are formulated in the FD, e.g. not only amnesty, but also pardon, etc.

[61] Fourth round of mutual evaluations 'Evaluation of the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States', Report on Lithuania by Multidisciplinary Group on Organised Crime (doc. 12399/2/07 REV 2 CRIMORG 134 COPEN 121 EJN 25 EUROJUST 45), p. 19.

[62] The courts considered that in cases where (e.g.) alibi defences were raised, it would be prudent to make further enquiries to the issuing Member State. If such alibi evidence stood up to examination, the EAW was unlikely to be maintained and so the process could be terminated by the issuing Member State itself, thus preventing the surrender of a requested person in circumstances in which it would be contrary to the interests of justice to pursue the request. However, there have been no judicial refusals of EAWs on this ground. Report on Lithuania, supra n. 61, p. 22.

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2007 of 30 August 2007, whereby J. M. was surrendered to Hungary, noted as follows:

> Paragraph 10 of the Preamble of the FD on the EAW states that the mechanism of the EAW is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6 EU, determined by the Council pursuant to Article 7(1) EU with the consequences set out in Article 7(2) thereof. Such circumstances have not been identified and the implementation of the mechanism of the EAW has not been suspended.

In another ruling (No. 1N-4/2008, dated 8 January 2008), where by A.D. was surrendered to Estonia, the Court of Appeal held that

> [d]ifferently to requests for extradition, it is not required to provide the information substantiating the accusation in the case of requests to surrender under the EAW. Competent judicial authorities of the executing state have to trust the information received from the issuing judicial authorities and believe that it has been substantiated by specific data of the criminal case file. Therefore, the claims contained in the request expressed during the court hearing by A.D. to check the case information on the amount of narcotic substances and the facts [regarding validity of his] Russian visa, as well as the requests of the defence counsel to produce thorough evidence of guilt shall be refused.

In principle, the Regional Court of Vilnius must carry out the same review as the prosecutor. According to the Regional Court of Vilnius, the Court does not normally check for double criminality if the offence is on the list of the 32 criminal offences, and does not investigate the circumstances of the crimes or evidence of the guilt underlying an EAW.[63] For the issuing state it is enough to prove that according to its laws, the offence is on the list of the 32 criminal offences[64] and is punishable in the state by a custodial sentence or a detention order for a maximum period of at least three years. The court deciding on the EAW usually checks: (1) whether the EAW complies with the EAW form and content requirements; and (2) whether there are grounds on which transfer of the person to another EU Member State should be refused. Depending on the outcome of this check, the court will only verify that no mistakes have been made (for example, if the offence is on the list of 32 criminal offences although it should not be included in the list, given the description of the offence). In cases where a question as to whether a crime has been rightly 'ticked' as a 'listed offence' by the issuing authority arises, the prosecutor or court may ask for additional information from the issuing authority. An omission by the issuing authority may result in the non-execution of the foreign decision on the grounds of 'not enough information'.

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[63] Rulings of the Court of Appeal of Lithuania in criminal cases No. 1N-48/2008; 1N-4/2008.

[64] The question as to whether a crime is reasonably placed in a certain category is not elucidated in the national legal provisions. However, it may be presumed that if the executing authority were to discover that the legal description of a committed offence was manifestly incorrect and could not be described as one of the categories of '32 listed crimes', it would be forced to take a negative decision on recognition of the issued EAW or other mutual recognition instrument. Thus, in practice, Lithuanian authorities usually require a full description of the offence even if it is a 'listed offence'. For example, see Švedas and Mickevičius 2009, p. 344.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle of *nullum crimen, nulla poena sine lege* is set out in Art. 31 of the Constitution: 'Punishment may be imposed or applied only on the grounds established by law'. Article 2 of the Criminal Code of the Republic of Lithuania states that

> [o]nly a person whose act as committed corresponds to a definition of a … crime or misdemeanour provided for by a criminal law shall be liable under the criminal law. Penalties, penal or reformative sanctions and compulsory medical treatment shall be imposed only in accordance with the law.

Concerns about the compatibility between the principle of *nullum crimen, nulla poena sine lege* and the EAW have still not been raised in Lithuanian legal practice or in CC case law.[65]

It should be noted that in the negotiations on other EU instruments based on mutual recognition (e.g. the draft Framework Decision on the application of the principle of mutual recognition to custodial sentences, which initially did not provide for the rule on double criminality), Lithuanian representatives have usually been consistent in pursuing the position that double criminality (at least for crimes that do not fall into the category of the 32 'listed offences') is a prerequisite for mutual recognition.

However, in the theory of Lithuanian criminal law, questions have arisen with regard to the compatibility of the principle of *nullum crimen sine lege* and withdrawal (abolition) of the rule of double criminality. It is worthy of note that with regard to the exception of the 32 'listed offences', a question has been raised in the legal commentary as to whether exclusion from the rule of double criminality would be in conformity with the constitutional principles of equality of individuals before the law and their legitimate expectations, as well as with *nullum crimen sine lege*. Such a question arises in two situations: if Lithuania executes an EAW issued by another state (1) on the ground of an offence which is not fully (or partly) prohibited under the Lithuanian Criminal Code, e.g. in the case of counterfeiting and piracy of products, illicit trafficking in hormonal substances and other growth promoters, or (2) on the ground of any other of the 32 listed criminal offences, where the elements of such offence according to the laws of the requesting state lead to the criminalisation of a broader scope of actions than those covered by the Lithuanian Criminal Code. This theoretical conflict lies in the fact that Lithuania, by executing such an EAW, would be forced to apply coercive measures (e.g. detention, property seizure or other remand measures, etc.) provided for in criminal procedural law for an act that is not prohibited in Lithuania. In other words, if the act were committed in Lithuania, the person in question would not be subject to the coercive measures laid down in the law of criminal procedure and/or criminal law.[66]

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[65] See Sect. 2.3.1.1 for an explanation of the reasons for this tendency.

[66] Švedas 2008, pp. 67–68; Švedas 2010, pp. 944–945.

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It should be noted that research shows that the identical constitutional problems (since the constitution does not allow for cooperation in relation to acts that do not constitute an offence in national criminal law) are faced by 25% of the Member States, and the identification of offences for which double criminality in the other Member State is no longer relevant is problematic in 92% of the Member States.[67]

This theoretical conflict with the constitutional provisions can be disproved only by the CC. However, it has not yet heard any cases of this nature.

It should be noted that the question regarding the issue of retroactive amendment of substantive criminal law still has not emerged either in judicial practice or in the theory of Lithuanian criminal law.

The conclusion may be drawn by the Experts that the principle of *nullum crimen sine lege, nulla poena sine lege* can no longer fully be granted the same level of protection as prior to the entry into force of the EAWFD (especially in accordance with the two previously-mentioned cases).

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Article 31 of the Constitution states that '[a] person charged with the commission of a crime shall have the right to a fair public hearing of his case by an independent and impartial court'. This constitutional provision grants the accused person the right to participate in the court hearing.[68]

Article 246 of the CCP provides for one case allowing *in absentia* proceedings (judgments) in Lithuania: 'The hearing in the court of first instance is conducted in the presence of the accused. The accused person must appear in court. Proceedings in the absence of the accused shall be allowed only if the accused is not in the Republic of Lithuania and avoids appearing in court'.[69] This exception is not absolute, as Art. 433 of the CCP provides that the trial is to be postponed if the case cannot be properly resolved without the presence of the accused.

Despite the quite rare application of Chapter XXXII (including Art. 433) of the CCP in practice and its exceptional nature in the CCP, there have been no theoretical discussions about *in absentia* proceedings (as well as EAW judgments *in absentia*) conflicting with constitutional provisions in Lithuania. On the contrary, in the doctrine of Lithuanian criminal procedure some proposals have been put forward to expand the grounds for proceedings *in absentia* in the context of the EAW; for example, to amend certain provisions of the CCP to legitimise the following institutes: judgments *in absentia* for misdemeanours, negligent crimes, and non-serious or semi-serious premeditated crimes.[70]

[67] Vermeulen et al. 2012, pp. 127–128.

[68] Goda et al. 2011, p. 597.

[69] Translation by the author.

[70] Švedas 2008, p. 72.

It should be noted that Council Framework Decision 2009/299/JHA amending the *in absentia* trial rules set out in previous framework decisions[71] has been transposed into the Lithuanian legal system by the amendments of the Criminal Code and CCP of 30 May 2013, using the same wording as in the relevant provisions of the Framework Decision.

The Experts draw the conclusion that the standard of protection remains at the same level in ordinary criminal proceedings and EAW proceedings *in absentia*. However, in EAW proceedings it is important to: (1) secure for a person convicted *in absentia* the right to review the case (pending against him) in his physical presence, and (2) ensure a real defence in such proceedings.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Article 13 of the Constitution provides that '[t]he State of Lithuania shall protect its citizens abroad. It shall be prohibited to extradite a citizen of the Republic of Lithuania to another state unless an international treaty of the Republic of Lithuania establishes otherwise'.[72]

Article 18 of the Law on Consular Statute provides as follows:

> If a citizen of the Republic of Lithuania is being detained or is serving a sentence or is suspected of having committed a criminal act in a consular district, a consular officer shall … contact or, where necessary, meet this person upon a justified request from him, his authorised representative, his spouse (cohabitee) or close relatives. Upon the request of a citizen of the Republic of Lithuania, a consular officer shall ascertain that the citizen has been provided with a defence counsel and other legal aid in accordance with the local laws and that he has been provided with a translator, and where necessary, arrange for the legal aid and translator to be provided. A consular officer shall, where possible, keep in contact with the citizen of the Republic of Lithuania who is serving a sentence of imprisonment and shall ascertain that the conditions of detention of the citizen of the Republic of Lithuania are not worse than those of the citizens of the host State.

A special safeguard for citizens and permanent residents is established in Art. 9^1 of the Criminal Code, which subjects surrender to the condition that the person against whom the issuing Member State has delivered a judgment will be returned to Lithuania to serve the custodial sentence at the request of the person surrendered or where the Prosecutor General's Office of the Republic of Lithuania so requires. Lithuania has chosen not to enact domestic legislation to regulate such surrender of

[71] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

[72] This constitutional provision has been established in the Constitution from the adoption of the Constitution by citizens of the Republic of Lithuania in the Referendum of 25 October 1992.

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its own nationals, rather it relies upon the provisions of the 1983 Convention on the Transfer of Sentenced Persons.[73]

Article 51 of the CCP provides that the assistance of a defence lawyer is mandatory in the proceedings when deciding on a person's extradition or surrender to the International Criminal Court or under an EAW. Article 12 of the Law on State-Guaranteed Legal Aid provides that persons falling within the scope of Art. 51 are eligible for secondary legal aid regardless of their property and income levels.

These are the common rules regarding the assistance that Lithuania provides to all its citizens (*inter alia* extradited citizens or residents). The laws do not provide for the possibility to recover travel expenses.

According to the available information, there are no public or non-governmental organisations providing assistance to extradited persons in Lithuania. These questions generally belong to the duties of the consulate of the state. The Experts would support a recommendation to introduce a publicly funded state or non-governmental body to provide assistance to residents who are involved in trials abroad. However, this question should be the subject of an individual study on, for example, the competence of such body, etc.

There should be mention of the opposite side of the question – recovering the costs of the transfer process in EAW proceedings. The statistical data shows that the state has recovered the costs of the transfer process from 35 (2007), 14 (2008), 43 (2009), 20 (2010), 30 (2011) and 40 (2012) persons who have been transferred, corresponding to a sum of approximately 56 000 LTL to 264 467 LTL (∼18 200–76 000 EUR) per year. This policy of the state has received a lot of criticism, because it unreasonably extends the definition of the costs of criminal proceedings and raises serious doubts about the compliance of this policy with human rights and freedoms standards and the statutory requirements of Lithuania.[74] The view that the recovery of the costs of the transfer process in EAW or extradition proceedings from transferred persons conflicts with, *inter alia*, the statutory requirements of Lithuania has been confirmed by the Court of Appeal of Lithuania. The Court of Appeal of Lithuania[75] has emphasised that

> the ensuring of costs for material/in-house provisions, health care, catering and other costs related to the maintenance of such persons shall be the responsibility of the state. Such provisions are established in Chapter XIV of the Punishment Enforcement Code of the Republic of Lithuania and in Section 5 of the Law on Detention of the Republic of Lithuania. The status of a person surrendered under extradition or transferred for criminal prosecution to the Republic of Lithuania is a detained person because a court order to impose a remand measure – detention – has been rendered in regard to him/her. It means that all costs related to the material/in-house provisions for this person are the responsibility of the state. … Meanwhile other costs related to the execution of extradition are related to

[73] Report on Lithuania, supra n. 61, p. 23.

[74] Švedas 2008, p. 72.

[75] Ruling of the Court of Appeal of Lithuania of 1 June, 2012, No. 75/2012. Translation by the author.

Table 1 Statistics on the Operation of the EAW 2005–2011 in Lithuania

Data on the EAW	2005	2006	2007	2008	2009	2010	2011
EAWs issued[a]	500	538	316	348	354	402	420
Transferred to Lithuania under an issued EAW[b]	68	62	117	119	108	138	169
Sentenced persons transferred to Lithuania, including:	48	50	59	25	58	31	42
Imprisonment	31	22	42	10	38	21	29
Fine	10	13	14	7	11	5	2
Other penalty	7	15	3	8	9	5	11
Process terminated due to acquittal[c], amnesty, expiry of limitation period, reconciliation	6	7	5	–	7	2	1
Process terminated in the pre-trial investigation stage	12	3	11	15	5	6	14
Percentage of processes terminated because of acquittal, amnesty, expiry of limitation period or reconciliation	9%	11%	4%	0%	6%	1%	1%
Percentage of processes terminated	24%	16%	14%	13%	11%	6%	9%[d]

(*Source* Authors, on the basis of a variety of documents indicated in the footnotes in the Table)
[a]Data from the CEPS report noted in the Questionnaire
[b]Data from the Annual reports of the Prosecution Service of the Republic of Lithuania at http://www.prokuraturos.lt/Veikla/Veiklosataskaitos/tabid/515/Default.aspx
[c]The Experts were unable to obtain exact data on acquittals
[d]In 2012 this percentage was the lowest ever – 4% (191 persons transferred; 8 cases of termination)

> the activities of the state in the area of criminal justice. As it has already been mentioned, the ensuring of such costs is an obligation of the state, which may not be transferred to the person subject to prosecution. Thus, the extradition of R.E. to the Republic of Lithuania is one of the political functions to be financed by the state from its budget; hence, the extradition costs in this case may not be considered as procedural costs.

2.3.4.2 The statistics of the operation of the EAW in Lithuania are summarised in Table 1.

According to the data, there is an obvious trend indicating the increasing efficiency of EAWs year over year. The percentage of extradited persons who have been found innocent in the courts of first instance is approximately 1%. This is not extraordinary compared to the data on general domestic trials. Annually, 1–2% of all cases in the Lithuanian courts of first instance result in acquittal, as summarised in Table 2.

Compensation for individuals who have been extradited and subsequently found innocent could be provided on the grounds already provided for in the legislation of the Republic of Lithuania. Article 30 of the Constitution states that '[any] person whose constitutional rights or freedoms are violated shall have the right to appeal to [a] court. Compensation for material and moral damage inflicted upon a person shall be established by law'. These provisions are further elaborated in the Civil

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Table 2 Accused found innocent in the courts of first instance

Data of the courts of first instance[a]	2010	2011	2012
Convicted	17322	16342	17472
Acquitted	227	294	405
Percentage	1,3%	1,8%	2,0%

(*Source* National Courts Administration, and Reports of the Prosecution Office of the Republic of Lithuania (Data from the National Courts Administration: http://www.teismai.lt/lt/teismai/teismai-statistika/; and Reports of the Prosecution Office of the Republic of Lithuania. http://www.prokuraturos.lt/Veikla/Veiklosataskaitos/tabid/515/Default.aspx))

[a]It is worth noting that the data is very similar compared to the outcomes of cases in the Lithuanian courts of all instances. See http://osp.stat.gov.lt/services-portlet/publication-file/4224/24_Nusikalstamumas_%202012.pdf

Code (Art. 6.272) and the Law on Compensation for Damage Inflicted by Unlawful Actions of Government and on Representing the State (Art. 4). According to these laws, both pecuniary and non-pecuniary damage resulting from unlawful arrest, conviction or detention shall be compensated, with a maximum limit of 10,000 LTL (2,900 EUR) for pecuniary and 5,000 LTL (1,500 EUR) for non-pecuniary damage in non-judicial order.

It must be noted that no precedents have been highlighted in the Lithuanian media with regard to compensation for damage to persons surrendered under an EAW and later found innocent in court.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.3 No constitutional issues similar to those indicated in the questionnaire have arisen in the constitutional jurisprudence, court practice or legal commentary of Lithuania with regard to mutual recognition in criminal law and the abolition of the exequatur in civil and commercial matters.[76]

Moreover, there have been no debates about the suitability of transposing mutual recognition from internal market matters to criminal and civil procedures either in the doctrine of criminal procedure or in the doctrine of civil procedure of Lithuania. No concerns have been expressed about a change in the role of the courts. In the opinion of Vytautas Nekrošius (a leading expert in the field of Lithuanian civil procedure), the abolition of the exequatur in civil and commercial matters has been accepted favourably in the doctrine of Lithuanian civil procedure.

2.3.5.4 The practical application of the EAW has revealed a serious problem with regard to issuing EAWs in Lithuania: until 2013 neither the prosecutors nor the

[76] Regarding the reasons, see Sect. 2.3.1.1.

courts applied a proportionality test.[77] During the fourth round of mutual evaluations,[78] prosecutors expressed the following concern:

> Under Article 2 of the CCP the prosecutor is obliged to prosecute all criminal acts and to take all steps and action under the law to prosecute an offender, domestically or otherwise. This provision was referred to by the Lithuanian authorities as the 'principle of legality'. In application of this principle no proportionality test whatsoever is applied in issuing EAWs, although Lithuanian authorities informed the expert team that in practice in certain cases – in view of the resources used compared to the gravity of the criminal offence – they may choose not to issue an EAW in the first place but to exploit other possibilities to address the issue (such as MLA requests). This may explain, together with a rather strong criminal environment, why Lithuania issues around 500 EAWs per year. In per capita terms this is most probably the highest rate of issue of any Member State.

However, the situation changed significantly in 2013 after the adoption of amendments to Art. 69^1 of the CCP, which provides: '[the] Lithuanian Prosecutor General's Office or the Regional Court, acting on a European arrest warrant …, must evaluate whether the transfer of the person under the European Arrest Warrant is in line with proportionality and procedural economy, taking into account the nature and extent of the severity of the committed crime, as well as the personality of the suspect, accused or convicted person'. It should be emphasised that Lithuanian judges and prosecutors are of the opinion that control of the proportionality of EAWs is among the most important issues raised in recent years.

Moreover, the non-legally binding European Handbook on How to Issue a European Arrest Warrant, which provides guidance for improving the uniformity of the application of the EAW across the EU and includes the proportionality test amongst the factors to be examined by national authorities when issuing an EAW as well as alternatives to issuing an EAW, has also played a very important and positive role in this context.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

Doubt has been expressed in the theory of Lithuanian criminal law with regard to the manner in which the EAWFD provisions were drafted, in particular whether they are in conformity with the requirements of Art. 13 of the Constitution, according to which a citizen of the Republic of Lithuania may be surrendered only in the cases specified in the international treaties concluded by Lithuania. Some authors (for example, Algimantas Čepas) claim that the EAWFD specifies that it has been adopted under para. 2(b) of Art. 34 TEU, whereby the EU Member States have delegated to the Council of the EU the power to adopt Framework Decisions, and that therefore, the grounds for surrendering Lithuanian citizens is the TEU as an

[77] Švedas and Mickevičius 2009, p. 354; Žižienė 2014, pp. 450–452. For similar problems in other Member States, see Weyembergh et al. 2014.

[78] Report on Lithuania, supra n. 61, p. 32.

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international treaty.[79] Similar arguments have also been upheld by the Court of Appeal, which has concluded in one of its rulings[80] regarding the surrender of a Lithuanian citizen, M.M., to France under an EAW that 'the surrender of persons under the European Arrest Warrant is provided for in an international treaty of the Republic of Lithuania, which has supremacy in respect of the rules of Art. 226 of the Code of Criminal Procedure of the Republic of Lithuania'.[81]

On the other hand, such arguments raise certain doubts,[82] because in cases of extradition the court directly applies the provisions of the international treaty on extradition of the Republic of Lithuania, the CC and the CCP,[83] whereas when deciding the issue of surrendering any person (including a citizen of the Republic of Lithuania) under an EAW, the court in fact applies only the provisions of the CC and the CCP. Nevertheless, the actual provisions of the CC and CCP continue to be applied as they stand and the aforementioned question of a constitutional nature can only be resolved by the CC if such a case is submitted to it.

2.4 The EU Data Retention Directive

2.4.1 Article 22 of the Constitution protects the right to privacy and secrecy of communications as follows:

> The private life of a human being shall be inviolable. Personal correspondence, telephone conversations, telegraph messages, and other communications shall be inviolable. Information concerning the private life of a person may be collected only upon a justified court decision and only according to the law.

It may be worth noting that by using the term 'inviolable', the provision is stricter than the equivalent provisions in the EU Charter and the ECHR that refer to 'respect' for private and family life, home and communications (Art. 7 of the Charter).

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[79] Švedas 2004, p. 75.

[80] Criminal case No. 1N-11/2006.

[81] Čepas and Švedas, pp. 84–85. Translation by the author.

[82] Švedas 2008, p. 66; Švedas 2010, pp. 946–947.

[83] It should be noted that this practice of the courts has been held to be well-founded by the Supreme Court of Lithuania in para. 2 of the Senate's Ruling No. 42 'On the practice of courts in applying international treaties of the Republic of Lithuania and the provisions of the Criminal Code and the Code of Criminal Procedure, regulating the surrender of persons to foreign States or to the International Criminal Court' of 29 December 2003, where it emphasised that in 'deciding whether there are grounds and conditions to surrender the person to a foreign state …, the Vilnius County Court shall follow international treaties, Art. 9 of the Criminal Code and Art. 71 of the Code of Criminal Procedure' (translation by the author).

The adoption and implementation of the Data Retention Directive[84] in Lithuania has not raised any wide constitutional concerns neither in court practice nor at the political level. However, some commentators, including the author of the present report, supporting the views of the Art. 29 Data Protection Working Party established under Directive 95/46,[85] have voiced doubts as regards the compatibility of the then draft data retention framework decision, which later became the Data Retention Directive, both conceptually (that is, the regime itself: data retention versus data preservation) and regarding certain details (the scope of collectable data; the length of the retention period, the lack of judicial control, etc.).[86] These doubts were based both on the jurisprudence of the European Court of Human Rights (ECtHR)[87] and of the CC.

The CC ruled in 2002 that the right to the inviolability of private life is not absolute. Under the Constitution, restriction of the constitutional rights and freedoms of the individual is permitted if certain conditions are observed (see Sect. 2.1.2).[88] The Court ruled that Art. 22 requires, inter alia, that the legislature establish by a law a procedure for collection of information about the private life of an individual. While the law must provide that information concerning the private life of an individual may be collected upon a reasoned court decision only,[89] the Court pointed out that the obligation on the part of operators to collect, store and provide all communications data to state institutions at their own expense is contrary to Arts. 22 and 23 of the Constitution (protection of the right to privacy and property).

The Directive was implemented by amendments to the Electronic Communications Law (Art. 65 and Annex I) by restating the relevant contents of the Directive and adding that the operators have to provide data to state institutions for free. Because of this, all of the constitutional concerns raised by the ECJ in the *Digital Rights Ireland* judgment as well as by the constitutional courts of some of the Member States in their respective decisions are also relevant for Lithuania. It could be said that the relevant provisions of the Law are clearly excessive and disproportionate and have failed to establish proper mechanisms for supervision, including judicial control. Additionally, they go against the ruling of the CC as regards the provision of data to state institutions for free. Therefore, the annulment

[84] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[85] See Opinion 4/2005 of the Art. 29 Data Protection Working Party. http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp113_en.pdf.

[86] Jarukaitis et al. 2005, pp. 369–375; Štitilis 2006, pp. 69–75.

[87] For example, *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II.

[88] Ruling of 23 October 2002.

[89] Ruling of 19 September 2002.

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of the Data Retention Directive should trigger at least a review of the Electronic Communications Law, although hitherto no formal amendments have been tabled before the Parliament.

2.5 Unpublished or Secret Legislation

2.5.1 Article 7(2) of the Constitution explicitly stipulates that only laws which are promulgated shall be valid. The CC treats this requirement as part of the principle of the rule of law. In its rulings of 11 January 2001 and 29 November 2001, the Court made it clear that law must not be secret; laws are not valid and must not be applied until they are officially published. It stressed that an essential element of the principle of the rule of law is that only published legal acts are effective; the constitutional requirement that legal acts must be published to have legal effect is an important precondition of legal certainty. Indeed the CC went so far as to state that *all acts* of the Government (of normative or individual nature) must be published; the Court annulled a provision of a law which provided that resolutions of the Government 'in which legal norms are not established, amended or acknowledged as no longer valid' need not be published as well as the contested decision of the Government that had not been officially published, as contrary to the principle of the rule of law.

The SAC has developed similar practice. Where it has faced the question of conformity of normative acts (e.g. municipality regulations, ministerial orders, etc.) to the laws or decrees of the Government and a review of legality of a certain act has been initiated, the court, after establishing that the contested act has not been properly published, has refused to initiate the case, stating that it does not have the competence to review the legality of non-existent acts (that is, the content of the act does not exist, since it was not published).[90]

The SAC has also had to deal with the legality of individual acts that have been adopted on the basis of (not properly published) unpublished EU legislation. After clarifying with the Office of Publications that the relevant EU regulation had been properly published in Lithuanian only after the adoption of the contested administrative act issued by the customs authority by which an additional customs duty and a pecuniary fine were imposed on a company, the Court, relying on the ECJ *Skoma-Lux* judgment, annulled the contested measure.[91]

[90] For example, Ruling of 3 May 2012 in Case No. I^{492}-30/2012.

[91] Decision of 25 July 2011 in Case No. A^{438}-305/2011.

2.6 Rights and General Principles of Law in the Context of Market Regulation

2.6.1 No direct constitutional or similar challenges have been brought before the national courts concerning the national implementing measures for the EU transitional measures concerning agricultural stocks.

However, the Lithuanian Government was successful in challenging a Decision of the Commission concerning the obligation of the state to remove from the market all agricultural stocks which could not be considered as normal carryover stocks. Although it took the General Court five years to deliver the judgment, it annulled Commission Decision No. 2007/361/EC in 2012.[92]

The practice of the CC reveals its readiness to annul market regulation measures on the basis of a violation of the prohibition of retroactive effect of legal acts,[93] or of the principles of proportionality,[94] legal certainty[95] or legitimate expectations,[96] although the principle of legitimate expectations has entered the CC's 'vocabulary' rather late, in response to legislative practice in the field of social issues, which itself was a reaction to the economic crisis of 1998–1999.[97] It can also be said that the Court in its jurisprudence uses more ECtHR than ECJ case law as a source of inspiration.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 The ratification of the Treaty Establishing the European Stability Mechanism (ESM Treaty) has mostly been discussed in Lithuania in the context of the introduction of the euro as of 1 January 2015. In order to introduce the euro, Lithuania had to join the ESM Treaty, which was done by a parliamentary law adopted on 18 December 2014. The explanatory memorandum that was submitted to Parliament with the draft ratification law treated the ratification of the ESM

[92] Case T-262/07 *Republic of Lithuania v. European Commission* [2012] ECLI:EU:T:2012:171. The Court ruled that the Commission used the wrong methodology and was not able to show that the exports of surplus stocks actually took place or that other measures for eliminating the surpluses were taken, or that they were financed by the Community budget, i.e. it ruled that the Commission overstepped its wide discretion and violated provisions of the Act of Accession. From the point of view of this project, it may be worth noting that the Lithuanian Government's arguments were not formulated in constitutionalist terms.

[93] Ruling of 29 November 2001.

[94] Ruling of 14 March 2002.

[95] For example, Rulings of 17 March 2003; 31 May 2006.

[96] Rulings of 23 February 2000; 13 May 2005; 5 July 2007.

[97] Šileikis 2005, p. 254.

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Treaty as an additional financial guarantee for the state financial system. There were some discussions both within the Parliament and in the general public concerning the far-reaching obligations undertaken under the ESM Treaty, but these discussions were to some extent overshadowed by events in Ukraine, since accession to the eurozone is viewed in Lithuania not only from the economic but also from the geopolitical perspective.

It should further be noted, that the SAC has had to deal with a case concerning the lawfulness of the refusal of the Central Electoral Commission to register an application from a referendum initiative group concerning amendment of the Constitution with regard to the (non)introduction of the euro in 2014. Similarly as in the case before the Polish Constitutional Tribunal, the extensive financial obligations under the ESM Treaty were mentioned as one of the secondary arguments, with the claim that the obligation to introduce the euro under the Accession Treaty had in fact been annulled since the conditions of participation had changed dramatically.[98]

The different (constitutional) aspects of the ESM Treaty, Eurobonds and the Banking Union have not attracted the attention of Lithuanian legal scholars so far. In the Expert's opinion, as regards commitments under the ESM Treaty, two main, interrelated issues arise. The first concerns the intensity of solidarity desired at the EU level, since financial resources pooled under the ESM Treaty would be used for those in need (therefore Member States do not only undertake financial commitments, but they also receive guarantees). The second concerns democracy at the national level, since commitments under the ESM reduce the ability of the national parliaments to decide on spending.

The financial crisis is considered further below in Sect. 3.5.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 There are no statistics on the number of cases in which the applicants have requested a preliminary ruling regarding the validity of an EU legal measure in the Lithuanian courts. However, given the fact that applicants in Lithuania are still rather reluctant to rely on EU law, it may be assumed that the number of such requests is very low. In the majority of requests for a preliminary ruling to the ECJ, Lithuanian courts have raised questions regarding the interpretation and not the validity of EU acts. So far there has only been one request from the Vilnius District Administrative Court concerning the validity of various provisions of Regulation No. 73/2009/EU and the Commission Implementing Decision C (2012) 4391,

[98] See the Ruling of the SAC of 18 July 2014 in Case No. R-858-11-14. The Court rejected this argument and stated that the ESM Treaty may not be viewed as a factor modifying the obligations undertaken under the Accession Treaty without its formal amendment.

which was submitted to the ECJ on 4 March 2014 (*Jakutis and Kretingalės kooperatinė ŽŪB*, C-103/14).[99]

2.8.2–2.8.5 Looking at the latest ECJ case law that has been developed after the entry into force of the Charter of Fundamental Rights and the methodological approach of the Court in these cases,[100] it is difficult to draw the definite conclusion that the ECJ standard of judicial review is clearly lower than that performed by the Lithuanian courts. Admittedly, the *Sugar quotas* case law raises certain questions as regards the intensity of judicial review; however, in the Expert's view, this may to some extent be explained by the transitional (one-off) nature of the contested measures. On the other hand, the CC has also exhibited certain self-restraint in the evaluation of measures which involve complex policy choices.

The CC jurisprudence reveals different approaches in terms of the intensity of judicial review depending on the content of the contested legal provisions. Where the CC has been faced with questions related to *ex ante* economic (or other) policy formation or implementation, it has demonstrated judicial self-restraint: the CC has emphasised the wide discretion of political institutions, which means that from the point of view of the principle of proportionality, the Court has used the test of manifest error, instead of rigorous scrutiny. Still, the Court has been certain to check whether the contested provisions are in line with the general principles of law.[101] This approach is similar to that of the ECJ when it is called upon to evaluate decisions involving political, economic and social choices.[102]

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[99] The request related to the question of differences in direct payments to farmers of the 'old' and 'new' Member States and the conformity of various provisions of Regulation No. 73/2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and the Commission Implementing Decision C(2012) 4391 final with the Accession Treaty and the general principles of EU law. The ECJ in its judgment of 12 November 2015 found no grounds affecting the validity of Regulation No. 73/2009, but declared the Commission Implementing Decision C(2012) 4391 of 2 July 2012 contrary to the 2003 Act of Accession. The Implementing Decision ordered, inter alia, the reduction of complementary national direct payments paid to Lithuanian farmers in 2012 if certain levels of direct payments were surpassed.

[100] For example, see Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063; Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-00773; C-283/11 *Sky Österreich* ECLI:EU:C:2013:28; and Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[101] For example, in its Ruling of 31 May 2006, the Court found: 'Under the Constitution, the Seimas as the institution of legislative power and the Government as an institution of executive power ***enjoy very broad discretion*** to form and execute the economic policy of the state (each according to their competence) and to properly regulate economic activities by means of legal acts, by not violating the Constitution and laws, inter alia by not exceeding the powers established in them to the said institutions of state power and by following the requirements of the proper legal process which stems from the Constitution and the principles of a state under the rule of law, of separation of powers, of responsible governance, of protection of legitimate expectations and the principles of legal clarity, certainty and security' (translation by the author; emphasis added).

[102] For example, Case C-289/97 *Eridania* [2000] ECR I-05409; Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-09895.

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In other cases, where the contested measures have been more an *ex post* reaction to various market failures (e.g. the establishment of exclusive rights in areas where a natural monopoly exists) or where the balancing of the freedom of business activities with other (societal) non-economic ends is involved, judicial review has been more intensive.[103] The CC has invalided national provisions on various grounds: breach of the principle of non-discrimination and the grant of unlawful privileges,[104] non-respect of legitimate expectations and excessive restrictions on economic activities,[105] breach of proportionality[106] and the rights of consumers.[107]

Thus, as a matter of the test applicable, it is not possible to say that the judicial review performed by the CC and the judicial review by the ECJ are conceptually different. Of course, when it comes to the evaluation of a particular situation, views may differ.

As regards the judicial review of EU legal acts or national acts implementing EU law at national level, Lithuanian commentators agree that judicial review of EU legal acts is not possible before the CC[108] or the SAC. The CC has never elaborated on this issue and *de facto* has never performed such control. In the Expert's opinion, such control is not possible due to the fact that the Constitution clearly defines the legal acts which may be subjected to constitutional control before the CC; these, according to Art. 105, are laws of the Republic of Lithuania, other acts adopted by the *Seimas*, and acts of the President and of the Government. There is no right of an individual constitutional complaint before the CC in Lithuania.

The CC in its practice has never differentiated between national acts depending on whether they implement EU law or not (again, there is no legal basis to do so). To date, when reviewing the constitutionality of national laws that implement EU law, the CC has taken 'the EU law dimension' into account by either referring questions for a preliminary ruling to the ECJ (see Sect. 1.3.4 above) or referring to EU law itself when interpreting the relevant provisions of the Constitution. After the Ruling of 24 January 2014, it appeared theoretically possible that the CC could rule that a national provision implementing EU law contravenes the Constitution, if the innate nature of human rights and freedoms would be negated. It could be argued that the principle of loyal co-operation would require that the CC address the ECJ first with regard to a challenge to the validity of the relevant EU provision.

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[103] For example, in its Ruling of 26 January 2004 the Court noted that rights and freedoms, as well as the freedom of economic activity may be restricted on the conditions noted earlier in the report, and proceeded to note that '[t]he state and its institutions, having the discretion to establish the special legal regulation of alcohol production and the market, may not do so by choosing means so inadequate to the objectives sought, by which they would introduce the monopoly of production and the market of these products, [and] would groundlessly restrict the freedom of economic activity and fair competition' (translation by the author).

[104] Rulings of 20 April 1995; 17 March 2003; 26 January 2004.

[105] Ruling of 23 February 2000.

[106] Ruling of 14 March 2002.

[107] Rulings of 17 March 2003; 20 September 2010.

[108] Jarašiūnas 2004, p. 26; Namavičius 2004, p. 135; Kūris 2004a, pp. 199–200; Abramavičius 2006, p. 313; Jarukaitis 2010a, pp. 256–257.

2.8.6 So far there has been no judicial practice related to the question of equal treatment of persons depending on whether they fall within the scope of EU law or not. This might be because of the fact that as a rule, there would be no differentiation from the point of view of the Constitution or Lithuanian laws; the main dividing line is between persons having Lithuanian or EU citizenship and third country nationals.

2.9 Other Constitutional Rights and Principles

2.9.1 According to the CC, restrictions of fundamental rights and freedoms may be imposed only by laws adopted by Parliament. Further, the CC has explicitly stated in 2002 that the Constitution does not allow for the delegation of legislative powers from the Parliament to the Government.[109] Thus, Art. 1 of the CA is the only explicit exception to this prohibition in the sense that it legitimates the transfer of legislative powers to the Council and in doing so implicitly acknowledges that the ministers act as legislators in the Council. Such approach has not changed after Lithuania's accession to the EU. The only change has been the introduction of the fast-track procedure for the adoption of EU related draft law in the Statute of the Parliament, which aims to ensure the timely implementation of EU law.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 In the Expert's opinion, the ECHR is the best reflection of the common minimum standard of protection of fundamental rights and freedoms within the Member States. Therefore, all the rights and general principles of law addressed in the Questionnaire may be treated as part of the common constitutional traditions.

With regard to promotion of the relevance of national constitutional traditions on the EU level, several aspects should be noted. National constitutional imperatives are of particular importance in the EU legislative process. In the Expert's view, these imperatives are addressed to all national institutions, including national governments which vote within the Council. It means, inter alia, that the national minister has the obligation to vote against a draft EU measure, which would, once adopted, create a conflict between the national constitution and EU law (except in situations where there are plans to modify the relevant constitutional provision).

[109] Ruling of 26 October 1995.

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When interpreting and applying EU law, national courts refer to national constitutional provisions in their requests for preliminary rulings from time to time.[110] Arguments related to national constitutional traditions submitted by the courts in references for preliminary rulings are welcome and should be promoted as an important tool for maintaining the relevance of national constitutional traditions in the discourse on human rights at the EU level.

As regards reflection of national constitutional traditions in ECJ judgments, several aspects should be noted. Bearing in mind the current number of Member States, it would be impossible to reflect on all of the relevant constitutional traditions in each judgment of the ECJ. If this is not possible, the question rises as to the methodology the ECJ should choose to identify which Member States' traditions would be considered, and the ECJ may be subjected to criticism on this point.[111] Further, extensive references to national legal traditions would usually relate to the interpretation of national law. It should also be noted that such comparative reflection should not be seen as an end in itself, but as a tool for finding optimal solutions to problems raised. Thus, in the Expert's opinion, the most appropriate tool for extensive reflections on national constitutional traditions are the opinions of the Advocates General.

Nevertheless there is one particular area which inevitably calls for a deeper analysis of national constitutional traditions and where direct references to national constitutional traditions are not only welcome, but necessary. These are cases where the Member States rely on Art. 4(2) of the TEU. Given the fact that the obligation to respect the national constitutional identities of the Member States extends to all EU institutions, including the ECJ, the Court has the obligation to respond to such arguments and to balance the imperative of EU law to respect national identity against other imperatives of EU law.[112]

[110] See, for example, Case C-314/13 *Peftiev and Others* [2014] ECLI:EU:C:2014:1645, which concerned the possible unfreezing of assets by a national institution that were needed for legal representation before the General Court. In the reference to the ECJ, the SAC noted that a literal interpretation of the relevant provisions of Regulation No. 765/2006 of 18 May 2006 concerning restrictive measures in respect of Belarus would not be compatible with the right to judicial defence, as guaranteed by Art. 47 of the Charter of Fundamental Rights, Art. 6 of the ECHR and Art. 30 of the Constitution of Lithuania. In its judgment the ECJ, although without mentioning the Constitution of Lithuania explicitly, broadly adopted the approach proposed by the SAC.

[111] The Expert has no doubt that 'internally' the ECJ undertakes such analysis of national constitutional traditions, however; this should not always be reflected in the text of the judgment.

[112] For example, Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-03787.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 With regard to higher or lower standards for human rights protection, one has to bear in mind what rights are involved. Commentators writing on the *Melloni* judgment have usually tended to emphasise the right of the suspected/accused/convicted person to a public hearing (which in fact the person in the main proceedings decided to waive). However, what about the rights of the victims of the crime (this question is of relevance especially taking into account the facts in the main proceedings, where the whole story began already in 1996!)? Should victims of crime be afforded lower standards of protection simply because of the fact that the suspected/accused/convicted person used his/her right of free movement under EU law, or should there be a balance between the two?

In the Expert's opinion, the ECJ judgment in *Melloni* is quite balanced, since the main emphasis was placed on the compatibility of the Framework Decision with the Charter and the responsibilities of the Member States: if they do not want to have a single set of rules, the requirement of unanimity in the Council ensures the right of the Member State to maintain a higher standard of protection. Thus, if there is no 'EU consensus' in the form of a piece of secondary EU law, Art. 53 remains relevant. Otherwise, in terms of legal logic it is quite difficult to come to some other conclusion than the ECJ: how could provisions of the Framework Decision, which were declared to be compatible with the Charter, not be applicable to the Member State which agreed to be bound by it, unless the Member State has claimed that it contravenes Art. 4(2) TEU, which was not the case?[113] Moreover, the Charter itself does not oblige the Member States to provide for a higher standard in every situation. If the Framework Decision left discretion to the Member States to adopt a different ('higher') standard, what would be the purpose of adopting the Framework Decision?

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 There have been no wide public deliberations either at the time of adoption or at the time of implementation of the EAW Framework Decision and the EU Data Retention Directive in Lithuania.

2.12.2–2.12.3 Normally, democratic deliberations should take place before an EU measure is adopted. If the Member States envisage that an EU measure might trigger possible constitutional reforms or involve difficult value choices at the national level, they should take this into account by establishing a longer

[113] See Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras. 62–63.

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transposition period. As regards the national constitutional review of national implementing measures, the question is whether the constitutional issue is predetermined by the EU measure itself. If the answer is positive, there are no obstacles to using the preliminary ruling procedure in order to check the validity of the EU measure and to ask for the application of interim measures under Art. 279 of the TFEU. Thus, one has to differentiate between situations where the unconstitutionality of a national measure is predetermined by the unconstitutionality of the EU measure itself, and situations that concern purely 'internal'/national unconstitutionality issues.

As for the permissibility of an 'unconstitutionality' defence in the course of infringement proceedings, this would be highly problematic from the point of view of the equality of the Member States and EU citizens. The only approximate legal basis for such a defence would be Art. 4(2) of the TEU with the argument that the EU measure violates the obligation to respect the national identity of the Member State; however, it would be difficult to explain why the Member State did not use the annulment procedure in order to contest the EU measure if it clearly violates the core values of the particular Member State. It would be also difficult to introduce any element of subjectivity in infringement proceedings, since this would open the door for other 'innocent' excuses (like failure to form a Government or to achieve the necessary majority in the national parliament, etc.).

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.2 The Expert is of the opinion that there is no basis to speak of the *overall* reduction of the standard of protection of fundamental rights or the rule of law which is predetermined by EU law. One of the exceptions to this general conclusion is the field of criminal law or, to be more precise, the abandonment of the double criminality rule for some categories of offences in the EAW Framework Decision. In other fields, in the majority of cases the problems lie at the level of implementation/application of EU law or in the national implementing measures. Moreover, the entry into force of the Charter of Fundamental Rights has been of utmost importance for providing the ECJ with an important tool to tackle problems related to the protection of fundamental rights.

In the Expert's view, one of the most important things to do is to ensure true democratic deliberations before the adoption of an EU measure. To do so, national parliaments, NGOs and the academic community should all play a role.

Given the complexity of EU decision-making and the process of implementing EU law, *ex-ante* constitutional review of draft EU measures before the ECJ could be considered as an option to ensure the timely evaluation of possible constitutional concerns.

Finally, it seems that national (constitutional) courts have become more active in recent years in using the preliminary ruling procedure, which is a welcome development.

2.13.3–2.13.4 So far, Lithuanian courts have not raised any constitutional concerns before the ECJ. The question of national constitutional concerns is quite delicate, since in some cases (e.g. the EAW Framework Decision as regards the surrender of nationals) the adoption of the EU measures may explicitly or implicitly pre-suppose national constitutional reforms, and failure to implement such constitutional revisions could hardly be treated as a legitimate excuse for failure to implement EU law. On the other hand, if a Member State bases its defence on the national identity clause (Art. 4(2) of the TEU), the ECJ has the obligation to respond to this argument properly, as required by Art. 6 of the ECHR and the jurisprudence of the ECtHR.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.4 Article 136 of the Constitution provides that '[t]he Republic of Lithuania shall participate in international organizations provided that this is not in conflict with the interests and independence of the State'. Additionally, Art. 135(1) of the Constitution states that '[i]n implementing its foreign policy, the Republic of Lithuania shall follow the universally recognized principles and norms of international law, shall seek to ensure national security and independence, the welfare of the citizens and their basic rights and freedoms, and shall contribute to the creation of the international order based on law and justice'.

These constitutional provisions were established in the original version of the Constitution, adopted in 1992, and are treated as the constitutional basis for Lithuania's participation in international organizations other than the EU, for which the separate Constitutional Act was adopted. No formal amendments of Art. 135 or 136 have been tabled before the Parliament so far.

In 2011, the CC ruled implicitly that Art. 136 is the proper constitutional basis for Lithuania's participation in NATO.[114]

In the Expert's opinion, the current constitutional provisions are adequate and no amendments are needed.

[114] Ruling of 15 March 2011.

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3.2 The Position of International Law in National Law

3.2.1–3.2.2 Under Art. 138(3) of the Constitution, international treaties ratified by the *Seimas* shall be a constituent part of the legal system of the Republic of Lithuania.

According to the jurisprudence of the CC, treaties that have been ratified by the Parliament have the force of law and may be directly applied in Lithuania. In the case of a conflict between a ratified treaty and a statute adopted by the Parliament (let alone lower sources of law such as governmental decrees, etc.), provisions of the treaty have priority. However, this rule is clearly not applicable to the Constitution itself, which has precedence over ratified treaties.[115]

In the legal commentary, the approach of the CC to international treaties is treated as monistic,[116] since the provisions of treaties may directly generate rights for private persons at the national level. The ECHR has received special treatment, as the CC has explicitly acknowledged the impact of the ECHR on the Lithuanian legal system, including on the Constitution of Lithuania.[117] It is also the source of international law that is most frequently applied by the Lithuanian courts.[118]

Of course, the process of globalisation has modified the interrelationship between the national and international levels of governance in various ways. Still, the concepts of monism and dualism remain relevant to the extent that they explain whether, as a matter of principle, provisions of international law are a source of law from the point of view of the national constitution, that is, whether private persons may defend their rights directly on the basis of international law in the national courts.

3.3 Democratic control

3.3.1–3.3.2 Article 67(16) of the Constitution envisages that the Parliament shall ratify and denounce international treaties and consider other issues of foreign policy. Article 138(1) lists the categories of international treaties which require ratification by the Parliament. These include treaties on the participation of the Republic of Lithuania in universal international organisations and regional international organisations; multilateral or long-term economic treaties; treaties regarding alteration of the state boundaries, defence of the state, peace treaties and treaties on the use of force; political co-operation with foreign states; mutual

[115] See, for example, Ruling of 5 September 2012 of the CC; Judgment of 6 March 2014 of the SAC in Case No. R525-8/2014.

[116] Vadapalas 1998, pp. 47–48 and 55–62; Vadapalas and Jarukaitis 2003, pp. 473–478; Jarukaitis 2006a, pp. 385–390.

[117] Rulings of 8 May 2000; 29 December 2004; 15 November 2013; Kūris 2004b, p. 85–86.

[118] Jarukaitis 2010b, pp. 176–195.

assistance treaties; and treaties on the presence and status of Lithuania's armed forces on the territories of foreign states. Laws as well as international treaties may also provide for other cases in which the *Seimas* must ratify an international treaty.

The Law on International Treaties, adopted by the Parliament in 1999, regulates the procedures for the conclusion of international treaties in detail. It establishes a traditional approach to the conclusion and execution of international treaties, where the right of initiative belongs to the executive branch and, once negotiated, treaties are submitted to the Parliament for ratification. The executive branch is also responsible for the implementation of concluded international treaties at the national level. Neither the Constitution nor parliamentary statutes establish specific provisions concerning the *ex post* involvement of the Parliament in the supervision of the execution of international commitments. Under the Statute of the *Seimas*, the committees of the Parliament may discuss any questions, including those related to international issues or commitments. In practice, the Parliament and its committees discuss international issues on a regular basis.

With the exception of Lithuania's accession to the EU, no referendums have hitherto been held as regards participation in international organisations or the conclusion of any particular international treaty. There are no legal obstacles to organising a referendum on international matters.

3.4 Judicial Review

3.4.1 Article 105 of the Constitution grants the CC the powers of *ex ante* review (by adopting an opinion) of international treaties as regards their compliance with the Constitution. These powers have been used once, when Lithuania decided to ratify the ECHR.[119] There have so far been no instances of *ex post* constitutional control of an international treaty ratified by Lithuania with regard to compliance with the Constitution.

As already noted in Part I, the CC treats the *pacta sunt servanda* principle as part of the constitutional principle of the rule of law. Indeed, the CC has gone so far as to say that no constitutional amendments that fail to comply with international obligations undertaken by Lithuania may be adopted. However, the recent ruling of the CC which declares that pursuant to the Constitution, the innate nature of human rights and freedoms may not be negated, may theoretically be treated as a possible ground for challenging international commitments that contravene this requirement.

[119] Opinion of 24 January 1995.

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3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 The Constitution of Lithuania does not establish the principle of a social state explicitly. Nevertheless, both the CC[120] and Lithuanian commentators[121] tend to speak about the principle of social solidarity and the social orientation of the Constitution.

Lithuania was hit by the economic crisis of 2008–2009 particularly badly, the reason being the global recession and the price bubble in the real estate sector. The cuts in the public sector (salaries in the public service, pensions and social allowances) were drastic. Nevertheless, the Government decided to borrow from markets rather than from the IMF or other international institutions. One of the explanations for this decision was the argument that the conditions imposed by the IMF would reduce the ability of the Government to implement its own policies. Moreover, the probability of devaluation of the national currency also played its part.[122] This decision of the Government received much criticism, because the interest rates in the international markets were much higher than those proposed by the IMF.[123] Later, the CC ruled that certain measures introduced during the crisis that reduced social benefits and pensions were unconstitutional.[124] Lithuania has not been subject to any EU or international bailout or austerity programme so far.

The constitutional discourse on this subject has not been developed in Lithuania. In the Expert's view, the social dimension of the Constitution first and foremost depends on the sound macro-economic policies of the state and its ability to compete on the European and global markets. The CC, relying on the principle of good governance, requires that all draft measures, the implementation of which would require extra state funding not envisaged in the budget adopted by the Parliament, should clearly indicate the source of necessary funding.[125] Further, relying on Art. 128 of the Constitution, according to which '[d]ecisions concerning

[120] For example, Ruling of 1 July 2013.

[121] Kūris 2001, pp. 266–270; Šileikis 2005, pp. 210–214.

[122] For more details on the subject, see, for example, http://www.networkideas.org/featart/apr2013/pdf/Kattel_Raudla.pdf; https://euobserver.com/opinion/114419.

[123] It should also be noted that the sharp decline in 2009–2011 was followed by a very brisk economic recovery during the last couple of years. According to the statistics, the Lithuanian economy exhibits one of the highest growth rates in the EU.

[124] For example, in the Ruling of 6 February 2012 the CC ruled, inter alia, that the reduction of social pensions for working persons contravenes Art. 48(1) of the Constitution, as '[e]ach human being may freely choose a job or business'; in the Ruling of 5 March 2013, the CC ruled that certain aspects of the reduction of maternity allowances were not in line with the principle of the rule of law (were not proportionate); in the Ruling of 1 July 2013, the CC ruled that the uneven reduction of the salaries of state officials, where the salary reductions of highly paid state officials were greater in comparison to those of persons who earned less, was not in line with Art. 29(1): 'All persons shall be equal before the law', Art. 48(1) 'Each human being … shall have the right … to receive fair pay for work' and the principle of the rule of law (proportionality principle).

[125] For example, Ruling of 13 December 2004.

[State loans] and other basic property liabilities of the State shall be adopted by the Seimas on the proposal of the Government', the CC implicitly expanded the principle of democracy to the extent that all decisions related to 'basic property liabilities', i.e. having significant financial implications on the state budget, have to be approved by the Parliament.[126]

3.6 Conclusions

To conclude the Report, concerns related to the state of protection of fundamental rights or constitutionalism in general reveal the close interaction of the supranational and national levels. In the view of both Experts, there is no basis to speak of the overall decline in the standards of protection of fundamental rights or the rule of law which is predetermined by EU law. On the other hand, at least as regards Lithuania, analysis shows a lack of real discussion among the public concerning various issues decided at the EU level, which later have had a profound impact upon implementation at the national level (the adoption and implementation of the Data Retention Directive is one such example). Thus, there is a real need to stimulate both academic/analytic and public discussions about what is going on at the EU level. This would help to clarify national priorities and ensure the consistency of the actions of national institutions at the national and EU levels.

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[126] For example, Ruling of 18 October 2000.

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Romania – The Vagaries of International Grafts on Unsettled Constitutions

Bogdan Iancu

Abstract The report observes that – with context-driven caveats – the Romanian Constitution could be categorised as representing 'legal' or post-authoritarian constitutionalism. The report outlines weaknesses in Romanian constitutionalism, including issues that have necessitated the EU post-accession monitoring procedure. At the same time, it also documents a number of ways in which EU law has caused strain on the constitutional culture. In particular, it emerges that many of the key adverse impacts of EU law explored in the present research project were raised by Romanian courts. For example, the Romanian Constitutional Court was the first to annul the national law implementing the EU Data Retention Directive, and a lower instance court was the first, in *Radu*, to send a question about the presumption of innocence and liberty in the context of the automaticity of extraditions in the European Arrest Warrant system to the ECJ. The constitutional adjudication by the Constitutional Court is marked by a high proportion of annulments, especially on substantive grounds. The report also outlines the adjudication regarding the European Commission and IMF austerity programmes, social rights and the economic emergency regime. Regarding the discourse, the report makes insightful observations about the way the constitutional language and logic are changing through EU and transnational law, e.g. as regards the adaptation of the proportionality analysis from protecting the individual to benefitting commercial freedom. The report observes that the older methodological predilection for 'simplistic legal positivism with a thin Marxist sauce' (Czarnota) has been replaced by an equally simplistic and often instrumental internationalisation.

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The current Constitution of Romania was adopted in 1991, two years after the collapse of state socialism, and was extensively revised in 2003, in prospect of the country's impending NATO membership (2004) and EU accession (2007).

Due to the fact that pre-totalitarian constitutional traditions were (correctly) perceived as fused at the hip with the monarchical form of government and since restoration of the monarchy was not a feasible option in the early 1990s, the post-communist fundamental law bears little resemblance (e.g. in terms of institutional framework) to the pre-WWII liberal-democratic experiences of the country under the Constitutions of 1866 and 1923.[1]

Even though some general institutional choices were predicated by the Constitutional Committee upon the rationale of tradition and continuity,[2] for example the bicameral option and the names of the houses of Parliament (Chamber of Deputies and Senate), the actual composition and functioning of the two houses do not correspond to earlier Romanian parliamentary practices. In other crucial aspects, the break with the past is more apparent still: for instance, the 1990/1991 constituent assembly opted for a constitutional court, instead of reviving the early twentieth century tradition of judicial review by all the courts of general jurisdiction or by the High Court of Cassation and Justice.[3]

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[1] Iancu 2015.

[2] See the synopsis of the committee debates on the matter in Iorgovan 1998, pp. 35–37 ('*Cum s-a optat pentru un parlament bicameral*' (How the option for a bicameral parliament was made)).

[3] Judicial review was introduced in Romania at the beginning of the twentieth century, in 1912, by way of court judgments (the case of the 'Streetcar Company of Bucharest'), upon a reasoning similar to that of Justice Marshall in *Marbury v. Madison*. The Constitution of 1923 confirmed the solution but attributed the competence of judicial review to the highest court only (Court of Cassation in Joint Session).

Consequently, most provisions of the current fundamental law are adapted foreign transplants (for instance, semi-presidentialism). Many norm aggregations simply reflect the results of open-ended, post-communist 'bricolage'.[4] Rights and liberties were copied verbatim but somewhat haphazardly from various Western bills of rights and international documents, whereas some institutional choices were transplanted wholesale, without a clear idea of whether and how they would fit into the overall structure. In the case of the Ombudsman, for example, the office was provided for by the 1991 Constitution but was not established by an organic law until 1997; due to the lack of effective powers, the 'Advocate of the People' remained until very recently a purely decorative institution.

A boilerplate remark concerns alleged affinities between the French model and Romanian constitutional practice.[5] On closer inspection, one can notice few functional similarities between the French Fifth Republic and the Romanian system. For instance, although a few of the President's powers were initially inspired by the design of the French Constitution, Romanian semi-presidentialism is a much weaker form of its French institutional counterpart.[6]

With context-driven caveats regarding legal culture, one could categorise the Romanian Constitution under 'legal', post-authoritarian rather than 'evolutionary' constitutionalism (according to Besselink's taxonomy as per the Questionnaire).

1.1.2 In the logic of the initial, pre-2003 version of the Constitution, the accent or centre of gravity fell on sovereignty and the organisation of the state. The Constitution opens (compare and contrast, for instance, with the structure of the German Basic Law) with an article on 'The Romanian State', described in the first paragraph as 'a sovereign, independent, unitary and indivisible National State', followed by provisions on 'Sovereignty' (Art. 2), 'Territory' (Art. 3), and 'Unity of the People and Equality among Citizens' (Art. 4). The first paragraph of the 'eternity clause' (Art. 152, 'Limits of Revision') shields the 'national, independent, unitary and indivisible character of the Romanian State' from subsequent amendments.

[4] Cf. (expressivism, functionalism, bricolage) Tushnet 1999. By 'bricolage' I understand that, whereas some institutional choices reflected post-communist power imponderables, path dependencies and vested interests (for instance, the rule according to which 18 years of professional legal experience were necessary to qualify for a Constitutional Court appointment), many institutional choices (the Ombudsman) and norm aggregations (rights and liberties) were the result of insufficiently or partly theorised 'borrowings'. But cf. Parau 2013: according to Parau, Romanian constitutionalism is a product of a self-conscious design of local legal elites who had learned to 'think of themselves as an elite within a [transnational legal] elite' (at p. 526).

[5] Iorgovan, *supra, passim*. Even the Constitutional Court of Romania partakes occasionally of this widespread yet demonstrably erroneous opinion, see for instance, D.C.C. (Decision of the Constitutional Court) 683/2012 (M. Of. [Official Journal] No. 479 of 12 July 2012), for a reference to 'the Constitution of France, which constituted the source of inspiration for that of Romania'.

[6] On Romanian semi-presidentialism and its ambivalences, see Tănăsescu 2008 and Guțan 2010.

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By the same token, the initial version of the fundamental law provided for a relatively weak Constitutional Court (its findings of unconstitutionality could be overridden by Parliament, by a two-thirds supermajority) and judiciary.

The 2003 amendments and constitutional practice have to a certain extent shifted the focus towards checks and balances, by way of entrenching the autonomy of certain key institutions from the political branches. For instance, by virtue of these amendments, the Constitutional Court, the Superior Council of the Magistracy and the Ombudsman acquired more prominent roles within the system. The position of the Superior Council of the Magistracy (SCM) as 'guarantor of judicial independence' (Art. 133(1)) was virtually insulated from all kinds of overt democratic-majoritarian control by way of appointments. Moreover, the institution was entrusted with all decisions concerning the career of 'magistrates' (i.e. both prosecutors and judges). Likewise, in the case of the Constitutional Court, the parliamentary override was eliminated, additional attributions were introduced (e.g. ruling on 'conflicts of a constitutional nature between public authorities', Art. 146 (e)) and procedural remedies were added (e.g. the Ombudsman can trigger concrete review by way of an exception of unconstitutionality raised directly before the Court, Art. 146(d)). Nonetheless, this realignment – in the context of an unsettled constitutional system and culture – is not necessarily devoid of ambiguities and tensions of its own. Although the changes can in principle and generally be categorised as conducive to the rule of law, checks and balances and fundamental rights, one has to take this description with a contextual grain of salt.[7]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 In view of the expected accession to the EU in January 2007, the Constitution was amended by Law No. 429/2003 on the revision of the Constitution.

Title VI, 'Euro-Atlantic Integration', consisting of Arts. 148 (Integration into the European Union) and 149 (Accession to the North Atlantic Treaty) was included in the text in 2003, interspersed between the titles on the Constitutional Court and Constitutional Revision, respectively.

[7] See Tănăsescu 2013, who argues that the increased powers of the Romanian Constitutional Court, particularly with respect to the exception of unconstitutionality, did not lead in practice to increased protection of the citizens' fundamental rights, but rather served as the procedural backdrop for a power struggle between the Constitutional Court and the High Court of Cassation and Justice. See also Iancu 2010 and Tănăsescu 2011, who both argue that the empowerment of the Superior Council of the Magistracy after 2003 and its increasing alienation from any form of social or political control, albeit perceived and presented as 'judicial independence' guarantees, could also have detrimental consequences with respect to the rule of law, for instance due to hidden political or corporatist pressures.

Article 148 reads as follows:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.
(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.
(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.
(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.
(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.[8]

Other amendments have concerned electoral rights and the acquisition of property. Article 16(4) protects the right of European citizens 'who comply with the requirements of the organic law' to elect and be elected 'to the local public administration bodies' (i.e. mayors and local or county council positions).[9]

Article 38 provides for the right (N.B!) *of Romanian citizens to be elected to the European Parliament*: 'After Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament.'

Article 44(2) provides that '[f]oreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the European Union and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance'.

Only supremacy is mentioned in the text, which does not mean that direct effect is not recognised.[10] It has also been noted in the doctrine that, whereas the article requires the same supermajority for the parliamentary adoption of ratification legislation (of both the accession treaty and subsequent revisions of the constitutive treaties) as that mandated for constitutional amendments, the two procedures differ markedly. In the case of the ratification of EU treaties, the majority is computed on the basis of the total number of deputies and senators convened in a joint session of Parliament, whereas in the case of amendments, a two-thirds supermajority must be obtained in each house. If this is not achieved and the conference committee

[8] Authorised translation on the website of the Chamber of Deputies, http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=6#t6c0s0sba148.

[9] Article 16(4) 'After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies.'

[10] See Muraru and Tănăsescu 2008, comment on Art. 148 (Tănăsescu), pp. 1425–1441, at p. 1441.

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procedure fails, a three-fourths majority in joint session is needed to adopt the amendment law.[11]

1.2.2 The Constitution can be revised (subject to observing the limits of revision, according to Art. 152) by adopting an amendment law. The right of initiative belongs to the President on the proposal of the Government, one-fourth of the deputies or senators, or 500,000 citizens, provided that 20,000 signatures in support of the amendment are collected from at least one-half of the counties (including the Municipality of Bucharest) (Art. 150).

The bill has to be passed by each house with a two-thirds majority or by a three-fourths majority in joint session, should the conference committee procedure fail to build a consensus on a common draft of the bill. Once adopted, the revision law is submitted to a referendum, which must be organised within 30 days (Art. 151). The Constitutional Court decides on the constitutionality of revision initiatives (Art. 146(a) and Arts. 19–23 of Law No. 47/1992 regarding the organisation and functioning of the Constitutional Court) within ten days, upon receipt of the draft bill accompanied by the opinion of the Legislative Council, before the initiative is laid before Parliament. A finding of unconstitutionality must be supported by a two-thirds majority of the Court, i.e. at least six justices (Art. 21(1), Law 47/1992). The Court also decides *ex officio* on the revision law, within five days of its adoption. The competence of the Court includes the verification of both procedural forms and substantive elements concerning the limits of revision ('extrinsic' and 'intrinsic' constitutionality). In the case of a finding of unconstitutionality, the law is sent back to Parliament for reconsideration.

Amendments must be approved by referendum. In the case of the 'EU amendments' of 2003, massive absenteeism could have hampered the entire process, which would have been stalled by an eventual invalidation of the referendum. The 50% participation quorum was only met due to a last-minute extension of the poll to two days.

In 2013, the Referendum Law was amended and the quorum was reduced to a 30% participation rate and 25% validly cast ballots, numbers to be computed on the basis of the permanent electoral lists. Hypothetically, a constitutional revision could be approved by 12,5% of the registered voters. These changes have been applicable since 2014, one year after the publication of the 2013 amendments to the Referendum Law, according to a decision of the Constitutional Court that upheld the amendments but postponed the application of this new rule by one year.[12]

1.2.3 Article 148 and the provisions regarding rights were perceived in 2003 as sufficient legal bases for accession and integration.

Joint constitutional drafting committees of Parliament routinely co-opt legal scholars and experts, both at the stage of stakeholder and 'civil society' consultations, prior to committee debates ('Constitutional Forums') and at the drafting stage. The extent to which societal or academic advice is taken into consideration

[11] Ibid., pp. 1431–1433.

[12] See D.C.C. 471/2013 (M. Of. No. 754 of 4 December 2013).

depends on political vagaries and imponderables, as does the selection process of academic committee memberships. Such consultative procedures are often window-dressing.

For instance, a 2008 presidential expert committee on constitutional revision co-opted academics (experts in political science and public law), charged with discussing the flaws of the constitutional system and proposing amendments. When a considerable number of the initial membership resigned, some of them making accusations of pressures to conform, the 'defectors' were quickly replaced and the committee's work continued unabated. In the end, the incumbent President selected the recommendation that suited his institutional preferences and worldview predilections from the report. The writer of this report was appointed to a consultative academic committee attached to the parliamentary drafting committee, in the course of a recent (2013) parliamentary revision initiative. The comments initially made by the academics on drafts and minutes forwarded by the joint parliamentary committee were disregarded and, after a couple of weeks, the MPs broke communication and simply ignored the consultative expert body.

1.2.4 An amendment proposal initiated by the Presidency in 2011 sought to make marginal changes to Art. 148, introducing a new paragraph according to which the ratification of the accession of a new state to the Union would be 'made by a law adopted by Parliament, with the majority of two-thirds of its members'. Another proposed change was the elimination of a paragraph in Art. 44, regarding 'the presumption of lawful acquisition of property', in a context where this clause was seen as impeding the fight against corruption and in particular the transposition of Framework Decision 2005/212/JHA[13] on extended confiscation (see infra, Sect. 1.3.3). This project eventually got bogged down in the legislature, due to the lack of a clear supporting majority, more pressing agenda issues and, eventually, the change of government in early 2012.

The 2013 parliamentary revision proposal, initiated by the governing coalition, included some amendments related to EU membership. One of the proposed alterations was declaratory if not superfluous, concerning an additional paragraph in Art. 10 (International relations): 'Romania is a Member State of the European Union.'

Another modification concerned the form of the second paragraph of Art. 148, which after amendment would have read: 'Romania *shall guarantee the application of EU law in the internal legal order*, in accordance with the Act of Accession and other treaties concluded within the Union' (emphasis added).

The revision also sought to 'clarify', to the detriment of the President, the constitutional deadlock concerning the country's representation in European Council meetings. Article 91, which concerns presidential attributions in the field of foreign affairs, would have comprised an additional paragraph, reading as follows: 'The President shall represent Romania in (sic!) *European Union meetings and*

[13] Council Framework of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2005/212/JHA) [2005] OJ L 68/49.

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conferences (*reuniunile Uniunii Europene*) concerning foreign relations, the common security policy and the revision of the constitutive treaties.' Conversely, the proposal would have introduced a new paragraph to Art. 102 (Role and Structure of the Government), which read: 'The Government shall represent the country at all EU meetings, with the exception of those mentioned in Art. 91(1).' These two proposals were rejected by the Constitutional Court. In the case of the former, the argument of the Court rested on constitutional supremacy. The reasoning is relevant to this volume and worth quoting at some length:

> To establish a rule according to which EU law would apply without any qualification in the internal legal order, without distinguishing between the Constitution and subordinate legislation equates the subordination of [Romanian] constitutional law to the legal order of the EU. From this perspective, the Court notes that the fundamental law of the state – the Constitution – is an expression of popular will and cannot forfeit its binding force as a result of contradictory EU law. Accession to the Union does not affect the supremacy of the Constitution over the entire internal legal order.[14]

In the matter of European Council participation, the Court held in essence that the proposed changes, due to both faulty drafting and neglect of precedent, would have further confused the constitutional powers of the President and Prime Minister and fostered constitutional deadlocks.[15]

The revision law was not adopted, due to the numerous invalidations and recommendations to reformulate it made by the Court; furthermore, the government coalition was meanwhile dismantled, resulting in the absence of a parliamentary majority able to carry the vote.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Supremacy of EU law is mentioned expressly in the Constitution, whereas direct effect is accepted by the Constitutional Court in practice as implied.[16] Problems arose and a protracted constitutional battle ensued with respect to representation in the European Council (see e.g. above Sect. 1.2.4).

1.3.2 In its first decision touching on the transfer of sovereign powers to the EU (the decision concerning the constitutionality of the 2003 amendment law), the Constitutional Court stated:

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[14] D.C.C. 80/2014 concerning the proposal to amend the Constitution (M. Of. No. 246 of 7 April 2014), paras. 455–456 (citation of the Polish Constitutional Tribunal Judgment K 18/04 omitted).

[15] Ibid., paras. 294–297 and 302–312.

[16] See, for instance, D.C.C. 799/2011 (M. Of. No. 440 of 23 June 2011), noting that even though direct effect – unlike supremacy – is not specified in the Constitution (or in the revision bill at hand), the principle is constitutionally implied.

> Member States have decided to exercise certain functions in common that traditionally pertained to the purview of national sovereignty. It is undeniable that in our age of globalised human concerns, intensified inter-state interactions and worldwide means of communication among individuals, the concept of sovereignty cannot be conceived as absolute and indivisible without incurring the unacceptable risk of international isolation.[17]

1.3.3 Article 152, regarding the limits of revision, rests on the premise of a core of unalterable constitutionality and could, at least in principle, form the basis for the emergence of a constitutional jurisprudence that would put the brakes on integration (just as the constitutional core established by the eternity clause of the German Basic Law has led to the jurisprudence regarding 'identity control', *Verfassungsidentität*). This supposition is however an academic exercise. As things stand at the moment, the Constitutional Court has taken a consistently 'EU-friendly' stance in terms of the actual results, albeit not necessarily in the evolution of its argumentation (see Sect. 1.2.4).

Further, legislation transposing the Data Retention Directive[18] has twice been declared unconstitutional. In neither case was a preliminary reference sought; the first decision assailed the failure of the lawmaker to avail itself of the transposition leeway, whereas the second ruling followed the lead of the European Court of Justice (see Sect. 2.4).

A proposal to modify the Constitution in order to eliminate the 'presumption of lawful acquisition of property' from the text of Art. 44 (right of private property) was declared unconstitutional, although the Court hastened to add that nothing prevented the lawmaker from transposing the Justice and Home Affairs *acquis* (in particular the Framework Decision 2005/212/JHA on confiscation of crime proceeds, instrumentalities and property) at the level of ordinary legislation.[19]

1.3.4 As in the case of other Eastern European systems,[20] some early post-accession decisions evidenced a degree of unfamiliarity with the new jurisdictional setting. For instance, in a decision on an exception of unconstitutionality concerning a challenge to a state aid granted to small and medium-sized enterprises in the beer industry, the Court interpreted the direct effect of Arts. 87–89 EC Treaty and held that the principle of direct effect implied the use of different interpretive methods in domestic constitutional adjudication.[21]

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[17] D.C.C. 148/2003 (M. Of. No. 317 of 12 May 2003) (unless otherwise indicated, all translations are by the author). See generally, on the emerging 'dialogue' between the Romanian Constitutional Court and the Court of Justice of the European Union, Toader and Safta 2013.

[18] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[19] Decision No. 799/17.06.2011 on the proposal to amend the Constitution, M. Of. No. 440 of 23 June 2011.

[20] Sajó 2004.

[21] D.C.C. 59/2007 (M. Of. No. 98 of 8 February 2007).

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Obversely, once the principles of 'cooperative federalism' were internalised, the balance shifted to a sort of categorical positivistic stance, according to which conflicts of competence and jurisdiction could not arise, since the two legal orders were clearly separated.

1.4 Democratic Control

1.4.1 The constitutional amendment regarding parliamentary participation (Art. 148 (5)) was mentioned in Sect. 1.2. There are standing Committees on European Affairs in both the Chamber of Deputies and the Senate. Members of these committees are appointed by the houses, upon nomination by the parliamentary factions, negotiated according to the proportional breakdown of the parties' parliamentary representation. The two bodies have symmetrical powers concerning the national legislative process (committee debates of draft legislation transposing EU directives) and EU lawmaking (reporting opinions concerning the application of the Subsidiarity Protocol back to the houses). In addition to their legislative functions, both committees hold advice and consent hearings regarding national appointments to EU institutions and the nomination of the Minister of Foreign Affairs, and hold inquiries into the exercise of the country's mandate and vote in the Council.[22]

Law No. 373/2013 regarding the Relations between Parliament and the Government in the Field of European Affairs[23] regulates the procedure for exercising the national parliamentary prerogatives according to the second protocol to the Treaty of Lisbon, as well as the supervision of harmonisation, and the right of Parliament to be informed with regard to all appointments to EU institutions and to hold appointment hearings with respect to European Commissioner nominations.

1.4.2 Even though the 2003 revision did not exclusively concern the EU and NATO-related amendments (Title VII, Arts. 148–149 and the rights provisions), the revision was primarily presented to the citizenry as a prerequisite to European integration and was perceived as being focused on and linked with EU accession.

In the end, participation reached the 50% validity threshold only as a result of the extension of the poll by emergency ordinance, from one to two days. Out of the 55.7% of registered voters who did eventually turn out, 89.7% voted in favour of

[22] The membership and committee rules are available at http://www.cdep.ro/pls/parlam/structura.co?idc=33, https://www.senat.ro/Comisie.aspx?Zi&ComisieID=4bdde3ad-f10b-4557-8527-0c6f36710843. The procedures were adopted by parliamentary resolutions, *Hotărârea Senatului Nr. 39/2014 privind modificare și completarea Regulamentului Senatului, M. Of. 473/27.06.2014, Hotărârea Nr. 11/2011 privind procedura de lucru și mecanismul decizional pentru exercitarea controlului parlamentar asupra proiectelor de acte legislative ale Uniunii Europene, în temeiul prevederilor Tratatului de la Lisabona privind rolul parlamentelor naționale, M. Of. Nr. 292/27.04.2011*.

[23] Law No. 373/18.12.2013, M. Of. No. 820 of 21 December 2013.

the amendments. This discrepancy between the lack of interest in going to the poll and quasi-unanimous approval of the revision (constitutionalism without a constitutional moment, as one might say) can be explained as a result or consequence of the top-down, hasty nature of the pre-accession negotiations and of an instrumental perception of integration. Accession as such, the desideratum of 'returning to Europe' was widely supported, yet people perceived themselves as having little voice and choice in the scope and pace of integration.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Even though it contains few clauses that are directly related to the EU, the Constitution has been considerably overhauled due to EU accession, albeit in less apparent ways.

For example, as a result of the pre-accession monitoring along the Copenhagen Criteria, the Superior Council of the Magistracy (SCM) was insulated in 2003 from almost any kind of meaningful political (democratic majoritarian) or social form of influence. The transplantation or rather importation of a version of the French-Italian high judicial council model, proffered by international bodies as a 'best practice' of judicial organisation,[24] was a direct consequence of pre-accession recommendations of the European Commission, coupled with a readily available 'Ikea [institutional] model'[25]. This understanding of judicial independence, which in the Romanian context encompasses, under the institutional umbrella of the SCM, both judges and prosecutors, has produced significant ripple effects in the functioning of the Romanian political-constitutional system. Likewise, the EU-induced, quasi-constitutional feature of anti-corruption policies and entrenched institutions has considerably influenced the actual functioning of the Romanian constitutional system. Moreover, Romania, together with Bulgaria, is under post-accession monitoring within the framework of the Cooperation and Verification Mechanism (CVM). The European Commission reporting in the framework of the CVM started in 2012 to include a section on the constitutional system. Commission delegations have liaised more recently with the Constitutional Court. Furthermore, one can observe increasing cross-hybridisation and cross-citation between the European Commission and the Venice Commission in recent years.

All these factors, even though they cannot be subsumed under positive constitutional law (black letter law EU-clauses), have a significant impact on the context and operation of the domestic system. These changes will be further discussed below in Sects. 2.3.6 and 2.13.

1.5.2 Although the amendments are relatively numerous, some were poorly formulated. The limitations are to a certain extent due to a lack of foresight. For

[24] See Garoupa and Ginsburg 2009.

[25] Frankenberg 2010.

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instance, in the matter of representation in the European Council, the constitutional conflict between the President and the Prime Minister could have been anticipated, given the bifurcated nature of the executive branch, a notorious characteristic of semi-presidential systems. The issue, like many other gaps in the fundamental law of Romania, was partly clarified by an interpretive gloss by the Constitutional Court. A narrow and contested 2012 ruling[26] attributed the competence to the President, based on the rationale that the office of 'the head of state' was constitutionally entrusted with preeminent attributions in the field of foreign affairs. According to this holding, the Prime Minister can only take part in European Council meetings in the President's stead, on the basis of an explicit delegation by the latter.

However, a subsequent majority decision muddled the 2012 ruling, by holding that the President has only a fettered discretion in the matter and, according to 'the principle of loyal cooperation among state institutions', he must take into account, in deciding whether to delegate this competence to the Prime Minister,

> certain objective criteria, such as i. the institution best placed in what concerns the topics on the agenda of a European Council meeting; ii. Whether the position of the President or the Prime-Minister is validated by a congruent standpoint of the Parliament; iii. the difficulties related to the implementation of European Council decisions.[27]

1.5.3 The perception of the role of national constitutions vis-à-vis internationalisation is highly charged with normative presuppositions about the limits and scope of national constitutions, and indeed about the proper limits of delegation to international bodies. To wit, a Habermasian sees the state as a transitional instrument and would find little common ground on this matter with an advocate of purely administrative-regulatory supranational or international integration as coordination.[28] An inextricably linked question is whether traditional constitutional principles, norms and institutions can be translated outside their original environment, in order to offset and compensate displacements of decisional competence beyond the nation state.

In my view, national constitutions remain for now the primary locus of legitimacy and the main point of democratic decisional ascription. Hence, their role is, at least for the foreseeable future and at least as the primary legitimacy transmission belts, secure. This is not to deny the considerable pressures put on national

[26] The court was divided by 5 to 4. As the dissenting justices noted, the phrase 'head of state', a notion on which the majority reasoning relied, cannot be found in the Constitution as such. D.C.C. 683/2012 (M. Of. No. 479 of 12 July 2012).

[27] 'The political decision to delegate or not the competence to represent the country at European Council meetings must take into account these objective criteria, with a view to reaching consensus between the two authorities … and must rest upon the constitutional principle of loyal cooperation.' D.C.C. 449/2013 (M. Of. No. 784 of 14 December 2013).

[28] For the second position (regulatory nature of supranationalism), see the classical position by Majone 1996 and the more recent monograph by Lindseth 2010.

constitutions by integration, especially in the crisis context of the current acceleration of EU-related developments.

Constitutions and their safe-keepers, constitutional courts, with their focus on normativity and the ends of political community, also serve (or at least have the potential to serve) the important function of censoring and disciplining the supranational institutions, by constantly restating the normative questions about the kind of European constitutionalism that is feasible at any given juncture. According to Dieter Grimm, constitutional courts are even '*the only institutions* that in the current configuration constitute a counterweight [*Gegengewicht*] to the democracy-averse mechanisms [*demokratie-mindernden Mechanismen*] which are at work within the EU' [emphasis added].[29]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Fundamental rights are codified in the Constitution. Title II (fundamental rights and freedoms) comprises a relatively long list of rights and liberties, without a clear analytical delineation according to subject-matter, so that social and economic rights defined as state duties to protect (Art. 35, right to a healthy environment) are interspersed between classical civil and political rights. Title III lists duties, namely faithfulness towards the country, the duty to defend the country, financial contributions and the prohibition of abuse of rights. Proportionality is defined in the text of the Constitution (Art. 53(2)).

The rule of law, human dignity and the free development of personality are protected as general constitutional principles; Art. 1(3) defines them as 'supreme values'.

2.1.2 Article 53 (restriction on the exercise of certain rights and freedoms) reads:

> (1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.
> (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

The principle of proportionality is methodologically understood as comprising the familiar steps (provided by law, legitimate objective, necessity and proportionality in the narrower sense (balancing)).

[29] Grimm 2014a, p. 47. See also Grimm 2014b.

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2.1.3 The rule of law (‘*statul de drept*’) is mentioned as a ‘supreme value’ (Art. 1 (3)). Article 1(5) defines the principle of legality: ‘the observance of the Constitution and its supremacy and of the laws is mandatory’ (the two provisions are often interpreted in conjunction).

The term ‘*stat de drept*’ (neologism of French inspiration, *État de droit*) is sometimes used in the literature in conjunction or even interchangeably with the notion ‘*domnia legii*’ (*the rule of law*, in an *ad litteram* translation). However, the latter concept means (in its Romanian conceptual context) only legality, subordination of the state to the law.

The concept of ‘*stat de drept*’ is understood in the doctrine as encompassing not merely the supremacy of the Constitution and the principle of legality of administration but also qualitative-substantive criteria, such as stability and certainty, predictability, the duty to give reasons (not only for judicial decisions but also for administrative action) and proportionality.[30]

The principle of the rule of law has been invoked as an argument in constitutional review. In Romania, there are two types of cases of constitutional review by the Constitutional Court: ‘objections of constitutionality’, which denote *ex ante* abstract review, and ‘exceptions of unconstitutionality’, which mean *ex post* concrete review.[31] The rule of law is invoked in both types of cases.

However, the Constitutional Court refrained until relatively recently from encouraging or even lending credence to its use as a justiciable principle; it intimated that the rule of law was too grand a concept to have practical justiciable bite. For example, in rejecting an exception of unconstitutionality to a law ratifying a government ordinance concerning foreign currency transactions, the Court noted:

> In what concerns the degree to which the impugned norm fulfils the exigencies of the rule of law principle … the Court notes that the said principle *defines the major objectives of state activity*, as envisioned by what is customarily called the supremacy or rule of law (*domnia legii*), which means subordination of the state to legality, the existence of structures that allow law to censor political options, and within this framework enable the law to ponder the abusive or discretionary tendencies of state institutions. The rule of law guarantees the supremacy of the Constitution, the constitutionality of inferior legal norms, and the separation of powers, which are only to act within the bounds of law and more particularly within the limits of a law expressing the general will [emphasis added].[32]

[30] See e.g. Balan 2015, pp. 99–112. Definitions and subsumed elements of the concept differ, as expected, from one author to another. But cf. Muraru and Tănăsescu 2008, pp. 7–9 (*statul de drept* encompasses legality, fundamental rights guarantees, separation and balance of powers, access to justice).

[31] The system of constitutional review is explained further in n. 76.

[32] D.C.C. 70/2000 (M. Of. No. 334 of 19 July 2000). Emphasis added. The excerpt, while revealing of the earlier understanding of the principle, is *obiter dicta*; the main grounds for rejecting the exception was the existence of a prior decision which had held the provision constitutional.

The rule of law has been used sparsely by the Court, for instance as a complementary argument for affirming the *erga omnes* character of Constitutional Court decisions solving exceptions of unconstitutionality, namely the effect of constitutional decisions on the adjudication by referring courts of general jurisdiction.[33]

However, more recently, the Constitutional Court has given more clout to rule of law guarantees, perhaps also as a result of institutional interaction and socialisation with international structures, such as the EU Commission and the Venice Commission in whose institutional discourses the rule of law concept looms large. The rule of law (and the principle of legality, Art. 1, Paras. (3) and (5)) was used as an argument to strike down, in its entirety, a 2015 legislative proposal which, ostensibly in anticipation of the draft EU Network and Information Security (NIS) Directive,[34] would have entrusted all policy and regulatory decisions in the field of informational security to the Romanian Intelligence Service. The NIS directive, proposed by the European Commission in 2013, has not yet been adopted and thus cannot be transposed. Therefore, this argument was an attempt to make a controversial domestic policy more palatable for a national audience, by reference to a presumptively respectable and unquestionable EU 'standard'. No access to a court was provided in the bill. The Court declared the law unconstitutional on grounds of a breach of privacy rights, access to justice and due process, and legality (clarity, precision and predictability of the norm). It cited its decision 70/2000, adding this time that the principle of the rule of law is not purely procedural but also presupposes 'a series of guarantees, including jurisdictional safeguards, to ensure the protection of rights and liberties by means of limiting the state'.[35]

In the field of anti-corruption legislation, the rule of law argument was used by the Court to strike down a proposed amendment to the Criminal Code, which sought to shield appointed or elected officials from prosecution for misfeasance or abuse of office and corruption crimes by restricting the definition of 'public servant' to low-level civil servants. The Court reasoned that such an amendment would have hampered the fulfilment of international commitments (anti-corruption treaties ratified by the country prior to EU accession), the stability of state institutions and, by implication, the trust of the citizens in state institutions.[36]

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[33] D.C.C. 169/1999 (M. Of. No. 151 of 12 April 2000). The issue at stake was a divergence of opinion between the referring court and the Constitutional Court over the effect (*inter partes* or *erga omnes*) of concrete review (exceptions of unconstitutionality) decisions.

[34] http://ec.europa.eu/digital-agenda/en/news/network-and-information-security-nis-directive.

[35] D.C.C. 17/2015 (M. Of. No. 79 of 30 January 2015).

[36] 'The Court appreciates that if such actions [corrupt or abusive behaviour by high public officials] would not be discouraged by way of criminal law, this would result in *a breach of fundamental values sheltered by the Criminal Code*, such as the rule of law, democracy, the supremacy of the Constitution and the observance of legality, which are proclaimed as supreme values by Art. 1(3) and (5) of the Constitution' [emphasis added] D.C.C. 2/2014 (M. Of. No. 71 of 29 January 2014). Appeal to the rule of law was made also in D.C.C. 418/2014, (M. Of. 563 of 30 July 2014). The Constitutional Court interpreted a three-year disqualification to occupy the 'same function' applying to officials sanctioned for conflicts of interest or incompatibilities to mean 'all elective offices' and not just *the same kind of elective office* – mayor, deputy, senator or local or county

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2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 The balancing of fundamental rights with economic free movement rights has not raised constitutional issues in Romania so far, due to the relatively idiosyncratic economic circumstances of the country.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1 The Presumption of Innocence

2.3.1.1 The Constitutional Court has thus far rejected all exceptions of unconstitutionality regarding the transposition law, Law No. 302/2004.[37] It has stressed that the internal surrendering procedure meets all constitutional requirements and that all due process guarantees will be surely respected in the Member State requesting the extradition. The position of the Constitutional Court is that the executing court has no authority to rule on the merits of the measure taken by the judicial authority requesting the surrender. According to the Court, '[c]hallenges regarding the merits will be made in the Member State from which the warrant was issued, where all [fair trial] guarantees will be observed'.[38]

The Court of Appeal of Constanța made a preliminary reference to the Court of Justice of the European Union (CJEU) questioning the way in which the presumption of innocence might be infringed in the case of an automatic surrender for the purposes of prosecution, where the surrendered person has not previously been heard by the issuing judicial authorities.[39] The referring court asked whether deprivation of liberty and forcible surrender under a European Arrest Warrant (EAW), without the consent of the person, constitutes interference with the right to individual liberty on the part of the state executing the warrant, and whether such a forced surrender satisfies the requirements of necessity in a democratic society and of proportionality in relation to the objective actually pursued. The reference was

councillor. A restrictive interpretation of the legal disqualification would have allowed, for instance, a mayor found ineligible to run in future parliamentary elections. The Constitutional Court found the law constitutional only if the disqualification was interpreted extensively (three year disqualification from running for any elective office).

[37] Law No. 302/28.06.2004 regarding judicial cooperation in criminal matters, amended and republished M. Of. 377 of 31 May 2011.

[38] D.C.C. 419/2007 (M. Of. No. 330 of 16 May 2007). See a study of the early rulings of the Court by Benke 2007; Benke noted 'the particular importance attached to the principle of mutual recognition of criminal judgments in the jurisprudence of the Romanian Constitutional Court'.

[39] Case C-396/11 *Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:39.

based on Arts. 6, 48 and 52 of the EU Charter and Arts. 5 and 6 of the European Convention on Human Rights (ECHR). Constitutional rights were not mentioned in the preliminary reference. The question whether constitutional rights could be considered by the referring court, on the basis of Art. 20 in the Constitution, upon determining whether international law or the Constitution or national laws comprise more favourable provisions is fraught with jurisdictional and procedural difficulties. Conflicting views persist with respect to the question whether ordinary courts can rely on Art. 20 and consider autonomously which provisions (national or international) provide a more favourable treatment to a fundamental right; the prevailing opinion is that problems of constitutionality are a monopoly of the Constitutional Court[40] (see also Sect. 3.2.2). Thus, the referring court motivated the request for a preliminary reference exclusively on the basis of fundamental rights guarantees deriving from EU law (the Charter and general principles of EU law, which include the ECHR).[41]

The Grand Chamber of the CJEU found that Framework Decision 2002/584[42] must be interpreted as meaning that the executing judicial authorities cannot refuse to execute a European Arrest Warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before the arrest warrant was issued.

2.3.1.2 Preliminary review is granted by the courts of appeal; these are the courts which, according to the transposition law, are charged with deciding in first instance on the execution of European Arrest Warrants.

Whilst no statistical studies are available, examples of refusal to execute an EAW, grounded in breaches of fair trial guarantees, can be found in the practice of the appeal courts.[43]

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[40] The Romanian Constitution is fairly detailed in this respect; see, e.g. Art. 23 on individual freedom, paras. 1 and 11: ((1) Individual freedom and security of a person are inviolable; (11) Any person shall be presumed innocent till found guilty by a final decision of the court.); and Art. 21 on free access to justice, paras. 1 and 2: ((1) Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests. (2) The exercise of this right shall not be restricted by any law.). The ordinary judge can however direct problems of constitutionality only towards the Constitutional Court (by way of an exception) which in turn can refer them by a preliminary reference to the CJEU. No request for a preliminary reference has been made by the Constitutional Court of Romania (CCR) as of yet.

[41] From a broader perspective, it is worth pondering whether these jurisdictional complexities and overlaps at the national level and the countervailing wide interpretive palette in terms of defining the source and scope of fundamental rights at the disposal of the CJEU do not lead to the neglect and erosion of rights provisions in the national constitutions. See, for an analysis of the way in which the current discursive shift towards rights protection under the Charter and the ECHR impacts negatively on national constitutional fundamental rights guarantees, the argument by Albi 2015.

[42] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[43] For instance, *Curtea de Apel București, Secția a II-a Penală, Sentința 225/F din 11 septembrie 2009* (EAW for the purposes of executing a foreign sentence; incidental recognition of the foreign

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2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The principle of legality of incrimination is guaranteed by Art. 23(12) of the Constitution, according to which '[p]enalties shall be established or applied only in accordance with and on the grounds of the law'. According to the Constitutional Court, this provision entails the premise that the primary lawmaker, by parliamentary statute, or the delegated legislator (i.e. the Government, by means of an ordinance or an emergency ordinance) must legislate with clarity and not simply incorporate by reference and analogy subordinate normative instruments or administrative interpretations in the definition of a criminal offence.[44]

Problems arose in the matter due to conflicting interpretations and the ensuing jurisdictional turf wars between the Constitutional Court and the High Court of Cassation and Justice. For instance, when a 2007 Constitutional Court decision declared the decriminalisation of libel and slander unconstitutional on the grounds of a breach of dignity, conflicting interpretations arose in practice. Some courts held that the consequence of the decision was the 'abrogation of the abrogation' and consequent re-criminalisation, whereas some courts deemed the decision inconsequential until such time as the lawmaker should decide to heed it and recriminalise defamation. Conflicting decisions by the Constitutional Court (2013, exception of unconstitutionality) and the High Court of Cassation and Justice (2010, *recurs în interesul legii* (extraordinary appeal on points of law)), with neither jurisdiction yielding to the other's interpretation, did little to clarify this legal quagmire.[45]

A more recent clash occurred in the context of the entry into force of the New Criminal Code, with divergent decisions over the interpretation of the *lex mitior* principle and its application to the so-called autonomous criminal law institutions (such as repeat offences, plurality of offences, statutes of limitations).[46] The High Court considered that, during the overlap, judges could combine provisions concerning the crimes and 'autonomous institutions' rules, in order to compute the

judgment as a result of the citizen's expressed desire to execute the sentence in Romania; refusal to recognise a judgment of the Tribunal de Grande Instance de Paris, due to breaches of fair trial guarantees: trial *in absentia*, lack of representation by either a private defence attorney or a court-appointed public defender); *Curtea de apel Cluj, Secția penală și pentru cauze cu minori, Sentința nr. 14 din 3 martie 2014 a judecătorului de drepturi și libertăți* (refusal to execute an EAW issued by the Trial Court of Badajoz, Spain, due to the lack of an internal arrest warrant and due to breaches of procedural fairness amounting to an infringement of the presumption of innocence).

[44] D.C.C. 363/2015 (M. Of. No. 495 din 6 iulie 2015), declaring unconstitutional a provision in Law 241/2015 on the prevention and punishment of tax evasion. Article 6 criminalised the non-remittance to the Government, within 30 days, of taxes withheld at the source. According to the reasoning, an insufficient definition of the term 'tax or levy withheld at the source' in the law or the Fiscal Code breached the principle of *nullum crimen, nulla poena sine lege,* including the prohibition of extensive interpretation by analogy.

[45] D.C.C. 206/2013 (M. Of. No. 350 of 13 June 2013) (CCR); Decision of the HCCJ, Joined Sections, No. 8/18.10.2010, M. Of. No. 416 of 14 June 2011.

[46] D.C.C. 265/2014 (M. Of. No. 372 of 20 May 2014) (CCR); Decision No. 2/14.04.2014, High Court of Cassation and Justice, Section on Solving Problems of Criminal Law Interpretation.

sanctioning regime most favourable to the offender, whereas the Constitutional Court interpreted penal retroactivity to mean choosing the most favourable regime to the defendant, as established by *either* of the two codes taken as a whole.

The overall complexity entailed by the interpretation of the principle of legality of incrimination is not yet reflected in, and no jurisdictional conflicts have as of yet arisen with regard to, the interpretation of the EAW transposition law, due to the institutional reservations to deal with the matter of judicial cooperation. The Constitutional Court invariably rejects all exceptions of unconstitutionality concerning Law No. 302/2004; the High Court routinely orders the execution of warrants on appeal.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The right to a fair trial is guaranteed under Art. 21 of the Constitution. Paragraph 3 reads: 'All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term.' According to Art. 24, throughout the trial parties have the right to be represented by a court-appointed defender or a private lawyer. The general fair trial guarantee also implies ECHR standards since, the Romanian Constitution adopts a 'monist-comparative' solution with respect to human rights treaties, which means that the higher level of protection, domestic or international as the case may be, will be applied (Art. 20).

The Constitutional Court has interpreted Art. 21 to imply the principle of equality of arms in criminal law. For instance, a very recent decision declared unconstitutional an article of the new Criminal Procedure Code which authorised the rendering of rulings on granting *revision* relief (an extraordinary appeal) with the participation of the prosecutor but without citing the parties.[47] According to the new Criminal Procedure Code that entered into force on 1 January 2014 (Art. 466), a criminal trial can be reopened if the initial judgment resulted from an *in absentia* procedure. *In absentia* is defined as justified impossibility to take part in the proceedings and inability to notify the court of the matter or lack of citation or official notice. The term for introducing such action is relatively stringent, i.e. a month from the date of having knowledge of the conviction.

The European Court of Human Rights has ruled against Romania (violation of Art. 5) in a case involving the reopening of an *in absentia* trial, pursuant to surrender on the basis of an EAW. The former criminal procedure code did not provide for the possibility of the court to suspend the execution of the initial sentence after reopening the proceedings.[48]

[47] D.C.C. 506/2015 (M. Of. No. 539 of 20 July 2015).

[48] *Sâncrăian v. Romania*, no. 71723/10, 14 January 2014.

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2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Neither public nor private funding is available for covering the legal expenses of individuals surrendered pursuant to an EAW.

The rate of acquittal is well under the European average. Recurrent public debates have revolved around the somewhat higher percentage of acquittals in anticorruption cases (as compared with 'regular' criminal law trials), which, according to statistics and annual official releases of the National Anticorruption Directorate, levels around 9% yearly.[49]

2.3.4.2 No official data or statistics of any kind exist regarding extradited individuals who have subsequently been found innocent.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 Not applicable.

2.3.5.2 Debates on the suitability of transposing mutual recognition from (ostensibly less problematic) internal market and regulatory matters to criminal law and civil and commercial disputes presuppose an internalisation of legal debates that have gradually, incrementally grappled with the legislative and judicial developments in 'old Europe', in slow lockstep with the evolution of practices.

Romania is a recent Member State where enthusiasm for accession was not yet been blunted by qualifications and reservations regarding the proper course of integration. By the same token, Romanian legal doctrine is still characterised by a strong positivistic penchant (and a relatively rudimentary strain of positivism). The 'mechanical jurisprudence'[50] and doctrine entailed by this post-communist methodological propensity are not very useful in the context of sophisticated new practices, such as the emerging European 'constitutionalisation'.

2.3.5.3 Concerns about the shift in the role of the judiciary have thus far not been adequately addressed, whereas the dearth of commentary on these issues is a ground for concern. More generally, few writings exist on the impact of Europeanisation on judicial culture.[51]

In the case of the younger generation of judges and scholars, the older methodological predilection for 'simplistic legal positivism with a thin Marxist

[49] Official Press Release for 2014. http://www.pna.ro/faces/comunicat.xhtml?id=5982.

[50] This appears to be – in various degrees – a post-communist commonality; see, Kühn 2011.

[51] For a welcome exception in the Romanian doctrinal landscape, see Guțan and Selejan-Guțan 2014.

sauce'[52] has been replaced by or seasoned with an equally unselfconscious, simplistic and often instrumental internationalisation. That is to say that international documents, case law, developments, soft law and doctrine are cited in an often encomiastic and rather haphazard manner, without clear distinctions or an analytically disciplined assimilation ('internalisation') of the developments and practices concerned.

In the case of the judiciary as such, the openness towards dialogical incursions and international networking are coupled with an increasing isolation from all internal accountability mechanisms: in the name of judicial independence, the Superior Council of the Magistracy has been virtually isolated from all social or political levers of responsibility and, moreover, this original transposition of the French-Italian model has subsequently been progressively shielded by the Constitutional Court from future amendments (see Sects. 1.1.2 and 2.3.6).[53] A recent decision of the Constitutional Court rendered even a recall procedure, by virtue of which the Superior Council was accountable to the system as such, inoperative.[54]

2.3.5.4 In the context of an increased use of EAW execution requests and the trivial matters at stake in some requests, the introduction of a proportionality test would be welcome.

2.3.6 EU Monitoring of Anticorruption Measures in Romania

Romanian criminal law and penal policy have been significantly influenced by pre- and post-accession conditionalities relating to anticorruption measures. One could safely say that anticorruption criminal policy functions almost as a quasi-constitutional phenomenon, insofar as it significantly affects both the operation of the political-constitutional systems as such, and patterns of institutional discourses and structures of justification.

The focus on anti-corruption as a determining criterion in the monitoring of the new Member States is a more general recent tendency of the Union[55] which may by virtue of a ratchet effect generate new EU constitutional vocabularies and institutional developments.[56] To wit, the Vice-President of the European Commission at the time, Justice Commissioner Viviane Reding, recently floated the idea of a post-accession new constitutional mechanism, analogous to the Copenhagen criteria. The Justice Commissioner supported her plan to solve the 'Copenhagen

[52] Czarnota 2009, p. 179: 'The dominant type of legal theory under communism was simplistic legal positivism with a thin Marxist sauce.'

[53] D.C.C. 799/2011 (M. Of. No. 440 of 23 June 2011).

[54] D.C.C. 196/2013, regarding the exception of unconstitutionality of Art. 55, paras. (4) and (9) of Law No. 317/2004 on the Superior Council of the Magistracy (M. Of. No. 231 of 22 April 2013).

[55] Schrot and Bostan 2004. More generally, Szarek-Mason 2010.

[56] Generally, Sadurski 2012.

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dilemma' (i.e. the non-democratic derailment of a Member State after accession) by reference to the Cooperation and Verification Mechanism for Romania and Bulgaria.[57] The proposal of squaring the circle between soft power and the 'nuclear option' of Art. 7 TEU (in Reding's words) by way of a 'post-Accession Copenhagen' is now under consideration in the European Commission and European Parliament. Whether or not it will be explicitly called so in the constitutive treaties, a European constitutional area (which includes quasi-constitutional vocabularies such as anti-corruption) has crystallised at the interface of national and international guarantees.

The post-accession CVM mechanism was initially scheduled to lapse after three years (in 2010) but has in the meanwhile been extended, seemingly indefinitely. The judicial reform and the related anti-corruption benchmarks have taken the upper hand in the monitoring. In the aftermath of a protracted domestic constitutional crisis in 2012, the European Commission has included general references to the 'Romanian constitutional system' as such in its biannual reports. This was supported with/based on the argument that judicial reform is related to the rule of law and, although not technically a part of the judicial system, the Constitutional Court and the Constitution are essential to the rule of law.

More concretely, anti-corruption policies are implemented in the field of penal policy by the National Anticorruption Directorate (NAD), a structure ostensibly subordinate to the General Prosecutor's Office Attached to the High Court of Cassation and Justice (in the vernacular, it is still referred to by its former title, the General Prosecutor's Office of Romania). NAD has jurisdiction over mid- and high-level corruption, defined *ratione materiae* by the value of the bribe or prejudice that has to exceed 10,000 and 200,000 EUR, respectively. *Ratione personae*, the institution has jurisdiction over corruption crimes committed by enumerated categories of public officials, according to Law 78/2000 on the Prevention, Investigation and Sanctioning of Corrupt Acts. In practice, the office is fully autonomous, since the symmetrical modes of appointment and tenures of both the General Prosecutor and the Chief Prosecutor of the NAD in practice guarantee the functional independence of the anti-corruption prosecutorial office within the Public Ministry.[58]

A wave of high-profile arrests and convictions have nearly captured the public sphere. There are neatly divided camps, on the one hand of detractors of anti-corruption prosecutions, which are perceived as politically motivated and/or a form of 'televised justice' and, on the other hand, supporters, who see

[57] 'Safeguarding the rule of law and addressing the "Copenhagen Dilemma": Towards a new EU mechanism', address by Viviane Reding, Vice-President of the European Commission, to the General Affairs Council, Luxemburg, 22 April 2013. http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm.

[58] Both the Chief Prosecutor of the NAD and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice are appointed by the President, on the recommendation of the Minister of Justice, upon receipt of the high judicial council's advisory opinion on the nominee. The term of office is three years, renewable once.

anti-corruption policies and institutions as a panacea or – in the extreme version of the discourse – even a substitute for a corrupt political system.[59] The very autonomy of the structure, which is monitored effectively only by the High Council (itself a fully autonomous body), lends itself easily to speculative journalism about the ends and means of anti-corruption.

2.4 The EU Data Retention Directive

2.4.1 The Romanian Constitutional Court was first confronted with national legislation implementing the Data Retention Directive in 2009, prior to the annulment of the Directive by the Court of Justice.

The Romanian Constitutional Court ruled on an exception of unconstitutionality regarding Law No. 298/2008 and held that the open-ended authorisation to collect traffic data and 'related data (*date conexe*)' was a disproportionate infringement of the constitutional guarantees of the freedom of expression, the right to secrecy of correspondence and the general right to privacy.[60] Proportionality played a crucial role in the analysis, since Art. 53 on restriction of certain rights and liberties is the reference norm for assessing rights limitations.

The Court emphasised the way in which blanket retention of data affected the rights of the addressees of electronic or mobile phone communications: '[t]he rights to privacy of the addressee of a communication are thus exposed in the absence of any element of volition, as a result of someone else's behaviour, without having the possibility to counter the latter's bad faith or intention to harass or blackmail the addressee.'[61] The Court also stressed the way in which blanket retention has a chilling effect on rights and inevitably creates a general climate of suspicion.

[59] A volume of interviews with anticorruption prosecutors, with the head of the National Integrity Agency and with a notorious NGO activist is entitled, revealingly, 'I vote DNA' (DNA is the Romanian acronym for *Direcția Națională Anticorupție* (National Anticorruption Directorate)). Ghinea 2012. In the meanwhile, one of the interviewees – the director of the integrity agency – has been indicted on corruption charges.

[60] The directly relevant provisions in the Constitution are those of Art. 28 on secrecy of correspondence ('Secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.'), Art. 30(1) on freedom of expression ('Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.'), and Art. 26 on private and family life ('(1) The public authorities shall respect and protect the intimate, family and private life.; (2) Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.'). Note that the Romanian Constitution uses a stricter language than the Convention in terms of its definition of secrecy of correspondence (the right is defined as 'inviolable', whereas Art. 8 ECHR uses the milder term 'respect').

[61] D.C.C. 1258/2008 (M. Of. No. 798 of 23 November 2009).

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A new transposition law, Law 82/2012, brought before the Court by an exception of unconstitutionality, was struck down in July 2014 (the law was invalidated *in toto*).[62] Law 82/2012 had purported to heed the prior constitutional ruling by making marginal or cosmetic changes to the impugned provisions (so that, for instance, '*related* data [*date conexe*] needed for the identification of the subscriber or user' became, simply, 'necessary data'). The Court noted that such amendments were not of a nature to alter its position, insofar as the provisions continued to be open-ended and the law did not seek to limit the number of individuals and officials with access to such data to the greatest degree possible.

In its reasoning, a unanimous Court stressed that:

> [T]he infringement of fundamental rights regarding private and family life, secrecy of correspondence, and freedom of expression is *very wide in its scope and reach* [*de mare amploare*] and must be considered *extremely serious* [*deosebit de gravă*], whereas the fact that such data are subsequently stored and used without informing the subscriber or registered user is of the nature to imprint in the consciousness of concerned individuals the feeling that their private lives are subject to constant surveillance [emphasis in original].[63]

Interestingly, the 2014 ruling considered that implementation of the Directive concerns two stages, namely, blanket storage of data and use of the stored information, respectively. Only unsupervised access to data was deemed constitutionally suspect, insofar as privacy and secrecy of correspondence are concerned. According to the Court,

> [T]he Court appreciates that the nature and specificities of the first stage, insofar as the lawmaker deems the storage necessary, does not in and of itself impinge upon the exercise of the right to private and family life or the secrecy of correspondence. Neither the Constitution nor Court precedents forbid preventive retention and storage, inasmuch as use of the data is accompanied by adequate safeguards and is not disproportionate in nature.[64]

The structure of the reasoning, in this respect, tracks that of the annulment judgment of the CJEU.

A significant part of the 2014 ruling grappled with a peculiarity of recent Romanian legislation, i.e. the large scope of delegations to the intelligence services. Thus, the 2014 decision invalidated an authorisation to the intelligence services, which, according to the law, would have received a generous access to traffic data 'concerning the prevention and combatting of threats to national security'. This mandate, the justices observed, unlike the request of a prosecutor (which must be sanctioned by the judge of rights and liberties), was not controlled by a court or indeed by any external body.

Moreover, whereas two national institutions, the Data Protection Agency (*Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter*

[62] D.C.C. 440/2014 (M. Of. No. 653 of 4 September 2014).

[63] Ibid., para. 65 (emphases in original).

[64] Ibid., para. 60.

Personal (ANSPDCP)) and a regulatory agency (*Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (ANCOM)) are nominally entrusted with the supervision of the way in which public service providers fulfil their legal obligations with respect to data retention, storage and access, and can impose sanctions (misdemeanour fines), the Court noted that 'no authentic control mechanism exists, to ensure that such institutions permanently and effectively implement the law [i.e. in monitoring the public services providers]'.[65]

In September 2014, a majority decision declared unconstitutional legislative provisions which introduced an obligation, incumbent upon service providers, to retain and store identification data pertaining to purchasers of prepaid SIM cards and users of open access internet services. The reasoning departs from the logic of the earlier ruling in July, insofar as in the paradigm of the newer decision blanket retention and storage as such ('first stage') are described as negatively affecting constitutional rights.[66] This *volte face* in argumentation was duly pointed out and criticised by the three dissenting justices.

In early 2015, a unanimous Court rendered a decision on a germane issue, declaring the Law on 'Cybersecurity' unconstitutional in its entirety. The impugned act would have in effect granted broad, almost unfettered supervisory discretion over data and internet network security policy to the Romanian Intelligence Service (SRI). The 'Cybersecurity Law' purported to 'transpose' *avant la lettre* the draft NIS Directive (see supra Sect. 2.1.3).[67]

In early 2015, in the wake of this series of decisions of unconstitutionality concerning the legislation transposing the Data Retention Directive, the retention of identification data pertaining to purchasers of prepaid SIM cards, and the Law on 'Cybersecurity', the President of the Constitutional Court publicly accused the SRI of exerting undue pressure on the justices (i.e. to render constitutionality rulings). In response, the incumbent Director of the Romanian Intelligence Service, George Maior, charged the Court for its alleged lack of moral responsibility and good faith and subsequently resigned, arguing that the unconstitutionality decisions had crippled the pursuit of his institution's objectives and mission and consequently the fulfilment of his own mandate as Director of internal intelligence.[68]

In October 2015, another data retention law (also dubbed the 'Big Brother Law') was passed in Parliament. Law 235/2015 Amending Law 506/2004 On Personal

[65] Ibid., Para. 68.

[66] D.C.C. 461/2014, M. Of. No. 775 of 24 October 2014.

[67] An English translation of the decision can be found on the Court website, https://www.ccr.ro/jurisprudenta-decizii-de-admitere.

[68] Newscast, National Television, 25 January 2015. The Romanian Intelligence Service Puts More Pressure [on the Court]: George Maior Declares That He Will Know Whom to Point Out as the Main Culprit in the Case of a Catastrophe. http://stiri.tvr.ro/sri-mareste-presiunea–george-maior-spune-ca-stie-pe-cine-va-arata-cu-degetul-in-caz-de-catastrofa_55586.html.

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Data Processing and the Protection of Privacy in the Field of Electronic Communications[69] explicitly provides that all requests for traffic data, 'made by prosecutors or state authorities with national defence or intelligence attributions', have to be authorised by a judge; traffic, location or equipment identification data must be deleted or anonymised within three years at most. When a request from a court or prosecutor's office or state authority with defence or intelligence attributions is made for such data, the obligation of service providers to store and preserve such data extends to a maximum term of five years from the date of the request or the date of the rendering of a final court judgment, respectively. This last 'Big Brother' law was prepared by extended consultations among party factions, under the patronage of the Presidency, and consequently passed by a landslide in Parliament. Thus, it was not challenged before promulgation, and the Ombudsman raised no direct exception of unconstitutionality before the Court. Nonetheless, the lack of an 'abstract' challenge leaves still open a possible 'concrete' challenge by exception of unconstitutionality raised by a party in the course of a future criminal trial, should the evidence issue from application of this law.

2.5 Unpublished or Secret Legislation

2.5.1 Unpublished or secret measures would not pass the constitutional muster, insofar as they were normative in nature. In this respect, the curbing of Romanian Intelligence Service attributions by virtue of the 'Cybersecurity Decision' of 2015 is apposite. The reluctance of the Constitutional Court to sanction the incorporation by reference of administrative acts (e.g. ministerial orders and circulars) is also relevant in this vein.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 Not applicable.

[69] Law No. 235/2015, M. Of. No. 767 of 14 October 2015.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Not applicable.

2.7.2 Not applicable.

2.7.3 Romania was subject to EU-related Balance-of-Payments (BoP) 'economic emergency' measures right after the onset of the sovereign debt crisis.[70] In 2009, the Council agreed to make medium-term financial assistance of up to 5 billion EUR available, in conjunction with a Stand-by Agreement with the IMF (in the amount of 11.4 billion SDR, approximately 12.9 billion EUR), with a further 2 billion EUR being provided by the World Bank (WB), the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) (the WB provided 1 billion under a Development Policy Loan, whereas the EBRD and the EIB provided 1 billion combined).

The measures agreed with the lenders did not single out pension or salary cuts (see, for instance, the Memorandum of Understanding with the European Commission of 23 June 2009, which recommended only foregoing scheduled salary increases and replacing departing public employees at a rate of 1 to 7).[71] Yet the agreed budgetary and fiscal discipline targets were such that few alternatives to salary and pension cuts were available.

Law 329/2009[72] was passed in furtherance of obligations undertaken by Romania through memoranda concluded with the European Commission and the IMF. It provided for a restructuring of public institutions (entailing also, under certain conditions, the firing of redundant public service employees), the rationalisation of public expenditures by 15.5% monthly reductions in October-December 2009, and the obligation of public employees drawing a pension higher than the average gross salary to opt between the pension and the salary.

The Constitutional Court was seized of the issue in abstract review, by virtue of an objection of unconstitutionality raised by the parliamentary minority. The objection identified various procedural and substantive flaws. In terms of procedural flaws, the complainants argued that the plea of necessity under Art. 53, under which the law had been adopted, did not conform to the constitutional conditions regarding the declaration and imposition of a state of emergency. This argument was important, since a national state of emergency on the ground of 'defence of national security' constitutes a legitimate purpose for restriction of rights according

[70] I borrow the metaphor 'economic emergency' from Kilpatrick 2015. The term is apposite in the Romanian context, since dealing with a national emergency was the legitimate objective advanced as justification for the rights restrictions.

[71] http://ec.europa.eu/economy_finance/assistance_eu_ms/romania/index_en.htm.

[72] Law No. 329/05.11.2009 regarding the Restructuring of Public Institutions, the Rationalisation of Public Expenditures, the Support for the Business Environment and the Implementation of Memoranda of Understanding with the EU Commission and the International Monetary Fund.

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to Art. 53, which provides for the proportionality principle. According to the argument of the complainants, since the law was justified as an emergency measure, the requirements of Government Emergency Ordinance 1/1999 on the state of siege and the state of emergency should have been applied. Moreover, the parliamentary challenge was based on the reasoning that, according to Art. 93 (on emergency powers), the President should have instituted a state of siege or state of emergency and asked for parliamentary approval within five days at the latest. The Constitutional Court dismissed this objection to the austerity measures adopted under a plea of necessity, with the reasoning that the term 'defence of national security', as used in Art. 53, has a wider meaning than the term 'state of siege or state of emergency' envisioned by Art. 93. What is worthy of note is that the Court thus confirmed that restriction of rights in the context of an economic crisis qualifies as part of 'defence of national security' under Art. 53.

A second procedural argument was less dramatic in nature. The complainants alleged that the law unlawfully presumed (in the case of restructuring) that a positive clearance would in fact be issued by the audit authority, the Court of Accounts.[73]

The complainants additionally put forth a number of substantive objections, arguing that the law infringed the right to property (Art. 44) and the right to 'labour and social protection of labour' (Art. 41), insofar as it compelled publicly employed pensioners to opt between the two incomes. Further, the general prohibition of discrimination in Art. 16 was also invoked with regard to the firing criteria.

The law was upheld by a majority of the Court, except insofar as it covered 'constitutionally entrenched offices and mandates' (an interesting and perhaps not fully public-spirited exception). The majority opinion insisted upon the proportionality and especially the time limitation of most restrictions:

> We must emphasise that the essence of the constitutional legitimacy of rights or liberties restrictions is the exceptional and temporary character of a measure. … It falls upon the state to find solutions to counteract the economic crisis, by adequate economic and social policies. The reduction of public sector employees' incomes cannot constitute, in the long term, a proportional measure. Contrariwise, the extension of such measure may result in unintended effects and disturb the good functioning of public institutions and state authorities.[74]

There were three dissenting justices, who emphasised that the complainants were correct to raise the procedural argument regarding the requirement for the Court of Accounts to authorise cases of institutional reorganisation by means of government decree (*Hotărâre de Guvern*). Additionally, they stressed the substantively distinct levels of constitutional protection which ought to apply to pensions and public

[73] According to Art. 117(2): 'The Government and Ministries may, on the authorization of the Court of Audit, set up specialised agencies in their subordination, but only if the law acknowledges the competence thereof.'

[74] D.C.C. 1.414/2009 (M. Of. No. 796 of 23 November 2009).

sector salaries, respectively. This minority caveat resurfaced in subsequent majority opinions.

A series of constitutional decisions (Nos. 872, 873, 874) was rendered by the Constitutional Court on 25 June 2010 on conditionality-related austerity measures. The most prominent ruling was Decision 872/2010,[75] which resulted from an objection of unconstitutionality raised (referred) by the High Court of Cassation and Justice.[76] Law 118/2010 on Measures Necessary to Restore Budgetary Balance welded together a string of restrictions, among which were the reduction of pensions by 15%, a 25% public sector salary cut and a 15% diminution of unemployment benefits and child allowances. According to the High Court, the reductions were disproportionate and discriminatory, the reiteration of the restrictions in 2010 breached the principle according to which restrictions ought to be temporary in order to be considered proportionate, and was also – insofar as the cuts were applicable to the judicial system – in breach of judicial independence.

Most of the challenges were held by the Constitutional Court to be unfounded, either in proportionality review (salaries) or in principle. In the case of the argument regarding judicial independence, the Court insisted that judges ought to shoulder common burdens and that judicial independence comprises many elements, 'none of which must be either neglected or absolutised'. Some challenges were rejected by the Court with the procedural reasoning that not all social benefits are protected constitutionally to begin with, and thus can be either granted or stripped at the legislative level.

However, the Constitutional Court upheld the challenge of unconstitutionality referring to the scheduled pension cut, with the argument that constitutional protection in Art. 47(2) and the special character of pensions, which are partly contributory in nature, shielded them from state interference. The state could not invoke hardship in defence of such measures, as the good husbandry of the social insurance budget is incumbent on the state. According to the Court,

> [T]he aim of the pension is to compensate during the passive life of the insured person the latter's contribution to the State social security budget under the contributory principle and to ensure the means of subsistence of those who have acquired this right by law (contributory period, retirement age, etc.). Thus, the State has a positive obligation to take all means necessary to achieve that objective and to refrain from all conduct likely to limit the right to social security.

[75] D.C.C. 872/2010 (M. Of. No. 433 of 28 June 2010). An English translation of this ruling can be found on the Court website.

[76] In the Romanian system, the constitutionality of a law can be verified by the CCR *in abstracto*, *ex ante*, before promulgation (Art. 146(a)), subsequent to an *objection* of unconstitutionality raised by the President, the Speaker of either House, the Government, the High Court of Cassation and Justice, the Ombudsman ('Advocate of the People', *Avocatul Poporului*), 50 deputies or 25 senators, as well as *ex officio* on laws amending the Constitution. Laws *and ordinances* can be subjected to the Court by virtue of an *exception* of unconstitutionality, raised by parties in cases pending before courts or arbitration tribunals (or *ex officio* – as referrals – by the courts), as well as directly, by the Ombudsman (in the latter case, the term 'exception' is somewhat of a constitutional misnomer, since the Advocate of the People challenges the norm abstractly).

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In terms of reasoning, although the tenor of the argument of the High Court in its referral was that pension would be a form of property under the Constitution and the ECHR, and although the Constitutional Court did cite in support of its own reasoning the well-known decisions of the Hungarian Constitutional Court from 1995 and 1997, the decision did not rest upon the argument that some parts of the social insurance scheme would be accorded 'property-like protection'.[77] Article 44 (right to property) was not mentioned in the court's reasoning. The finding of unconstitutionality with respect to pension reductions rested entirely on Art. 47(2) (living standard), which refers to the right to pensions in the same vein as the right to maternity leave, public health care, unemployment benefits 'and other forms of public or private social securities', generically referred to as 'the right to social assistance, according to the law'.

Another referral from the High Court, adjudicated on the same day, concerned the 2010 Law Concerning some Measures with Respect to Pensions. The act sought, in the crisis context, to subject the so-called 'special pensions' (i.e. pensions of Members of Parliament, members of the military and diplomatic services, the judiciary, prison system, police, etc.) to the general legislative regime applicable to the contributory pension scheme. Whereas the austerity measures were generally upheld on the basis of the argument that such pensions were not calculated on the basis of the 'contributory principle' and were thus not constitutionally immune from changes, the rule seeking to eliminate the service pension of judges, prosecutors and 'assistant magistrates' of the Constitutional Court[78] was struck down. This seems somewhat paradoxical in the light of the Court's previous ruling; the reasoning of the Court was that it would have infringed upon the principle of judicial independence and prosecutorial impartiality, as guaranteed by Arts. 124(3) and 132(1) of the Constitution.[79]

In another decision rendered on the same date, Decision 874/2010,[80] the Constitutional Court adjudicated on a further objection regarding the Law on Measures Necessary to Restore the Budgetary Balance, raised by deputies and senators. The objection revisited in part the analytical structure of the High Court referral, previously addressed by Decision 872 (regarding the constitutional definition of emergency, the nature of acquired rights, the special status of pensions, etc.). An additional and somewhat eccentric argument in the MPs' objection was that the salary cuts not only breached legitimate expectations but also imposed a levy on the public sector, analogous to a tax burden. The logic was that, should the cut be considered a form of taxation, this would lead to the conclusion that the

[77] For a scathing criticism of this argument in the Hungarian context (as 'state socialism redivivus'), see Sajó 1995 and 1996.

[78] According to the Law on the Status of Magistrates 303/2004, judges and prosecutors benefit, at the age of 60, after 25 years of service, from a service pension, at the rate of 80% of their income (computed from gross salary and benefits) of the last month of service. Assistant magistrates of the Constitutional Court are assimilated to regular magistrates in terms of legal status.

[79] D.C.C. 873/2010 (M. Of. No. 433 of 28 June 2010).

[80] D.C.C. 874/2010 (M. Of. No. 433 of 28 June 2010).

general prohibition of discrimination in Art. 16 and the requirements contained in Art. 56(2) (fair distribution of the tax burden) were also breached, since private sector employees would contribute 16% of their revenue to the state budget whereas their counterparts in the public sector would suffer a burden of 41% of their income. Since the issues mirrored in good part those addressed in its prior decision, the Constitutional Court reiterated and refined the main tenets of its prior reasoning. First, emergency has an autonomous meaning in Art. 53. Here, the Court renewed its extensive references to IMF and EU Commission reports in order to substantiate the existence of an economic emergency. Secondly, all forms of social protection mentioned in the Constitution can be restricted if proportionality is observed. And thirdly, the right to a pension has a special status, which implies legitimate expectations that are opposable to the state and immunises this right from arbitrary governmental intrusions. Again, the Court refused to explain the special constitutional character of pensions by exclusive reference to contributiveness, i.e. in terms of a property-oriented justification. It held the pension cut to be unconstitutional solely by reference to Art. 47. Had the argument been formulated in terms of property, the extension of the unconstitutionality finding to the reduction of allowances paid for the attendants of disabled pensioners would have been difficult to justify, as such pensions and attendant allowances are based on need.[81]

The logic of the Court strikes therefore a mild 'Solomonic' chord in this respect, since the exclusive reliance on the 'living standard' guarantee of Art. 47 fails somewhat to explain the complete denial of protection to other rights enumerated in that article and affected by the austerity measures (maternity, unemployment benefits, etc.). Arguably, another Solomonic inconsistency of the austerity-related case law of the Constitutional Court is the use of the principle of judicial independence to single out and immunise the special pensions of magistrates from reduction (but not their salaries).

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Romanian courts (with the exception of the Constitutional Court, which has made no request for a preliminary ruling as of yet) have been increasingly active in making referrals to the CJEU. To date, 104 requests for a preliminary ruling have

[81] Ibid., 'The Court also notes that according to Art. 54(a) of the Law No.19/2000, disability of first degree is characterised "by the total loss of working capacity, the capacity of self-help, self-conduction or spatial orientation, the disabled person requiring constant care or supervision from another person". Therefore, the decrease by 15% of allowances of attendants for pensioners with disabilities of first degree, as well as establishing a pension-point value lower than the existent value to calculate the gross amount of attendant allowance, are contrary to Art. 47(1) of the Constitution, because the state failed to fulfil its obligation to take *appropriate* social protection measures.'

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been made, originating from all jurisdictional tiers (*Judecătorii, Tribunale, Curți de Apel, Înalta Curte de Casație și Justiție*).[82] Out of these referrals, 29 are still pending and 75 have been finalised. Out of the latter, 32 resulted in preliminary rulings, 17 were rejected as inadmissible, another 17 were disposed of by reasoned order on the basis of Art. 99 of the Rules of Procedure and 9 were removed from the docket at the request of the referring court.

One can notice a steady increase in references over the last few years. Over half of the requests for preliminary references (57) have been registered with the Court of Justice during the past three years alone (the breakdown is: 12 since 1 January 2015, 38 in 2014, 17 in 2013, 13 in 2012, 14 in 2011 and 17 in 2010).

The subject matter of the cases runs almost the full gamut of prerogatives of the Union, e.g. from rights attached to European citizenship to the interpretation of the non-discrimination directive and the free movement of goods.

The first preliminary ruling on a Romanian reference, the *Jipa* case, concerned the question whether a Romanian restriction on travel for up to three years applicable to a citizen removed (because of being an illegal resident) from another Member State with which Romania had concluded a readmission agreement, would constitute a breach of EU citizenship-related free movement rights of citizens and their families.[83] The second, somewhat of a *cause celèbre* locally, concerned the conformity of a national pollution tax (in effect a first registration levy on cars), which indirectly burdened the owners of second-hand automobiles purchased in other Member States yet did not discourage the local purchase of second-hand vehicles of the same age and condition.[84]

Until very recently, most of the references concerned exclusively the conformity of national legislation with EU law, namely, EU law and values were perceived and used as defences *against* national law and administrative actions. Nonetheless, this may change progressively, in lockstep with higher levels of familiarity with EU law, both in terms of judicial network socialisation and black letter law knowledge. For instance, the EAW reference of the Court of Appeals of Constanța (*Ciprian Vasile Radu*, referred to above in Sect. 2.3.1) sought to test the conformity of national law transposing the Framework Decision and the limits of the transposed normative act itself with the rights enshrined in the Charter and the ECHR (as 'general principles').

2.8.2–2.8.3 Over the past decade the Constitutional Court has acquired an increasingly prominent role within the Romanian constitutional system and adopted a more pronounced activist stance. These conjoined developments have resulted both from changes in the Court's prerogatives as well as in the institutional

[82] A database and search engine for preliminary references and rulings is maintained by Euroquod, a working group of judges authorised by the Superior Council of the Magistracy and affiliated with the National Institute of Magistracy. The database and some statistical data are available at http://www.euroquod.ro/ue/cereri/evidenta/.

[83] Case C-33/07 *Jipa* [2008] ECR I-05157.

[84] Case C-402/09 *Tatu* [2011] ECR I-02711.

make-up after the 2003 revision of the Constitution; these changes have led to a more unstable political system, the institutional dysfunctions of which the Court is often called upon to umpire.

The shift is visible in quantitative terms (rates of annulment), albeit perhaps more apparent still in terms of the effect of Constitutional Court decisions in high-stakes constitutional conflicts, such as the governmental crisis of 2012. The activist positions of the Constitutional Court have also relied on and generated a higher degree of 'transnationalisation' of both jurisprudence and institutional networking.[85]

In abstract (*ex ante*) control, the rate of annulment[86] is 41.70% in the preliminary review of laws (98 of 235 decisions), 57.14% in the case of *ex officio* review of constitutional revision initiatives (4 out of 7) and 39.47% in the case of standing orders of Parliament (15 of 38 decisions).[87]

In concrete control (*ex post* review), the annulment rate is 2.46% (385 out of **15,654** decisions rendered).

Especially after EU accession, the number of exceptions of unconstitutionality[88] exploded, flooding the court with referrals from cases pending before the ordinary courts. Part of the explanation for this development lies in internal legislative inconsistencies and in the Court's tendency to assert its prerogatives in jurisdictional battles with the ordinary judiciary. In this respect the Court was, as one commentator deftly put it, 'a victim of its own success'.[89]

The number of exceptions of unconstitutionality increased from under 500 before 2003 to 8,823 in 2009 and 4,750 in 2010, levelling again after 2011 (1,568, 888, 1,335 and 1,298 in 2012, 2013, 2014 and 2015, respectively).

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[85] Politics and theory alike were polarised in their perspectives on the 2012 constitutional developments. See, for different interpretations of the crisis and the role of the Romanian Constitutional Court in the summer of 2012, Bianca Selejan-Guțan's critical post, 'The Illusion of the Romanian Constitution', I-Connect, http://www.iconnectblog.com/2012/12/the-illusion-of-the-romanian-constitution/ (and her book on the Romanian Constitution in context (Selejan-Guțan, 2016)) and the much more sympathetic reading of the issues in Perju 2015. See generally, in the European context, the comparative studies on Romania and Hungary in Sonnevend and Bogdandy 2015.

[86] Annulment in these statistics encompasses all forms of admission, i.e. full and partial annulment as well as 'interpretive reservation' (interpretation in conformity with the Constitution, analogous to the German *verfassungskonforme Auslegung*). The latter form of relief is in effect a doctrinal innovation by the Court, which leads to frequent doctrinal criticism with respect to the effect of an interpretive decision.

[87] The statistics are maintained (updated to July 2015) by the Court and available in English at https://www.ccr.ro/Statistici-periodice.

[88] On the difference between exceptions of unconstitutionality (*ex post* review) and *ex ante*, abstract review of objections of unconstitutionality see supra n. 76 and associated text.

[89] See the comparative graphs of abstract and concrete review on the Court website. Tănăsescu 2013, p. 17 notes also the inverse correlation between annulment and referral rates: 'If in 2008 the success rate for exceptions was 3%, in 2011 it had reached the lowest ebb, at 0.7%, whereas in 2010 it had been 1.1%, namely, very weak. One would do well to compare these figures against the yearly average rate of 2.18%, measured for the twenty years of activity' (translation by the author).

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There are also EU influences that bear on this general phenomenon and explain the fluctuation in and the high number of exceptions. Until the criminal and procedure codes as well as the organic law of the Court were amended in autumn 2010 by Law 177/2010, exceptions were used by litigants as a dilatory strategy to reach the statute of limitations (prescription of criminal responsibility), since, pending a decision on the exception, the trial before the judge *a quo* was stayed whereas the term of prescription continued to run. The use of these tactics was castigated by the European Commission as a hindrance to successful anti-corruption policies, which in turn prompted an expedited legislative revision process.[90]

2.8.4–2.8.5 German identity control case law was cited with approval; however it would be far-fetched to assert that the Court has taken an analogous position vis-à-vis EU law on the basis of the eternity provision of the Romanian Constitution. The Romanian Constitutional Court takes a Euro-friendly position, to the point of liaising with European Commission delegations monitoring the implementation of the Cooperation and Verification Mechanism. Romanian legislation transposing the Data Retention Directive was declared unconstitutional on the grounds of an autonomous understanding of fundamental rights, based on the national Constitution.

2.8.6 Integration, especially in the case of a peripheral jurisdiction like Romania, induces significant pressures to conform. Romania is a latecomer to the Union and one of only two countries to join the EU with the post-accession caveat of the Cooperation and Verification Mechanism.

An anecdotal example would help illustrate this assertion. Prior to EU accession, the Constitutional Court was called upon to verify whether a governmental ordinance which prohibited hate speech, punishable by a prison sentence of up to five years, met the criterion of emergency. The question was not the substantive issue, namely, whether the promotion of fascist or xenophobic discourses ought to be incriminated. The problem before the Court was whether this should have followed the ordinary path of parliamentary adoption (in view of the fact that the ordinance incriminated hate speech with a stiff sentence and fundamental rights were at stake), rather than the 'motorised' procedure of an emergency governmental ordinance. Unlike parliamentary legislation, emergency ordinances are in essence executive decrees with the force of law: they are drafted without any debate, enter into force immediately after the Executive registers them with Parliament and are deemed to be automatically adopted should Parliament take no course in the matter within a certain timeframe.

The Constitutional Court held that the 'extrinsic' constitutional criterion of emergency was fulfilled, even though fundamental rights were regulated by what is

[90] E.g. CVM Report of July 20, 2010, COM (2010) 401 final: 'Exceptions of unconstitutionality continue to delay high-level corruption cases while a draft law eliminating the suspension of trial proceedings when unconstitutionality exceptions are raised still awaits adoption in the Parliament.' Law No. 117 was adopted and promulgated a few months later (M. Of. No. 672 of 4 October 2010).

in essence a governmental decree, given an urgent need to join the Union and the fact that a signal of conformity needed to be sent expeditiously.[91] One could, contrary to the Court's reasoning, very well argue that the logic of defining emergency as a constitutional requirement for substitution of the parliamentary procedure in such terms trivialised and 'instrumentalised' the values at stake. Otherwise put, in the instrumental logic underlying the Court's reasoning, rights restrictions were justified as a fair bargain for EU accession, whereas a show of tolerance was considered necessary primarily for 'export' purposes.

This attitude still pervades in public debates, doctrinal literature and the institutional positions of the judiciary. However, even though no thorough statistics are at hand, one can note some emerging dissonances. Judges at the lower Courts of Appeal seem, on the average, to be more autonomous in their assessment of EU-related measures than judges of the High Court, in terms, for instance, of their readiness to refuse the execution of an EAW on the grounds of a breach of constitutional/ECHR rights. On appeal, the High Court almost invariably decides to uphold the execution of a warrant.

2.9 Other Constitutional Rights and Principles

2.9.1 See infra 2.13.1–2.13.4. On the problem of fundamental rights restrictions through measures adopted by governmental decree, see Sect. 2.8.6.

2.10 Common Constitutional Traditions

2.10.1 One usually finds that all traditions are somewhat idiosyncratic, the deeper one probes into the concrete meaning in a given context. This is not to deny patterns of commonality at the level of principles, but to underline the fact that commonalities must of necessity be pitched at a level that is oftentimes too abstract to help in the solving of concrete cases. To wit, all liberal constitutions adhere to the principle of judicial independence. A minimal core understanding of this principle is shared:[92] judges must not be removed from office, unless by some form of impeachment or after criminal conviction and should hold tenure 'during good behaviour' (*quamdiu se bene gesserint*). Nonetheless, the principle as such is of relatively little help in a myriad of minute questions that arise in practice, such as:

[91] D.C.C. 67/2005 (M. Of. No. 146 of 18 February 2005): 'The prevention and combatting of incitement to national, racial or religious hatred correspond to the requirements of the European Union in the field, constituting at the same time a positive signal given by the Romanian state in terms of combatting racism, anti-Semitism and xenophobia. The efficiency of the signal depends on the urgency with which the state adopts the measures sanctioning such deeds.'

[92] The only exception is constituted by judicial elections in US state constitutional law.

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Are prosecutors to be considered magistrates and if so, how and to what extent should their situation be analogous to that of judges? Should a high judicial council be created and if so, what should its composition be? Does independence also imply a constitutional prohibition on the reduction of judicial revenues?

The same observation could be made with respect to the understanding of rights or even to rapidly expanding methodological frameworks such as proportionality analysis. This tension is obscured by the precatory reference in Art. 6(3) TEU to 'rights result[ing] from the constitutional traditions common to the Member States'. The tensions with the logic of traditional constitutionalism are, however, laid bare by specific judgments of the CJEU. For instance, when it rules that human dignity is a legitimate limit to the free movement of services, *subject to proportionality control*, as in the *Omega* judgment,[93] or claims that an extended blockade would be a particular manifestation of a common constitutional understanding of the rights to *assembly and free speech*, as in *Schmidberger*, the CJEU speaks traditional constitutional language but uses the concepts very differently from and sometimes in order to counter traditional, nation state-bound constitutional understandings.[94] The *Laval* and *Viking* 'adaptations' of proportionality analysis and horizontal effect to the benefit of commercial freedom and to the detriment of trade unions, respectively, are also worthy of mention in this respect. Contrariwise, traditional constitutional logic places the burden on the state and gives the prima facie benefit of legitimacy to fundamental rights. Needless to say, this criticism does not presuppose wanton disregard of 'constitutional traditions' on the part of the CJEU. The Luxemburg Court does the best it is expected to do in the systemic and institutional logic of the current EU constitutional paradigm.

At a deeper level, the essentially embedded paradigm of national constitutional law, moored to history and experience as it inevitably is, coexists uneasily or in tension with the prospective and more rationalistic outlook of EU law.[95] The latter system integrates particles of constitutional information derived from the constitutionalist liberal tradition of the nation-state but it does so pragmatically and in an ad-hoc, unstructured manner.

2.10.2 The best protection of common constitutional traditions would in my opinion be jurisdictional in nature, i.e. either a procedural way of empowering national constitutional law by virtue of a presumption of conformity in cases of divergent national constitutional decisions or by a superimposed institutional umpire (an analogue of the French *Tribunal des Conflits* at the European level). For a (rebuttable) presumption of conformity to function, the voting procedure currently used by the European Court of Justice would need overhauling. As a first step, decision by unanimity would need to be replaced with majority voting. One could imagine a system in the logic of which a national constitutional court decision or –

[93] Case C-36/02 *Omega* [2004] ECR I-09609.

[94] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[95] Haltern 2003.

alternatively – an interpretation supported by a significant number of Member States' constitutional tribunals could only be rebutted by a supermajority of the CJEU.[96]

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 Deference is arguably, to use Jaffe's quip about standards of review in administrative law, a mere descriptive heuristic device or – to put it otherwise – a rough proxy for describing the 'spirit or mood in which judges should approach their task'.[97] Leaving aside the concrete circumstances of the *Melloni* case,[98] the answer of the Court of Justice to the higher standard guarantee under Art. 53 of the Charter was in point of principle that higher standards ought not to hinder the effectiveness of EU law. This is, however, oversimplifying a little, a paradox (or an oxymoron) equalled only by the notion that the Court could be externally controlled by another international court only insofar as that review guaranteed the autonomy of EU law as the Union judicatures interpret it.[99]

The Court of Justice could only be induced to allow higher standards and to express more 'constitutional empathy' towards its national counterparts by way of a procedural, remedy – or conflict-related change in the constitutive treaties, to make more room for differences.

This remark dovetails with the argument made in the section above.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Public debate on constitutional rights at the time of transposition was sparse to non-existent. In the case of data retention, the positions of the Romanian

[96] Analogous solutions have been suggested in comparative law, in order to break jurisdictional or competence-related ties. See for instance Adrian Vermeule's suggestion to solve the notoriously inconsistent jurisprudential quagmires related to the application of *Chevron* deference by recasting the *Chevron* doctrine. Vermeule recommended that the doctrine be institutionally reshaped as a voting rule by 'loading the [judicial decision-making] dice' 'say, by a six-three vote on the Supreme Court, or by a three-zero vote on a court of appeals panel'. Vermeule 1997, at p. 146.

[97] Jaffe 1951, p. 1236. Cf., similar, Shapiro 1983, p. 1490: 'Standards for judicial review are notoriously vague. The degree to which a court will substitute its judgment for an agency's is neither determined nor expressed by the formula it announces.'

[98] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[99] Opinion 2/13 *Opinion pursuant to Art. 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

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Constitutional Court have been followed and covered in the press, also due to the fact that wiretapping and surveillance are constant topics in the public sphere (also as a result of anticorruption campaigns and the occasional leak of transcripts in the press).

2.12.2–2.12.3 A mechanism (either a procedural defence or a suspension/freezing of the transposition pending review) would be a welcome amendment to EU law. However, the way in which such a mechanism would be incorporated in the constitutive treaties is impossible to predict at the moment.

Conversely, to expect a more sympathetic institutional poise by the European Commission or the Court of Justice runs counter to the logic according to which the Union institutions function. For instance, deference to national constitutional law is at loggerheads with the insistence of the CJEU, from *Simmenthal* onwards, on treating all national legal provisions alike, irrespective of their status in the internal hierarchy of norms, and thus of treating national constitutional courts on a par with ordinary tribunals.[100] Moreover, this tendency is complicated by various national adverse effects, reinforcing, for instance, conflicts among national judicatures and manipulative attempts by both constitutional courts and supreme courts to question internal normative hierarchies through proxy jurisdictional wars, as revealed, for example, by the backdrop of the *Melki and Abdeli* judgment, i.e. an attempt by the *Cour de Cassation* to subvert the effect of the newly introduced 'priority constitutional referral' (and by implication the position of the Constitutional Council within the internal constitutional system).[101]

Any institutional changes of such amplitude would, however, need to take into account the complexity of the unintended consequences which are possible down the line. For instance, allowing national governments to use constitutional court judgments as a form of estoppel to infringement procedures could become (in Member States with weaker constitutional tribunals) an incentive to over-politicise the already politically connoted constitutional judicial appointments at the national point of ascription.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.4 A general caveat in terms of extrapolating from Romanian developments to general conclusions concerns the special status of Romania within the Union. The country is, alongside Bulgaria, subject to a relatively amorphous and

[100] Komárek 2014.

[101] Joined cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-05667.

ambivalent[102] form of post-accession monitoring by the European Commission, through the intermediary of the Mechanism of Cooperation and Verification.
That being said and although it is generally hard to argue about rights reductions in a complex counterfactual setting, the protection of constitutional rights in Romania has in my view suffered a setback (in some respects and in some dimensions) after accession in 2007. At the very least, one could argue that discrete processes have been unfolding which give legitimate cause for concern.[103]

The 'transnationalisation' of discourses has set in motion patterns of conformity which are to a certain extent auto-logical (if one were to use Luhmannian jargon) or – in more pedestrian terms – very hard to account for in the paradigm of constitutionalism and constitutional law. In the name of judicial independence, for instance, the European Commission recommended, under the influence of the fashionable European Magistrates for Democracy and Freedom (MEDEL) template,[104] itself patterned on the French-Italian model, the entrenchment of an autonomous Superior Council of Magistracy, composed of judges and prosecutors elected by their peers. Romania has ended up having a council that has surpassed its Italian counterpart in autonomy, being in effect fully insulated from any kind of non-judicial control. Out of its 19 members, 14 are elected by their peers, and the elected members exercise most of the effective attributions of the Council in the two sections. Even though judicial independence, in this extreme form, exists nowhere outside Romania, the Constitutional Court has thwarted, in the name of 'judicial independence', all attempts to revise the Constitution in this respect, for instance a proposal to reduce the number of elected members and increase the number of political appointees (now there are only two 'representatives of the civil society' in

[102] The Mechanism was scheduled to lapse in 2010 but has been extended in the meanwhile, seemingly indefinitely. In addition to the temporal ambivalence, there was a measure of 'creative interpretation' by the European Commission in terms of redefining the scope of its purview. Although the initial mandate concerned four 'benchmarks', formulated in ostensibly technical terms (some of them were fulfilled in the meanwhile: adoption of civil and criminal codes and procedure codes, the creation of an integrity agency, etc.), the scope of the CVM reporting has been expanded after 2012 to include references about the 'Romanian constitutional system' as such. Last but not least, the current relevance of the CVM mandate within the Union system is not very clear, due to political statements and general perceptions associating Schengen accession with the lifting of the CVM conditionality.

[103] I deal at more length with some of the matters discussed in this section in Iancu 2016.

[104] MEDEL (French acronym for *Magistrats européens pour la démocratie et les libertés*), a judicial association founded in 1985 at the initiative of ten professional associations drawn from six European countries, produced a draft Additional Protocol to the European Convention on Human Rights in January 1993. The model statute (known as the 'Palermo Declaration') recommended, as a model of good practice, the creation of judicial councils composed of political (parliamentary) appointees and (at the rate of at least half the membership) of judges elected by their peers. MEDEL also recommended that the high judicial council should have extensive attributions with respect to budget, recruitment, administration of the judiciary and disciplinary measures. This model, reflecting Italian and French practice, was subsequently taken up by international organisations as a standard and expanded upon. See Garoupa and Ginsburg 2009, pp. 109 et seq.

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the Council). The most recent decision on the matter does not even attempt an exercise in comparative constitutional law to substantiate its finding of unconstitutionality with respect to a proposal to modestly increase the number of 'civil society' members from two to four. The Commission went further in a recent CVM report and recommended in essence that Romania curb freedom of expression directed at judges and the high council: 'The situation suggests the need for a review of existing rules, to ensure that freedom of the press is accompanied by a *proper protection of institutions* and of individuals' fundamental rights as well as to provide for effective redress.'[105] This argument could support the corollary that even political comments or critical media coverage of high-profile corruption cases would imperil judicial independence. Yet, an understanding of judicial independence that warrants restrictions of free speech to protect relatively powerful institutions fits uneasily in a rights-oriented constitutional paradigm, especially in a context where little transpires in the public sphere about the activity of the Council and its elected members. To wit, a civil society representative in the high council resigned from her position in 2012, accusing the high council of a lack of transparency and the by-passing of the Plenum by unilateral SCM leadership decisions (the two civil society representatives in the council take part and vote only in SCM Plenum meetings).[106] Another civil society member, while refraining from public comments, published a very critical article about the SCM reform and its actual functioning at the end of her mandate.[107]

From what little transpires in the media, an argument for more institutional transparency and responsibility can be made. A recent case, publicised widely by the national press, concerned a woman who had been arrested by the National Anticorruption Directorate (she was accused of blackmailing the President of the High Court of Cassation and Justice), held for over six months in pre-trial detention,[108] convicted in first instance but subsequently acquitted on appeal. However, in the meanwhile, the acquittal judgment was quashed and the trial on appeal was reopened and retried by a different section of the Bucharest Court of Appeals, which

[105] COM (2013) 47 final, p. 4; emphasis added.

[106] Neagu, A. (2012, August 23) Georgiana Iorgulescu, reprezentant al societății civile, a demisionat din CSM: '*Ceea ce s-a întâmplat în ultimele săptămâni a umplut paharul. Eu nu pot să iau parte la tot felul de jocuri de culise*.' (Georgiana Iorgulescu, civil society representative, has resigned from SCM: 'I cannot take part in cabals (*jocuri de culise*), deferrals, decisions taken without consulting the Plenum and decisions taken unilaterally by the leadership.'). Hotnews.ro. http://www.hotnews.ro/stiri-esential-13081356-georgiana-iorgulescu-reprezentant-societatii-civile-demisionat-din-csm-ceea-intamplat-ultimele-saptamani-umplut-paharul-nu-pot-iau-parte-tot-felul-jocuri-culise.htm.

[107] Tănăsescu 2011.

[108] Prior to indictment before the court, Art. 23(5) of the Constitution limits pre-trial detention to a maximum of 180 days (extendable by a judge by terms of 30 days). Once the person is on trial, preventive detention can be extended for up to 5 years or half of the maximum sentence, whichever term is shorter (Art. 239, Criminal Procedure Code).

convicted her to a three year suspended sentence.[109] In the last CVM report by the Commission, of January 2016, this incident is mentioned as an example of the High Court President being 'personally' subject to improper criticism by politicians [referring to a public letter of the President of the Senate to the President of Romania], whereas the case is impersonally described in a footnote as merely 'referring to a person acquitted in first instance but in preventive arrest for 6 months'.[110]

A related and more general phenomenon in the Romanian context is generated by the transformation of anti-corruption into a quasi-constitutional vocabulary, by virtue of the EU CVM conditionality. Debates on high-level corruption cases have substituted public discussions on genuine political issues, whereas the technical jargon of criminal procedural law is not accessible to either the media or ordinary citizens. Unsurprisingly, the inherently technical nature of the proceedings and the quantitative logic of anti-corruption campaigns have contributed to conspiratorial explanations with respect to the 'real' master of anti-corruption prosecutions and to a deeply ideological connotation and polarisation of the camps.

Hazarded press statements, such as the affirmation by the current chief prosecutor of the NAD that the department was not a 'Romanian NSA' since 'it has neither the manpower nor the resources' [i.e. to be a local counterpart of the American National Security Agency] and that anticorruption could hardly be expected to solve the problems of the healthcare or education system 'by arresting all doctors and teachers', do little to quell such apprehension.[111]

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[109] The event was extensively covered by an extremely polarised press (along anticorruption/anti-anticorruption lines), so that the acquittal itself was described, for instance, as 'the true judicial error' (anticorruption press) Avram, L. (2015, June 24) *Cazul Rarinca. De ce abia achitarea şantajistei este o eroare judiciară* (The Rarinca case: Why the acquittal of the blackmailer is the true judicial error) Adevărul. http://adevarul.ro/news/eveniment/cazul-rarinca-abia-achitarea-santajistei-eroarejudiciara-1_558ae67bcfbe376e3592d77a/index.html; and the conviction as 'generalized judicial delirium', Popescu, L. (2015, May 29) *Apel catre avocati: donatii pentru Doamna Mariana RARINCA, victima nevinovata a unor magistrati* (Appeal to members of the Bar: Donations for Ms. Mariana Rarinca, the innocent victim of certain magistrates). Lumea Justitiei. http://www.luju.ro/opinii/editorial/apel-catre-avocati-donatii-pentru-doamna-mariana-rarinca-victima-nevinovata-a-unor-magistrati (blog post by a University of Bucharest Professor and Bucharest Bar attorney, widely disseminated and commented in the anti-anticorruption-inclined media). Needless to say, most of the public perceives these matters, as reflected in the mainstream media, in grossly and grotesquely oversimplified forms, which is a natural effect of the corruption-related 'structural transformations of the public sphere' (few, if any, have either the time or the knowledge necessary to read hundreds of pages of indictments and judgments every day).

[110] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism of 27 January 2016, COM (2016) 41 final, p. 4.

[111] In fairness, both assertions are qualified by the observation that wiretap warrants are issued by judges and that preventive measures are also needed. See e.g. '*Keinesfalls. Dazu hätten wir keine ausreichenden Ressourcen, weder in puncto Personal noch bei der Finanzierung. Auch muss eine Erlaubnis von einem Richter vorliegen.*' (Not at all. For this we have neither sufficient personnel nor financial resources. Also, one needs a warrant issued by a judge.) '*Unter anderem müsste es*

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A more general, related issue to flag up from the point of view of traditional constitutional law concerns the principle of separation of powers, which is also a central element of classic safeguards in criminal law. Since the SCM was constitutionally entrenched in 2003, the distinction between judges and prosecutors has become more and more blurred in practice, as both categories are designated as 'magistrates' and represented by the same corporatist body. The 'insular' form of constitutional autonomy gained by the SCM in the name of judicial independence has been described in a recent study as reinforcing 'an absolute independence of the Romanian judicial system vis-à-vis the rest of the Romanian state structure'.[112] The initial division between the two categories of 'magistrates' (i.e. sitting judges and the prosecutors forming the Public Ministry) has been further obfuscated by the emphasis on anti-corruption policies and European Commission pressures for more 'judicial independence',[113] which has come to denote not only the complete autonomy of the SCM but also – conversely – the quest to secure the highest number of convictions. In spite of an already idiosyncratically broad understanding of the systemic autonomy of the judiciary, the self-referential logic of judicial and prosecutorial 'independence' from social and democratic-majoritarian checks and balances continues to dominate unabated EU demands on the Romanian constitutional system. The last Commission report (of January 2016) recommends the use of future debates on constitutional change to 'consolidate judicial independence at Constitutional level', asks that criticism of judges and the judiciary by the press and politicians be curbed, and urges for a further reduction of the ministerial (i.e. political) role in nominating prosecutors for appointment to high positions. The report also advocates for the replacement of political prosecutorial appointments with 'an independent system … settled in law, with the support of the Venice

einen deutlicheren politischen Willen zur Bekämpfung der Großkorruption geben und mehr Präventivmaßnahmen – es kann nicht sein, dass die DNA alle Ärzte oder Lehrer verhaften muss, bevor wir gegen die Korruption im Gesundheitssystem oder im Bildungswesen vorgehen.' (Among other things, political will is necessary to combat high corruption and in the field of preventive measures – it cannot be that the NAD must arrest all doctors and teachers before we proceed [preventively] to curb corruption in the education and health care systems.); Balomiri, L. (2014, August 12) *Rumänien:* '*Gesetz ist mittlerweile für alle gleich*' (Romania: 'The law has now become equal for all'). Der Standard. http://derstandard.at/2000004252427/Rumaenien-Gesetz-ist-mittlerweile-fuer-alle-gleich.

[112] Dima and Tănăsescu 2013, p. 123: 'By reforming the SCM in 2003 and adopting Law No. 317/2004 a transition was made in the functiong of the Romanian legal system from total dependence to complete independence. But, like any other extreme, this absolute independence of the judicial system from the rest of Romanian state structures, including the citizens, is deleterious.'

[113] See for instance the 2014 Cooperation and Verification Mechanism Progress Report of the European Commission for Romania, recommending that the SCM should be consulted in the course of future revision processes on all proposed constitutional amendments affecting judicial independence and suggesting that the Venice Commission and the EU Commission should be consulted and notified, respectively. COM (2014) 37 final, at p. 3.

Commission'. Moreover, in a country where judiciary salaries exceed considerably the emoluments of other public servants, the Commission deplores the fact that an instrument does not exist to offer 'financial or (sic!) legal help for magistrates seeking redress in court [for damages to their reputation or image caused by libellous or slanderous statements]'.[114]

None of this is to deny the constitutional value of an independent judiciary, in all aspects that traditionally concern judicial independence (immunities, institutional guarantees, financial security). Nonetheless, an exacerbated and abstract (uprooted) interpretation of constitutional concepts and institutions is also fraught with its own shortcomings and risks. Traditional constitutional logic is averse to the complete insulation of any branch of government from political, democratic, and social checks and balances.

In the context of the crisis, some tendencies and path dependencies of the European Union, towards 'governance without government' are naturally enhanced by the need to take swift action without much democratic or parliamentary debate.[115] These phenomena should be countered by mechanisms that enhance participatory democracy, both in its direct and parliamentary form.

The position of national constitutional courts vis-à-vis the European Union also ought to be strengthened in ways that are, albeit 'dialogical', procedurally accountable and transparent.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.2 See generally supra, Sect. 1.2.1. Article 10, which is also pertinent to the question, reads:

> Romania fosters and develops peaceful relations with all the states, and, in this context, good neighbourly relations, based on the principles and other generally recognized provisions of international law.

3.1.3 No attempts at constitutional reform related to international law and global governance have been made to date.

3.1.4 See generally Sect. 2.13.4.

[114] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism of 27 January 2016, COM (2016), pp. 3–4 and 16.

[115] Scicluna 2014.

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3.2 The Position of International Law in National Law

3.2.1 Article 11 (international law and domestic law) provides that the state undertakes to perform its treaty obligations in good faith (para. 1), that treaties ratified by Parliament according to the law are part of domestic law (para. 2) and that should a treaty comprise provisions contrary to the Constitution, its ratification is possible after revision of the fundamental law (para. 3). According to Art. 146(b), the Constitutional Court verifies the conformity of agreements and treaties upon notification by either of the Presidents (Speakers) of the two Chambers of Parliament, 50 deputies or 25 senators.

3.2.2 According to Art. 20 (international human rights treaties), '[c]onstitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to'. The article reads:

> Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
>
> Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.

Significant disagreement exists over the exact application of the latter provision and over the institutions competent (Constitutional Court, courts of general jurisdiction) to decide whether domestic law or international law comprises 'more favourable provisions'. Such disagreement is inevitable, especially in the case of conflicts of rights, where 'more favourable' is inevitably in the balance.

3.3 Democratic Control

3.3.1 The Constitution uses the terms 'agreement' (Art. 146(b), 'treaties and other international agreements'), 'treaty' (Art. 11), 'covenant' or 'regulation' (Art. 20(2)) somewhat interchangeably. For example, Art 20(2) provides: 'Where any inconsistencies exist between the *covenants* and *treaties* on the fundamental human rights Romania is a party to, and the national laws, the *international regulations* shall take precedence.'

Law 590/22.12.2003 on Treaties[116] enumerates the treaties and agreements that must be ratified by parliamentary law (Art. 19); however, apart from treaties 'concluded at state level', other acts (inter-governmental agreements) can be ratified exceptionally by emergency ordinance, subject to 'a well-founded justification of

[116] M. Of. No. 23 of 12 January 2014.

urgency'. Governmental legislation by emergency ordinance, albeit an exception in theory, dwarfs parliamentary legislation in practice, also due to the well-known difficulty of providing a normative definition of emergency that would be susceptible to enforcement by judicial review. The Government can also be authorised by way of ordinary delegation to ratify intergovernmental agreements, due to the fact that treaty ratification is not defined as being within the subject matter of organic legislation.[117] The Romanian constitutional system divides legislation into ordinary (a residual category) legislation, which can be adopted by simple majority, and organic laws, which are passed in enumerated fields (Art. 73(3)) and must be adopted by an absolute majority.

Hence, the peculiarity of the Romanian constitutional system, governmental substitute lawmaking by emergency ordinance, also influences the field of treaty ratification, increasing the asymmetries of information, which tend to be characteristic of the field of foreign affairs.

The Senate serves as a 'decisional chamber' for the adoption of 'treaties and other international agreements and the legislative measures deriving from the implementation of such treaties and agreements'. This means that the ratification law is introduced in the Chamber of Deputies as the 'first notified chamber' and, should the 'reflection house' take no action within 45 days, the bill is automatically sent for adoption to the 'decisional house'.

3.3.2 A national referendum is mandatory for the approval of constitutional amendment laws and to impeach the President. The President may initiate a *consultative* national referendum on any 'matter of national concern' (Art. 90). According to Art. 12(1)(e and f) of the Referendum Law 3/2000, such matters initially included the conclusion, signature and ratification of 'international acts' of unlimited duration or for a period over ten years, as well as 'Euro-Atlantic integration'.[118] According to the last amendment of the Referendum Law, the participation quorum now stands at 30%, with the validity quorum being 25% of the expressed ballots. No consultative referendum touching on international relations has been initiated as of yet.

On a related matter, according to Art. 74 (legislative initiative), popular initiatives may not relate to, inter alia, international affairs.

[117] D.C.C. 105/1998 (M. Of. No. 263 of 15 July 1998).

[118] The article as such was voided by DCC 567/2006 (M. Of. No. 613 of 14 July 2006). According to the Court, the organic law cannot add to the Constitution, and thus the right of the President is not qualified. Yet, in current (January 2017) political-constitutional debates, the issue of implicit limitations was raised in the context of a presidential proposal to submit a question relating to the possibility of a general pardon/amnesty law to a national referendum, upon the consideration that such measures are politically self-serving and impede the 'fight against corruption'. The president reformulated the initially proposed question, considering that an analogy would exist with the limits on popular legislative initiative, namely, amnesty, pardon, taxation and international relations. These were political statements, as of January 2017 no concrete proposal has been tabled.

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3.4 Judicial Review

3.4.1 A treaty can be referred to the Constitutional Court upon notification by either Speaker, 50 deputies or 25 senators (Art. 146(b)). This competence was acquired by the Court by virtue of the 2003 amendments. The procedure has been dormant since its adoption: no international agreement or treaty has thus far been referred to the Court.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 See supra Sect. 2.7.3.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

In terms of areas where global governance has posed problems for Romania, there have been massive protests against the Romanian subsidiary of Gabriel Resources, a Canadian mining corporation. These protests led to the rejection by the Chamber of Deputies, in June 2014, of a special law (locally dubbed the 'Roșia Montană Law'), which would have authorised intensive gold mining by cyanide leaching in the Apuseni mountains of Transylvania.[119] Recently, in July 2015, the company announced that it would seek ICSID arbitration and claim 4 billion USD in damages from the Romanian state. Protests also took place in a number of counties against exploratory hydraulic fracturing for shale gas by Chevron.

Environmental NGOs, activists and a few press articles have linked these issues with the arbitration dangers and asymmetries of power and information linked with the Transatlantic Trade and Investment Partnership (TTIP).[120] The number of

[119] http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=13777.

[120] Smith, K. (2015, August 4). Corporate vampires have tried to suck $ 4 billion out of Romania, and with TTIP the UK could be next. The Independent. http://www.independent.co.uk/voices/comment/corporate-vampires-have-tried-to-suck-4-billion-out-of-romania-and-with-ttip-the-uk-could-be-next-10435975.html; Goțiu, M. (2015, August 5) *Cazul Gabriel Resources vs. România în atenția întregii lumi* (Gabriel Resources vs. Romania in the global limelight). România Curată, http://www.romaniacurata.ro/cazul-gabriel-resources-vs-romania-in-atentia-intregii-lumi-anglia-ce-se-intampla-este-un-semn-inspaimantator-si-pentru-marea-britanie-canada-corporatiile-canadiene-ab/.

signatures in support of the 'Stop TTIP' initiative has barely exceeded the 'country quorum' (Art. 7, Regulation 211/2011/EU[121]), probably due to insufficient coverage in the national media.[122]

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[121] Regulation No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, [2011] OJ L 65/1.

[122] https://stop-ttip.org/signatures-member-states/.

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The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance

Evgeni Tanchev and Martin Belov

Abstract Bulgaria's 1991 Constitution is regarded as a 'reactive constitution', reflecting the transition from totalitarianism to democracy. It aims to introduce a genuinely new political model based on different concepts about the individual and the state, with legally defensible human rights, and makes the Constitution a substantial part of enforceable law. Whilst there are issues in practice, including the need for the EU post-accession monitoring process, the approach to constitutional review emerges as stringent. During the period 1991–2006, in the 158 challenges against Acts of Parliament, the Acts were declared to be partially or fully unconstitutional in 79 cases, often on rule of law grounds. With regard to EU integration, the Constitution has been amended extensively. The report considers such amendments to be important, as otherwise the Constitution would lose its regulative force for citizens. The report identifies the paradox that while minor domestic changes need to pass strict constitutional amendment hurdles, the transfer of constitutional powers to the EU can be done by the easier procedure for ratification of treaties. There has been no significant debate in Bulgaria regarding EU measures such as the European Arrest Warrant. The slogan 'Brussels wills it!' has functioned as a key explanatory strategy. Nevertheless, the report recalls that under the Bulgarian Constitution a reduction of rights protection is legitimate only on limited grounds, and finds that higher integration goals and teleological excuses based on efficiency arguments could not justify a reduction of the standard of protection.

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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The 1991 Bulgarian Constitution was adopted at the beginning of the transition from totalitarianism to democracy. It is a reactive constitution[1] that marks a radical legal and political break-up from both of the previous stages of Bulgarian constitutional development – the period of constitutional monarchy (1879–1947) and the period of a Soviet-type people's democracy (1947–1991). Hence, it aims at introducing a genuinely new political model based on different concepts about the individual and the state. This new legal model lays down the foundations of legally defensible human rights and of the powers of state institutions, and makes the Constitution a substantial part of the valid and enforceable law. This can be regarded as a profound break from the old regime due to the fact that the previous 1947 and 1971 Constitutions were regarded more as political acts and declarations of intent for constitutional engineering[2] rather than as directly applicable legal acts.

The 1991 Bulgarian Constitution is both a cornerstone of the political system and the supreme source of law. The political and legal aspects of its nature are balanced. As a result, the current Bulgarian Constitution contains both legal principles, values and aims that serve as a channel of influence for the meta-legal normative systems,[3] as well as detailed legal provisions that are enforceable in the courts.[4]

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[1] Bogdanor 1988, pp. 7–9.

[2] For the constitutional engineering concept, see Sartori 1994.

[3] The constitutional principles are cores of crystallisation around which the value system and the philosophy of the constitution are being developed. At the same time they act as channels for the introduction of meta-legal (philosophical, ethical, religious, economic, etc.) concepts and values into constitutional law. The reason is that they may serve as incentives for value-based legal argumentation by the courts as well as for legislation founded on constitutionally enshrined meta-legal categories. See Belov 2010, p. 193.

[4] However, according to recent surveys, a substantial percentage of Bulgarian magistrates (judges and state prosecutors) consider the Constitution as meta-law that is above but also behind and away from the 'real' law – the parliamentary statutes and normative acts of the executive. Only 41.7% of the magistrates declare that they regularly apply the Constitution directly in pending cases whereas 40.2% of them would apply the Constitution if this were consistent judicial practice; 2.8% try to avoid its direct application and 5% never apply it directly. See Belov 2012, pp. 29–45.

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The current Bulgarian legal and constitutional culture is a mixture of continental European, post-Soviet and, more recently, US influences. More precisely, moderate paternalistic views with regard to the role of the state and its relations with the citizens are intertwined with more recent liberal and even libertarian influences. This mixture enriches the Bulgarian constitutional culture, but also makes it rather eclectic. Hence, the non-cohesive amalgamation of quite different political concepts in the ideal constitution is one of the explanations for the disfunctionality of the 1991 Constitution in political practice.

1.1.2 The 1991 Constitution combines the *raison d'état* (state oriented) dimension with the human rights and societal dimension. It tries to ascertain the value of the state's authority based on the principle of the people's sovereignty. The organisation of the state as an efficient machinery for social management is one of its key goals. The current Bulgarian Constitution establishes the normative background for the existence of all key state institutions as well as for the local self-government bodies.

The 1991 Constitution devotes special attention to the rule of law, the protection of human rights and the restriction of the activity of state institutions to their constitutionally established spheres of competence. Moreover, it contains extensive provisions on human rights and fundamental freedoms as well as the means for their protection. Thus, the constitutional goals and values of the authority, efficiency and responsiveness of the government on the one hand, and of limited and responsible government on the other hand, are balanced by the 1991 Constitution.

1.2 The Amendments of the 1991 Consttution in Relation to the European Union

1.2.1 The 1991 Constitution of Bulgaria has been amended four times: in 2003, 2005, 2006 and 2007. The constitutional amendments were introduced in the context of, and with view to, the membership of Bulgaria in the EU, although not all of them directly concern EU matters.

Three groups of constitutional amendments can be identified. The first group concerns amendments which are directly related to the EU. The EU related constitutional amendments concern the integration clause (Art. 4 para. 3),[5] the right of EU citizens and companies as well as of the citizens and companies of states with which Bulgaria has a special treaty on acquiring property over land (Art. 22 paras.

[5] Article 4 para. 3, 'The Republic of Bulgaria shall participate in the construction and the development of the European Union.' All quotes are taken from the English translation of the Constitution of the Republic of Bulgaria available on the website of the National Assembly of the Republic of Bulgaria at http://www.parliament.bg/en/const, unless otherwise noted.

1 and 2),[6] the compulsory parliamentary ratification by a two-thirds majority of the Members of Parliament (MPs) of treaties that transfer competences stemming from the Bulgarian Constitution to the EU (Art. 85 para. 1 p. 9 and para. 2)[7] and the competences of the National Assembly for information and control over the activity of the Government on EU matters and on the EU level (Art. 105 paras. 3 and 4).[8] Last but not least, the Constitution was amended to provide electoral rights for EU citizens in EU Parliament and local elections.[9]

In the context of EU-related amendments, one should also mention Art. 25 para. 4, according to which:

> No Bulgarian citizen may be surrendered to another State or to an international tribunal for the purposes of criminal prosecution, unless the opposite is provided for by international treaty that has been ratified, published and entered into force for the Republic of Bulgaria.

This provision concerns both extraditions to the International Criminal Court in The Hague and the European Arrest Warrant (EAW).

The second group encompasses amendments which directly aim at reforming the judiciary. However, many of them were actually introduced in the context of Bulgaria's EU accession negotiations. Thus they are to some extent the result of the desire to satisfy the expectations of EU partners for improvement of the rule of law in Bulgaria. This second group of constitutional amendments include: the clarification of the functions of the state prosecutors' office; the establishment of a constitutional ground for the conduct of criminal investigations not only by state investigators who are magistrates but also by police officers; improvement of the system for the irremovability of magistrates and the replacement of their absolute immunity with functional immunity; the introduction of a mandate for the administrative heads of the courts, and state prosecutors' and state investigators' offices; the introduction of annual reports of the Supreme Court of Cassation, the Supreme Administrative Court and the Prosecutor General on the application of the law and on the activity of the courts, the prosecution office and the investigating bodies, which are submitted to the National Assembly by the Supreme Judicial Council; the constitutional provision of conditions for expiration of the mandate of

[6] Article 22 para. 1, 'Foreigners and foreign legal entities may acquire property over land under the conditions ensuing from Bulgaria's accession to the European Union, or by virtue of an international treaty that has been ratified, promulgated and entered into force for the Republic of Bulgaria, as well as through inheritance by operation of the law.' Article 22 para. 2 'The law ratifying the international treaty referred to in para. 1 shall be adopted by a majority of two thirds of all members of the Parliament.'

[7] Article 85 para. 1 point 9, 'The National Assembly shall ratify or denounce by law all international treaties which … confer to the European Union powers ensuing from this Constitution.' Article 85 para. 2, 'The law ratifying the international treaty referred to in para. 1, item 9 shall be adopted by a majority of two-thirds of all members of the Parliament.'

[8] The constitutional provisions regarding parliamentary control over the government on EU matters will be provided later in Sect. 1.4.

[9] Article 42 para. 3, 'The elections for Members of the European Parliament and the participation of European Union citizens in the elections for local authorities shall be regulated by law.'

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elected members of the Supreme Judicial Council and of the key competences of the Minister of Justice; and the establishment of an Inspectorate subordinated to the Supreme Judicial Council.

The third group of constitutional amendments is not thematically coherent and aims at improving different aspects of the Constitution. These include constitutional provisions for the national Ombudsman, which until 2006 was provided for only by an Act of Parliament, the competence of the Ombudsman to petition the Constitutional Court to declare unconstitutional any law which infringes human rights and freedoms, the provision of a separate budget for the National Assembly as well as a quorum for adoption of its Acts, some adjustments of the constitutional texts on the military forces reflecting the abolition of compulsory military service, the right of MPs to renounce immunity in writing and grant permission for the initiation of criminal proceedings against them, and the introduction of the competence of municipal councils to determine the rates of local taxes under conditions, by a procedure and within the framework established by law.

As for the timeline, the Bulgarian Constitution was amended after the initial period of transition to democracy and before accession to the EU. The fact that so many amendments were made in a very short period of time (from 2003 until 2007) could be interpreted as an indication of a lack of consistency in the ideas of the Members of Parliament and of their inability to generate sufficient political will for reforms. However, this was also a result of the wish of the constitutional legislator to use a step-by-step approach and to adjust the Bulgarian Constitution to the demands of EU law through the most cautious and non-radical manner.

That is why the method of constitutional gradualism[10] has been used in the course of the EU adaptation of the 1991 Constitution. Although there were four waves of constitutional amendments that concerned a great number of constitutional provisions, almost all of them were incremental because they tackled matters of secondary importance. A typical characteristic of constitutional gradualism is a step-by-step adjustment of the written constitution to the demands of social life through testing the political, economic and social effects produced by constitutional reform. Overall, the reform of the 1991 Bulgarian Constitution was wide in range but generally did not touch upon the key principles and cornerstones of the institutional design.

The only radical and fundamental amendment that was introduced was the EU integration clause, which provides as follows: ‘The Republic of Bulgaria shall participate in the construction and the development of the EU’. Despite its modest, declarative and even decorative wording, this provision represented a profound structural change in Bulgarian constitutional statehood. This is due to the fact that it serves as a key element of the constitutional foundations for the primacy of EU law and for the addition of a new supranational layer of institutions above the national constitutional design. However, the change was not considered so far-reaching as to require the convening of the special constituent body, the Grand National

[10] Tanchev and Belov 2008, pp. 3–19.

Assembly, which is envisaged for amendments that concern the form of territorial distribution of power (see below). This was confirmed by the Constitutional Court in Decision No. 3 of 2004[11] and, consequently, the amendment was adopted by the National Assembly (Parliament). The logic of this Constitutional Court decision is that the EU is not a federation. The Court further clarified that the form of the territorial distribution of power concerns only the internal aspect of the vertical separation of powers and not the external aspect which relates to participation in supranational organisations. There are a multitude of new supranational forms of distribution of public power, which are not limited to the federalist option. In the reasoning of the decision, the Court stated that

> the EU is neither a federation nor any other form of territorial structure of statehood. EU membership does not concern the territorial integrity of the state as one of the elements of the form of the territorial distribution of power … . The EU has no ambition to play the role of a federal state. Moreover, the Constitution for Europe cannot be interpreted literally as a constitution in the known legal sense. Consequently, all comparisons with the established legal order of a state are inadmissible at least in the context of an interpretative decision of the Constitutional Court.

On the other hand, despite the Court's ruling, it is obvious that the EU constitutes a new level in the hierarchy of public power with regard to the vertical polycentrism of power centres and institutional schemes. Moreover, there is an increasing trend to not limit public power to the notion and concept of state power. Hence, it could also be argued that the summoning of the Grand National Assembly was necessary. However, from the point of view of constitutional politics, recourse to the Grand National Assembly would have slowed down the speed of preparation for EU accession and could have even led to a long-term stalemate in the Bulgarian EU integration process.

1.2.2 The 1991 Bulgarian Constitution provides for a two-track amendment procedure. The first, difficult amendment procedure concerns key constitutional issues enlisted in Art. 158 of the Constitution. These include the adoption of a new Constitution, the substantial acquisition or loss of state territory and the ratification of international treaties for such territorial shifts, the amendment of the form of governance and the form of territorial distribution of power, the amendment of rules concerning the hierarchical status of international treaties and the direct effect of the Constitution, the irrevocability of human rights as well as changes to the model for constitutional amendment. These amendments can be adopted only by the Grand National Assembly. The form of governance and form of territorial distribution of power are key concepts since they represent the general models for the horizontal and vertical separation of powers (statuses, functions and competences) enshrined in the Constitution.

[11] Here and subsequently the cases can be accessed at the Court's website http://constcourt.bg/acts . The text of the judgments have been translated by the authors, as no English translations were available at the time of writing.

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This procedure is rather difficult to accomplish because it requires the adoption of a decision for summoning the Grand National Assembly. It has to be adopted by the National Assembly by a qualified majority of two-thirds of all MPs, followed by dissolution of the ordinary Parliament and election of this special constituent assembly. Furthermore, the Grand National Assembly must adopt the proposed amendments by a two-thirds majority of all MPs, of whom there are 400 and not 240 as in the ordinary Parliament, in three readings on three different days.

The second amendment procedure is for other constitutional provisions and is to be carried out by the Parliament. The National Assembly must adopt the draft bill for constitutional amendment in three readings held on three different days with a three-quarters majority of all MPs. A constitutional amendment can be initiated by the President, or by one-quarter of the MPs, if the amendment is to be adopted by the National Assembly, or by one-half of the MPs in case of amendment by the Grand National Assembly.

The Bulgarian Constitution is considered rigid due to the fact that its most important provisions can be amended only by a special institution elected with the sole purpose of functioning as a forum of the *pouvoir constitutant*. As previously mentioned, the decision to call elections to the Grand National Assembly has to be taken by the National Assembly by a two-thirds majority of all MPs. Thus, a very high degree of political consensus is required both for taking a decision to summon the Grand National Assembly and for the adoption of the constitutional amendments by this convent. Since 1990–1991, no Grand National Assembly has been summoned, notwithstanding the fact that such suggestions have been made from time to time by politicians and by some scholars. These appeals have pertained to both EU related proposals for constitutional amendment as well as to other aspects for possible improvement of the Constitution.

The border between the two types of provisions and constitutional amendment procedures is not as clear and stable as it might initially seem. This is due to the fact that the notions ‘form of governance’ and ‘form of territorial distribution of power’ can be rather vague in a theoretical and comparative perspective when it comes to their concrete institutional components. The abstractness of these concepts in combination with the right of the Constitutional Court to give an abstract interpretation of the constitutional provisions has shifted the demarcation line in a number of interpretative decisions. The concepts were first clarified by the Court as a precondition for amendment of the Constitution in the course of the preparation of Bulgaria’s EU accession. In Decision No. 3 of 2003, the Constitutional Court defined the ‘form of governance’ and ‘the form of territorial distribution of power’ very broadly by invoking the idea of change within the balance of government. Hence, all possible amendments and adjustments of the status, functions and competences of the Parliament, Government, President and Vice President, Constitutional Court, courts, state prosecutors’ offices and state investigators’ offices should be regarded as related to the form of statehood. On a strict interpretation of this decision, one could infer that most eventual constitutional amendments should be adopted by convening the Grand National Assembly.

However, one year later the Constitutional Court, in its Decision No 3. of 2004, ruled that none of the necessary amendments in the context of the EU accession of Bulgaria concerned the form of governance or the form of territorial distribution of power, and thus could be passed by the National Assembly instead of the Grand National Assembly. These potential amendments included the adoption by the EU institutions of acts with supranational, direct and universal effect; the right of EU citizens and companies to acquire land ownership in Bulgaria; the provision of EU citizenship and the consequences that stem from it; the competence of the National Assembly to exercise preliminary control over the drafting of acts of the EU before their adoption; the extradition of Bulgarian citizens to a foreign state or an international court under the conditions of a treaty; and the extension of the indicators for equality of Bulgarian citizens in accordance with the Charter on Fundamental Rights of the EU.

It is clear that in the light of Decision No. 3 of 2003, the granting of the direct and universal effect of EU acts and the extension of parliamentary control over the Government should have been deemed an amendment in the form of statehood. According to the decision,

> form of governance has to be interpreted extensively … it must include the competences and functions of the state institutions insofar as the balance between them is concerned based on the observation of the main principles on which the state is founded – the people's sovereignty, supremacy of the Constitution, political pluralism, separation of powers, rule of law and judicial independence.

It is obvious that the direct and universal effect of EU acts concerns the issue of constitutional supremacy, whereas parliamentary control is a core issue of parliamentarianism and is an important dimension of the relations between the Parliament and the Government. However in the aftermath of Decision No. 3 of 2004, a set of constitutional amendments was adopted by the National Assembly, which mostly coincided with the issues addressed by the Constitutional Court. Hence, the easier constitutional amendment procedure was put into practice for the purpose of adjusting the Constitution to the needs of EU membership.

It is also of interest to note that the extremely restrictive position adopted in Decision No. 3 of 2003 was changed to some extent by Decision No 5. of 2005, by virtue of which many important and far-reaching amendments regarding the judiciary were declared to be amendments that do not pertain to the form of governance as long as they do not affect the constitutional balance of powers. Thus, the Constitutional Court opened the way for a reform of the judiciary through constitutional amendments that were adopted by the National Assembly. The reform of the judiciary concerned EU membership indirectly, as Bulgaria's EU entry was conditional on strengthening of the rule of law.

1.2.3 The background to the amendment is addressed in Sects. 1.2.1 and 1.5.1.

1.2.4 One area where, in the experts' view, the Constitution may need amendment is the provision of a clearer stance on the hierarchical status of EU law in the system of the sources of law. At the moment, the 1991 Constitution does not contain any

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direct provisions concerning this issue. The current situation allows for two different interpretations. The first is that EU law does not have supremacy over the Bulgarian Constitution because, as with international treaties, it ranks above all domestic legislation except the Constitution. The allocation of EU law on the level of international treaties is problematic not only because most EU law, i.e. secondary EU law, is not adopted in the form of an international treaty. If EU law is regarded as a system of international treaties, major problems could occur in the case of a collision between EU law and an international treaty adopted outside the EU.

The second interpretation might be that EU law has supremacy over all national sources of law, including the Constitution. Such reflection might be founded on the case law of the Court of Justice of the European Union (CJEU) (e.g. *Internationale Handelsgesellschaft*)[12] and on the implicit suggestion that these cases are internally legitimised by the EU integration clause of the Bulgarian Constitution. However, such interpretation is problematic due to the lack of a clear normative basis in the text of the 1991 Constitution. The Constitutional Court has not addressed this matter.

The problem of the status of EU law in the hierarchy of norms also concerns the competence of the Bulgarian Constitutional Court to exercise control. According to the Constitution, the Constitutional Court can control the constitutionality of international treaties prior to their ratification, as well as the compliance of Acts of Parliament and of the President with international treaties and the general norms of the international law. There have been some cases in which the Constitutional Court has had to decide whether parliamentary statutes are in compliance with EU law. Hence, by admitting the cases, the Constitutional Court has implicitly assumed that EU law has the status of international treaties.

The relative indecisiveness of the Bulgarian Constitution regarding the issue of the hierarchical place of EU law in the Bulgarian legal system allows for its initial flexibility and openness towards the dynamic developments surrounding the issue of the delimitation between the national and supranational legal orders. However, it would be preferable if the Bulgarian Constitution were to explicitly provide the position of EU law in the system of sources of law and its relation to the Constitution itself and to international treaties.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The integration clause of the Bulgarian Constitution stipulates: 'The Republic of Bulgaria participates in the construction and the development of the European Union'. The transfer of competences contained in the Constitution to the EU by international treaties has to be authorised by the parliamentary ratification of a

[12] Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125.

statute adopted by a two-thirds majority of all MPs. Hence, the only procedural difference in comparison to other statutes through which the National Assembly ratifies international treaties, is the qualified majority.

Whilst the transfer of constitutional competences is usually an expression of the will of the constituent power, this would not appear to be reflected well in the type of procedure envisaged by the constitutional legislator, by the 2005 amendments, for the transfer of constitutional competences to the EU. Instead of procedures which involve the constituent power as in the case of a constitutional amendment, the transfer of constitutional competences to the EU is subject to the procedure applicable for the ratification of treaties, i.e. a procedure that is a manifestation of a constituted power albeit with higher procedural hurdles. Frequently, such transfer of competences may even result in a further transfer of sovereignty to the EU. The paradox is that while constitutional amendments concerning small adjustments and incremental reforms of provisions of secondary importance have to overcome higher procedural hurdles, the transfer of constitutional powers to the EU can be done much more easily. In other words, the introduction of constitutional amendments caused by internal considerations is much more difficult in comparison to the transfer of competences to the EU, even if in some cases summoning the Grand National Assembly might also be deemed necessary.

Additionally, the constitutional legislator has preferred to use the concept of transfer of competences and not of sovereignty or sovereign rights, which in terms of wording is a compromise that formally spares and preserves national sovereignty. However, the procedural safeguards for such transfer of constitutional competences are much lower in comparison to the procedural hurdles for constitutional amendment. This is rather problematic because the transfer of competences to the EU as well as the EU's increasing constitutionalisation influence the national constitution sometimes to a greater extent than the formal amendment of constitutional provisions that are of secondary importance.

As noted in Sect. 1.2.3, the Constitution does not contain any explicit provisions on the supremacy and direct effect of EU law. Different interpretations regarding the hierarchical relations between the Constitution and EU law can be used due to the lack of sufficient clarity on this issue. The constitutional restraint in regulating this subject matter has not been remedied by decisions of the Constitutional Court, which has only ruled that the supremacy, universal and direct effect of EU law does not touch upon the issue of the form of governance of Bulgaria. On the other hand, the silence of the Constitution can also be interpreted as tacit approval of the supremacy and direct effect of EU law based on the decisions of the CJEU, and as strategic waiting for clearer solutions to be taken on the European level.

1.3.2 The Bulgarian Constitutional Court has taken a very EU friendly stance towards the issue of transfer of sovereignty. The Constitutional Court ruled in the reasoning of Decision No. 3 of 2004 that 'the amendment of the Constitution imposed by the necessity of its adaptation to the requirements of the full EU membership of Bulgaria does not infringe its sovereignty'. With reference to Art. 1, para. 2 of the Constitution, the Court ruled as follows:

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> All state power stems from the people. It is exercised by the people directly or through the institutions provided in the Constitution. Consequently the people can voluntarily delegate part of their sovereign rights through the National Assembly that is elected by them and in accordance with the requirements of an international treaty to which Bulgaria is party.
>
> The accession of the Republic of Bulgaria to the EU became effective after the ratification of its accession treaty by the National Assembly. This ratification is an expression of the people's will. The EU membership that stems from it aims at protecting its state sovereignty and national security. The integration process is based on a shared exercise of sovereignties by virtue of which the Member States accomplish together some of their tasks and thus make a shared use of their sovereignties. The sovereignty of the Republic of Bulgaria is not in peril since the adoption of decisions and legal acts by the EU institutions with their supranational, direct and universal effect will be done with the participation of the Republic of Bulgaria.

This argumentation of the Bulgarian Constitutional Court clearly demonstrates that it understands the principle of state sovereignty and the principle of the people's sovereignty not in their absolute form, but rather in a modified and flexible version that are adaptable to the needs of EU integration. Thus, the Constitutional Court opened the way for the application of more modern concepts of sovereignty, such as the theory of pooling and sharing sovereignty.[13]

1.3.3 The Constitution explicitly tackles neither state sovereignty nor the eventually emerging allocation of sovereign competences at EU level. The Constitution pronounces the principle of the people's sovereignty and prohibits its usurpation by citizens, political parties, organisations or state institutions. Hence, it implicitly prohibits such usurpation also by EU institutions, EU officials and European political parties, although it is doubtful whether they could be subsumed under the above-mentioned categories. The historical and strictly textual interpretation should be replaced with teleological interpretation because it is obvious that the Constitution cannot serve as a safeguard against the usurpation of sovereignty by national political players while at the same time having no such function against European ones.

There is no extensive debate in Bulgaria regarding issues such as constitutional identity and judicial dialogue. The constitutional identity is an emerging issue in the Bulgarian scientific realm. There are articles tackling the issues of primacy and supremacy of EU law.[14] In a recent study, Evgeny Tanchev delimits the scope of issues that should be deemed as falling within the scope of constitutional identity. Furthermore, he suggests that EU law prevails over domestic law (including the national Constitution) in areas of transferred sovereignty under the conditions that 'the national constitution is below the standard of EU law or national constitutional

[13] The pooling and co-existence of sovereignties that has been suggested as appropriate also in the Bulgarian case by some theorists. Tanchev 2003, pp. 281–282, especially with reference to MacCormick 1993, p. 16.

[14] Drumeva 2009, pp. 101–102; Tanchev 2014, p. 69–75.

limitation exceeds or poses a higher restriction than EU law' and 'EU institutional law does not conflict with the national constitutional identity'.[15]

There is also no systematic jurisprudence of the Constitutional Court on the limits of transfer of competences to the EU level of governance that would be at least to some extent comparable to that of the constitutional jurisdictions of some other EU Member States. The three above-mentioned decisions of the Bulgarian Constitutional Court are concerned more with the internal question of which institution of the Bulgarian constituent power is competent to adopt EU related constitutional amendments, rather than with delimiting lines between the national and supranational levels of governance.

The Constitution itself also does not impose any explicit substantial limits to the transfer of competences or even sovereignty to the EU. However, as was seen in Sect. 1.2.1, constitutional amendments pertaining to issues such as the supremacy of the Constitution, the form of governance and the form of territorial distribution of power can be adopted only by the Grand National Assembly. The Constitutional Court's jurisprudence on these has indicated the existence of a very thick 'red line': a potential change in the EU's nature would influence these key elements of Bulgarian constitutionalism and require the convening of the Grand National Assembly.

1.3.4 The supremacy and the direct effect of the Constitution are explicitly proclaimed in Art. 5, paras. 1 and 2 of the Constitution. According to Art. 5, para. 4, international treaties that have been ratified, published and have entered into force have the position immediately below the Constitution but prevail over all other domestic sources of law. The Constitution does not contain any provisions concerning the hierarchical status of EU law; one of the reasons for this silence is the fact that the supremacy of the Constitution can be amended, and the supremacy of EU law over the Constitution or international treaties can be proclaimed only by the Grand National Assembly. Summoning such Assembly was deemed to be very difficult in the pre-accession period, so the direct effect and primacy of EU law had to be based on an indirect constitutional dialogue between the Constitutional Court and the CJEU. The Bulgarian Constitutional Court has taken its pro-integration decisions bearing in mind the CJEU's jurisprudence on the supremacy of EU law. The Bulgarian Constitutional Court emphasises EU-friendly interpretation and generally seeks to avoid undermining EU law in practice. This is the case also with other Bulgarian courts.

1.4 Democratic Control

1.4.1 The key issues regarding the competence of the National Assembly to participate in EU policy-making are regulated in the amended Art. 105, paras. 3 and 4

[15] Tanchev 2014, p. 72.

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of the Constitution.[16] The detailed rules are provided by Chap. XI of the Regulation for the Organisation and the Activity of the National Assembly (Regulation), and these broadly reproduce the provisions of the Protocol on the Role of National Parliaments in the European Union and the Protocol on the Application of the Principles of Subsidiarity and Proportionality. Although the provisions of the Constitution and of the Regulation formally enhance the role of the Bulgarian Parliament and upgrade the set of tools at its disposal for influencing governmental activity, the political practice does not differ from that in other Southern, Central and Eastern European Member States in which the domination of the national government over the national parliament in the EU decision-making process in terms of advantages in information, organisation, expertise and motivation is obvious.[17]

The main rules in the Regulation are as follows. The Committee on EU matters and Control over EU Funds has the right to impose a parliamentary reservation on EU draft acts that are included in the Annual Working Program of the National Assembly on EU matters. The imposition of a parliamentary reservation may be initiated by this committee or by any other standing committee of the Parliament. The parliamentary reservation obliges the Government to refrain from expressing any statement regarding the act concerned in the Council of the EU during a certain term, until the National Assembly pronounces on this issue. The Regulation of the current 43th National Assembly provides that the Government cannot be restrained from acting by a parliamentary reservation during the third session of the preparatory body of the Council which is working on the draft EU legislation. In theory, this competence increases the role of the National Assembly in the decision-making process of the EU. However, it is of marginal importance in political practice.

There are several institutions that can perform control over the activity of the Bulgarian Council of Ministers and over the Prime Minister, the ministers and other executive power institutions regarding their planned or past activity in the EU. These are the plenum of the National Assembly, the standing parliamentary committees and, more precisely, the specialised permanent parliamentary Committee on EU Matters and Control over EU Funds, as well as individual MPs. There are two groups of instruments for parliamentary control. The first encompasses the general tools for parliamentary control over governmental activity: questions, interpellations, parliamentary inquiries and deliberations as well as votes of confidence and non-confidence. The second group includes specialised forms for EU related parliamentary control. Some of them concern *a priori* parliamentary control, whereas others result in *a posteriori* parliamentary control. The *a priori* control consists of

[16] According to Art. 105, paras. 4 and 5 of the Constitution, '[t]he Council of Ministers shall inform the National Assembly on issues concerning the obligations of the Republic of Bulgaria resulting from its membership in the European Union. When participating in the drafting and adoption of European Union instruments, the Council of Ministers shall inform the National Assembly in advance, and shall give detailed account for its actions.'

[17] Kiiver 2006, and O'Brennan and Raunio 2007.

the obligations of the Bulgarian Council of Ministers: to inform the National Assembly in advance about the duties of Bulgaria arising from its EU membership and regarding governmental activity in the course of the preparation and adoption of EU legal acts; to present the Annual program for Bulgaria's participation in the decision-making process of the EU for approval in Parliament; to send the drafts of EU legal acts as well as framework positions on such acts to Parliament and to inform Parliament of circumstances that warrant amendments to such positions. The draft acts of the EU which are submitted to Parliament by the Government are distributed to the standing parliamentary committees. Moreover, the Committee on EU Matters and Control over EU Funds carries out preliminary hearings of candidates proposed by the Government for EU positions.

Last but not least, the National Assembly carries out control of observation of the principles of subsidiarity and proportionality in accordance with the above-mentioned EU Protocol. It participates in the mechanisms for evaluation of the execution of EU policies in the area of freedom, security and justice, in the political control of Europol and the assessment of the activities of Eurojust.

The Prime Minister is obliged to present a report to the plenary session of the National Assembly at the beginning of each six-month EU presidency period. It consists of a summary and assessment of the results of the previous presidency and of the tasks and expectations regarding the upcoming presidency of the EU. The National Assembly may ask the Prime Minister to also present the position of the Republic of Bulgaria in forthcoming meetings of the European Council.

The *a posteriori* parliamentary control consists in the obligation of the Government to introduce a report on the activity of the Government in the adoption of EU legal acts. This must include an explanation for any deviations from the initial Bulgarian position which have resulted in EU rules that differ from those set out in the initial position.

1.4.2 The Constitution does not provide for referendums on the Constitution, the EU or international treaties, but also does not prohibit them. The Direct Participation of Citizens in State Power and Local Self Government Act prohibits constitutional referendums on matters falling within the competence of the Grand National Assembly, but allows for such referendums concerning the competence of the National Assembly. In any case, these legislative provisions may raise doubts with regard to their constitutionality on the grounds that if only the principle of the people's sovereignty is taken into account, then the prohibition of some constitutional referendums is not possible. On the other hand, the permission for constitutional referendums falling within the competence of the National Assembly could be deemed unconstitutional because the Constitution itself creates a fully fledged model for its amendment that does not provide for a referendum. In addition, the Direct Participation of Citizens in State Power and Local Self Government Act allows for referendums for ratification of international treaties but prohibits referendums for their denouncement.

Consequently, it is possible that in the future a potential stalemate in Bulgarian EU integration could be overcome by a referendum or, on the contrary, a

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referendum might be used as a device for blocking a further deepening of Bulgaria's participation in EU integration.

Bulgaria was among the few European countries that did not hold an EU accession referendum. This is to some extent difficult to explain since, according to sociological public opinion surveys, Bulgarian citizens were very pro-European at the time of ratification of the Accession Treaty. Moreover, the problems that were experienced in other candidate countries that entered the EU through parliamentary ratification instead of direct democratic approval of the EU accession treaty did not exist in Bulgaria.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The EU related amendments in the Bulgarian Constitution which were adopted during the period 2003–2007 have been neither very extensive nor negligible. Their moderate scope and content was predetermined by a desire to demonstrate and provide a degree of legal reform that was deemed absolutely necessary for the EU accession of Bulgaria, i.e. the EU integration clause, the permission of EU citizens to buy land and the provisions for parliamentary control over the EU related activity of the Government. In addition to the constitutional amendments that were directly related to EU accession and membership, other parts of the Constitution were also subjected to reform. These amendments were motivated by a desire to adapt the Bulgarian Constitution to the rule of law and democracy standards that were considered inevitable for EU membership in the framework of the Copenhagen Criteria.

Whereas the constitutional amendment procedure for some of the amendments would have been very tough, the need to convene a special body, the Grand National Assembly, was avoided through decisions of the Constitutional Court. These decisions not only enabled the creation of the necessary legal basis for the integration of Bulgaria in the EU but also opened the way for a reform of the judiciary which was and still is very high on the Bulgarian political agenda.

Along with the above-mentioned Constitutional Court decisions and the political will for EU accession and constitutional reform, the public debate among scholars, politicians and civil society activists also influenced the constitutional reforms. The constitutional culture in Bulgaria has never been prohibitive for radical, drastic and even dramatic constitutional amendments. The great political and legal turbulences that Bulgarian society experienced during the 1990s as well as the general permissive consensus for 'more Europe' in general and the EU as its most clear expression in particular, allowed for the unproblematic and rapid adoption of the constitutional amendments. In fact, there was almost no opposition to these amendments either in the scientific literature or in the political discourse. The fact that Bulgaria entered the EU at a relatively late stage made it possible for Bulgaria to use the experience of the older Member States as well as to take the *acquis communautaire* into account.

The driving force behind the constitutional amendments was the political will of the predominant part of the Bulgarian political elite and society to join the EU. All reform efforts were directly or indirectly aimed at the achievement of this key goal of Bulgarian society, which dominated the Bulgarian political agenda from the end of the 1990s. Some of the amendments were also to some extent a result of internal constitutional and political debates. This is particularly true for the constitutional reform of the judiciary. The debates were centred predominantly on several issues: the status of state prosecutors and state investigators in the system for separation of powers, the immunity of magistrates, the structural reform of the Supreme Judicial Council and the role of the Minister of Justice. These constitutional amendments were prepared in close cooperation with experts provided by the European Commission and the Venice Commission of the Council of Europe. The reforms were accompanied by extensive scientific and political debate.

1.5.3 The national constitutions will surely remain the key projection of national sovereignty, collective personal identity and political self-consciousness of the people in Europe for a very long time, and maybe even forever. Precisely because of this central aspect of their nature, national constitutions are also the only legitimate devices for opening statehood to supranational levels of public power. Hence, the so called 'opening function' of the constitution[18] will constantly grow in importance because the constitutions will have to provide the central channel for EU law and international law influences, and will have to serve as the most prominent linkage between the multiple levels and spheres of governance.

If national constitutions were to be neglected, this would lead to an increased delegitimation of European and global governance. This is, on one hand, due to the fact that it would be difficult to re-establish the social preconditions for political cohesion and political obedience on the supranational levels that were necessary for the emergence and establishment of the constitutional civilisation of the nation state. On the other hand, the non-reflexivity of national constitutions regarding issues of EU, multilevel and global governance would diminish their regulative role.[19] Thus, the nation states would be exposed to the results of the supranationalisation of policy making, the national political actors would be entrenched in 'nested games'[20] while at the same time they would suffer from legitimacy and efficiency deficits.

Hence it is absolutely necessary for national constitutions to reflect the status quo and even to try to anticipate the tendencies that will emerge both with regard to the

[18] Klein 1983, pp. 21–22.

[19] Grimm 2010, p. 4; Peters 2005 p. 41; Peters 2006, p. 580.

[20] The theory of the 'nested games' has been developed by G. Tsebelis. It is an attempt to create a model for explanation of the behaviour of constitutional institutions when they are embedded in a vertically intertwined hierarchy and/or network of institutional interactions between the subnational, national, supranational and non-state players. The idea is to conceptualise the predetermination of the political behaviour of the institutions on the lower levels as systemically influenced by the preferences of the institutions that are allocated on the upper levels of the territorial power scale. See Tsebelis 1990.

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institutional infrastructure and the functional processes which are developing on the supranational levels of decision-making. The tacit approval of supranational constitutional and political novelties, i.e. by non-resistance on the part of the national constitutional legislators, constitutional and supreme courts, parliaments and governments could be just a tactical exercise but not a long-lasting attitude. Otherwise the national constitutions may well become obsolete, both 'from above' because they would impede common supranational projects and would turn into distorting relics from the past, and 'from below', due to the fact that they would lose their regulative and convincing force for the nations in general and the citizens in particular.

The democratic deficit of the EU, the development of negative phenomena such as deparliamentarisation, de-democratisation or even a 'hollowing out of national constitutions' can hardly be addressed on a national level as a mosaic solution on a case-by-case and state-by-state basis. The problems of the European representative democracy in the context of the existing degree of EU integration cannot really be resolved without a common and fully co-ordinated solution at EU level. Hence, attempts to reinforce and improve the standing of the national parliaments in relation to the national governments and the EU power machinery based on executive domination and 'agencification', will be doomed to failure.

If the degree of European integration were to remain at its current level, then a real representative system would have to be achieved at EU level. This aim requires the further parliamentarisation of the EU system, the establishment of a more functional party system and the strengthening of the role of the President of the EU Commission, whose legitimacy should be re-established on a more direct democratic basis.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Bulgarian Constitution contains an extensive Chap. II that is devoted to human rights and citizens' duties. The constitutional provisions on human rights in Bulgaria have been inspired by international human rights standards. The most important sources of inspiration are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights and the European Convention on Human Rights and Fundamental Freedoms (ECHR). Hence, the UN and the Council of Europe have been the key international organisations that have influenced the constitutional drafting of human rights in Bulgaria, whereas the EU had not developed extensive human rights standards at the time of drafting the Constitution. Because the standard of constitutional proclamation of human rights was

sufficiently high, there was no need for a thorough human rights reform later in the course of EU accession.

The 1991 Constitution provides for most civil, political, economic and cultural rights. It also includes constitutional duties. It contains all of the generations of human rights according to the theory of Vazak.[21] Moreover, all four statuses of man and of the citizen that were proposed by G. Jellinek[22] are incorporated in the Constitution.

In addition to Chap. II, the Constitution contains further human rights provisions. For example, key human rights and guarantees are provided in Chap. VI, 'Judicial Power'. The Bulgarian Constitution is interpreted to implicitly include all of the classic general principles of law, such as legal certainty, protection of legitimate expectations, non-retroactivity, proportionality, the competence of state institutions, etc. Moreover, it also contains specific provisions for the key elements of due process of law, i.e. *nullum crimen nulla poena sine lege praevia* Art. 5(3)); right to appeal (Art. 122); right to be heard by a jury in the first instance in the most important criminal cases (Art. 123); right to defence (Art. 30(3) and (4), Art. 56 and Art. 122); right to a public hearing (Art. 121(3)) and procedural equality (Art. 121(1)). Most of these provisions are in the chapter on judicial power, some are in the chapter on human rights, while some are in the chapter on the main principles of the Constitution. The *non bis in idem* rule is provided by Art. 24 para. 1, point 6 of the Code of Criminal Procedure.

The human rights and general principles enshrined in the Constitution are in principle directly applicable and enforceable in courts. However, some are by their nature non-self-executing; such rights do not enjoy immediate judicial protection but they may serve as a source for legal argumentation for the courts. The Constitution proclaims its supremacy and direct effect. The courts and the state prosecutors are to suspend judicial proceedings and file a petition with the Supreme Court of Cassation, the Supreme Administrative Court or the State Prosecutor General in the case of the presumed unconstitutionality of an Act of Parliament. These three institutions have the right to petition the Constitutional Court, which is the only institution that can proclaim an act unconstitutional. Consequently, although constitutional rights are theoretically guaranteed by constitutional supremacy, in practice their observation by Parliament may be guaranteed by the ordinary courts only indirectly through the above-mentioned lengthy and complex procedure.

2.1.2 According to Art. 57 para. 1 of the Constitution, human rights are irrevocable. The rigidity of this declaration is however rather of political than of legal nature because the Constitution does not contain any unamendable provisions (eternity clauses). This is due to the fact that Art. 57 para. 1 of the Constitution can be amended or even abolished by the Grand National Assembly, although this would be very unlikely from a political and practical point of view.

[21] Vazak 1984, pp. 837–850.

[22] Jellinek 1905, pp. 105–125.

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The irrevocability of human rights might be regarded as a limit to the transfer of power to the EU. However, it is a very broad limit which would not have any practical consequences, since a situation where human rights would be deemed revocable and would be abolished in EU law or in national law due to EU influence is rather unthinkable. The irrevocability of human rights is a very wide and vague limit also because it is not specific and addresses the abolition of human rights as a constitutional category. The Constitution provides for the irrevocability of the 'basic' rights. Thus, it perhaps presumes that these are actually classical human rights, i.e. civil and political rights. Consequently, amendments in the shape and scope of human rights design will generally not be understood as infringements of the irrevocability of human rights as a constitutional principle and as a limit to the transfer of powers to the EU.

Article 57 para. 3 of the Constitution allows temporary limitation of some constitutional rights in case of war, a state of emergency or state of siege by virtue of parliamentary statute adopted by the National Assembly. Several key civil rights such as the right to life, the prohibition of torture and other inhuman and degrading treatment, the right to personal freedom and integrity, the right to privacy and the freedom of conscience, thought and religion are excluded from the aspects of human freedom which may be limited.

Last but not least, Art. 31 para. 4 of the Constitution provides that limitations of the rights of the defendant which exceed the necessary degree for the due functioning of the criminal process, are inadmissible. This is a specific reflection of the proportionality principle in the context of criminal procedure that is explicitly provided by the Constitution.

2.1.3 The rule of law in its continental version of *Rechtsstaat* is one of the fundamental principles of the Bulgarian Constitution. It is explicitly enshrined in the Preamble as well as in Art. 4 para. 1. Moreover, the typical components of the rule of law are provided by the Constitution as well as by legislation. Human rights and most of their guarantees, such as constitutional and administrative justice, the ordinary and specialised courts, the prohibition of extraordinary courts, the Ombudsman, the limited version of indirect constitutional complaint via the national Ombudsman, the principle of the competence of state institutions (the principle that each state institution is to act only within its competence), the non-retroactivity of criminal and tax law, the key principles of due process, the supremacy of the Constitution, the primacy of international law over sub-constitutional legislation and of the Acts of Parliament over governmental and other executive acts are enshrined in Bulgarian constitutional law. There is no direct constitutional complaint, but its introduction has been a matter of long-standing discussion in the academic debate. The most important arguments in favour are that it would enhance the protection of constitutional rights and allow the Constitutional Court to develop human rights jurisprudence. The key argument against the introduction of a constitutional complaint is that it might lead to a case overload for the Constitutional Court.

The principle of the rule of law as provided by the Bulgarian Constitution and legislation is justiciable due to the direct effect of constitutional provisions and the fact that they are further developed and implemented by Acts of Parliament and the other sources of law. Of course the more concrete and self-executing the elements of the rule of law, the more applicable they are in lawsuits. This fact does not prevent the citizens and legal entities who are parties to a pending lawsuit from basing their arguments on more general stipulations grounded on the rule of law. There is no statistical data on how frequently the rule of law is used as an argument by applicants (in contesting legal acts) and by the courts (in exercising judicial review). However, one can suppose that in the different legal discourses there is a rather frequent use of the rule of law either as the core element of a general argumentative strategy or as an additional argument in support of the claim. Sometimes the argumentation is grounded not on the rule of law as a holistic concept but on one or more of its elements.

Access to courts and the right to judicial review are constitutionally entrenched and are regarded as core elements of the rule of law in Bulgaria. According to Art. 31 para. 1 of the Constitution, '[a]nyone charged with a crime shall be brought before a court within the time established by law'. According to Art. 30 para. 3 of the Constitution, '[n]obody can be detained for more than 24 hours without a permission of an institution of the judiciary. The institutions of the judiciary are informed for each detention from its very beginning'. Moreover according to Art. 120 para. 2 of the Constitution, '[c]itizens and legal entities shall be free to challenge any administrative act which affects them, except those listed expressly by the laws'. Last but not least, Art. 122 para. 1 of the Constitution grants all persons the right to legal counsel at all stages of a trial.

Article 5 para. 5 of the Constitution stipulates that all normative acts have to be published in the State Gazette (the Official Journal of Bulgaria) to be valid. They enter into force three days after publication except if they provide for some other *vacatio legis*. Legal certainty is a key principle of Bulgarian constitutional law. The central role in upholding this principle is played by the Supreme Court of Cassation and the Supreme Administrative Court, which can issue interpretative decisions in case of controversial or incorrect practice of the courts of first and second instance.

The retroactivity of criminal law is explicitly prohibited by Art. 5 para. 3 of the Constitution which stipulates that no one can be. convicted for an action or inaction which at the time it was committed, did not constitute a crime. According to Art. 2 of the Penal Code, for any crime, the law that is in force at the moment it is committed, applies. If another law enters into force before the pronouncement of the sentence, the most favourable norm for the sentenced person must be applied. According to Art. 2 of the Administrative Offences and Sanctions Act, all actions or omissions that constitute an administrative offence, as well as their sanctions, have to be determined by law. Furthermore, Art. 3 of the same Act provides that the Act that is valid at the moment an offence is committed applies, except if a newer Act is more favourable for the offender. Moreover, the non-retroactivity of the tax and financial obligations of citizens is provided by tax legislation. The administration of criminal justice by analogy is prohibited in Bulgaria.

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2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 The issue of balancing classic fundamental rights and economic free movement rights has barely been discussed in Bulgarian theory and political discourse.[23] From the available information it is very difficult to come to a scientifically verifiable conclusion as to whether the Bulgarian courts give priority to classical rights or EU economic freedoms. In general, the Bulgarian judicial discourse is relatively pro-human rights biased. This is the result of more than two decades of training of Bulgarian judges in a pro-human rights discourse. Hence, without any claim of accuracy, one can assume that in the case of a conflict, the protection of human rights would prevail over the guarantee of EU fundamental freedoms.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

With regard to the following sections regarding the European Arrest Warrant (EAW), it is important to note that the provisions on defence rights and guarantees as well as on judicial review and access to courts are notably strict, detailed and far-reaching in the Bulgarian Constitution, as outlined above in Sect. 2.1.3 on the rule of law. However, as will be seen in the following sections, there has been no real debate on how the European Arrest Warrant and other EU criminal law measures relate to these constitutional provisions.

2.3.1 The Presumption of Innocence

2.3.1.1 It is a constant practice of the Bulgarian courts to refuse to pronounce on the substance of the case, including the issue of the innocence or guilt of a detained person who has to be surrendered on the basis of a European arrest warrant. The issue of the presumption of innocence is not considered as relevant if the person is handed over to the state that has issued an EAW for execution of a verdict that has

[23] An exception is the chapter on Bulgaria in the Reports of the XXV FIDE Congress, Vol. 1, which was written by Alexander Kornezov. In his report he argues that the Bulgarian Constitutional Court is much more inclined than the CJEU to balance free movement rights with other constitutional rights. He grounds his argumentation on Decision No. 2 of 2011 of the Constitutional Court in which the Court proclaimed some provisions of the Bulgarian Personal Documents Act unconstitutional due to a disproportionate limitation of the right to free movement through constraints based on non-payment of tax duties serving as framework safeguards for some economic and social constitutional rights. Kornezov 2012, pp. 268–270. Although this suggestion is reasonable, we believe that the case law is still insufficient to make sound, justified and broader evaluations on the issue of the balancing of constitutional rights with EU law economic freedoms.

already entered into force. In both cases, the state that has to guarantee the observance of the presumption of innocence is the requesting state because its courts are deciding the substance of the matter. The courts of the surrendering state just control the observance of the formal and procedural prerequisites for the legal accomplishment of the process.

2.3.1.2 The predominant practice of the Bulgarian courts is to approve a European arrest warrant if the formal and procedural requirements are fulfilled. The Bulgarian courts do not evaluate the evidence gathered on the substance of the case. The claims of innocence that are sometimes made by the people that are subject to a European arrest warrant are deemed irrelevant. The Bulgarian courts do not refuse the execution of a European arrest warrant on the basis of such claims. On the basis of the jurisprudence of the Bulgarian courts, a conclusion can be made that they do not regard the European arrest warrants as infringing the presumption of innocence.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 Most of the 32 crimes for which a European arrest warrant can be issued create a very high degree of danger for society. Hence, most of them are defined as criminal offences by the legislation of all EU Member States. Only a few of them possess the potential for incorrect interpretation by the Bulgarian courts due to the vagueness of the terms in which they are formulated. In practice, the Bulgarian courts subsume the broadly formulated offences for which the principle *nullum crimen* is excluded under the more concrete criminal offences provided by the Bulgarian Penal Code, so as to enable the issuing of European arrest warrants. In many cases the Bulgarian courts point out criminal offences under Bulgarian criminal law for which the person can be held criminally liable, although there are legally granted exceptions from the principle *nullum crimen, nulla poena sine lege* by the Extradition and the European Arrest Warrant Act that implements the EAW Framework Decision.[24] The exceptions concern criminal activities which are directed against fundamental social values and interest that are common for all EU Member States. That is why it is very unlikely that there will be a great mismatch between the criminal legislation of the issuing and the executing state; it is also unlikely that the persons who are subject to a European arrest warrant are unaware of the fact that their actions or omissions possess a criminal character.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 *In absentia* judgments endanger the right to defence of the defendant. Personal participation in a judicial trial allows the defendant to give explanations,

[24] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

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have the last word, present evidence, etc. Hence, with regard to the rule of law, it is highly recommendable that *in absentia* judgments be avoided as much as possible.

The Bulgarian Extradition and European Arrest Warrant Act was amended in 2011 in order to allow the Bulgarian courts to reject the surrender of a person on the basis of a European Arrest Warrant which aims to execute a sentence of imprisonment or other type of detention that has resulted from a judgment pronounced in his or her absence. A prerequisite for such rejection is a lack of evidence that the person himself or herself caused the situation resulting in an *in absentia* judgment.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 The Bulgarian state does not provide legal or financial aid to its citizens or to persons who have permanent residence on its territory if they are surrendered on the basis of a European arrest warrant. There is only one NGO, the Association for Reintegration of Convicted Persons, which provides aid for the social reintegration of persons who are convicted either in Bulgaria or abroad. However, this organisation does not provide financial or legal aid for the defence of persons surrendered on the basis of a European arrest warrant in the issuing state. It is clear that the establishment of a state or non-state institution providing such aid would enhance the chances of persons who are transferred to another EU Member State on the basis of a European arrest warrant for a proper defence. However, due to financial reasons, it is not very likely that such an institution will be created any time soon.

2.3.4.2 There are no reliable statistics regarding the number of persons who have been extradited to another EU Member State on the basis of a European arrest warrant and subsequently acquitted by its courts. Hence, no comparison between the number of such persons and persons who have been acquitted by the Bulgarian courts can be made.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The constitutional issues concerning the EU mutual recognition instruments have not been extensively discussed in Bulgarian legal theory. Indeed, Bulgaria's report on the Area of Freedom, Security and Justice for the FIDE 2012 Congress notes that '[l]aw enforcement in Bulgaria strongly supported the principle of mutual recognition in criminal matters' and finds that '[c]ompliance with the rights of the accused or defendant in accordance with differences in national legislation should not impede the achievement of cooperation in criminal matters'.[25] There has been

[25] Panova and Kashumov 2012, p. 213 and p. 220.

no analysis regarding their compatibility with the principle of the rule of law and the human rights enshrined in the Bulgarian Constitution. There has also been no judicial practice on the constitutional dimension of the EU mutual recognition instruments.

The principles of effective judicial protection and the rule of law can no longer fully be granted the same level of protection as prior to the introduction of the mutual recognition rule in criminal law and the abolition of the exequatur in civil and commercial matters. This is caused by the status of the EU as a project in process of realisation and transition. The achieved degree of EU integration makes the introduction and practical use of EU mutual recognition instruments necessary. On the other hand, they are based on a presumption of equivalence and proximity of the legal systems of the EU Member States, which is far from reality at the present time.

2.3.5.2 There has been no debate in Bulgaria regarding the suitability of transposing mutual recognition from internal market matters to criminal law and civil and commercial disputes. As it has already been mentioned, such mutual recognition is necessary and even inevitable if EU integration is to keep its pace. However, this is rather problematic due to the mismatch between the legal presumptions on which EU law is grounded and the empirical social reality.

2.3.5.3 The shift in the function of the courts from providers of justice and peaceful resolution of conflicts to transmitters of justice and elements in the chains of trust and co-operation in the EU is to some extent a natural result of the rise of supra-national constitutionalism and the need for enhanced and more formalised co-operation between different segments of the emerging Europe-wide judiciary system. Hence, this process will inevitably have to deepen, if EU integration is to remain at its current level. That is why it would be necessary to acknowledge the new roles performed by the courts and try to improve the substantial and not just the normative and formal proximity of the rule of law standards existing in the EU Member States.

2.3.5.4 The reinstatement of substantial judicial review of European arrest warrants would infringe the very essence of this institute for judicial cooperation. The provision of such review would institutionalise mutual suspicion regarding the equality of the rule of law standards applicable in all EU Member States. It would put into question the quintessence of the mutual recognition and co-operation instruments. That is why it would be better to abolish these instruments and the European arrest warrant in particular than to provide such institutional devices for mistrust. Another possible solution would be to try to gradually approximate the applicable judicial protection and the rule of law standard throughout the EU Member States.

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2.4 The EU Data Retention Directive

2.4.1 The EU Data Retention Directive[26] was implemented in Bulgaria by amendments to the Electronic Communications Act which were introduced in 2010. There has been no extensive debate in Bulgaria on the constitutionality of these legislative provisions apart from the activity of some NGOs, e.g. Access to Information Program. There have been several decisions of the Sofia Administrative Court and the Supreme Administrative Court concerning the application of the provisions of the Electronic Communications Act in cases initiated by the above-mentioned NGO.

It has to be noted that two of these Decisions of the Supreme Administrative Court, No. 8786 of 16 July 2008 and No. 13627 of 12 November 2008, concern the abolition of articles of a decree for storage and distribution of information which had been issued by the Minister of Interior and the Chairman of the State Agency for Information Technologies and Communications. This decree had been issued prior to the implementation of the EU Data Retention Directive through the Electronic Communications Act. In its complaint, the Access to Information Program argued that some of the provisions of the decree contravened Arts. 32 and 34 of the Constitution concerning the right to private life, the freedom and secrecy of correspondence and other communications as well as Art. 8 of the ECHR.

The judgments were issued after the adoption of the EU Directive but prior to its implementation in the Bulgarian legal order by an Act of Parliament. Initially a chamber of three judges rejected the complaint in Decision No. 8786 of 16 July 2008. However, a chamber of five judges of the Supreme Administrative Court subsequently issued Decision No. 13627 of 12 November 2008. It abolished Art. 5 of the decree due to a lack of clarity regarding the safeguards for the right to defence, and against illegal interference with the right of citizens to private and family life. The Court based its latter decision on the argument that Art. 5 of the decree contravened the above-mentioned articles of the Constitution and the ECHR.

On 15 April 2014, the national Ombudsman petitioned the Constitutional Court to declare the provisions of the Electronic Communications Act (Arts. 250a to 250, 251 and 251a) that implement the EU Data Retention Directive unconstitutional. The Ombudsman claimed that these legislative provisions infringed the right to private life and the freedom and secrecy of correspondence and other types of communications which are enshrined in the Bulgarian Constitution. He argued that the above-mentioned articles of the Electronic Communications Act also infringed the primacy of international treaties as guaranteed by the Bulgarian Constitution because they contravened the Charter of Human Rights of the EU. The Ombudsman contested the constitutionality of the legislative provisions, and not their conformity

[26] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

with EU law, because the Bulgarian Constitution only grants the Ombudsman the right to approach the Constitutional Court with complaints regarding the unconstitutionality of Acts of Parliament and not on the ground of incompatibility with international treaties or EU law.

The Constitutional Court accepted the case for examination by its Ruling of 12 June 2014. The Constitutional Court adopted Decision No. 2 of 2015 which declares the above-mentioned articles of the Electronic Communications Act to be unconstitutional. It has to be noted that the CJEU's decision of 8 April 2014 in cases C-293/12 and C-594/12[27] was used as a source of argumentation in front of the Bulgarian Constitutional Court. One can also presume that the annulment of the Directive and the declaration of the unconstitutionality of the national implementing Act might begin to serve as a criterion for the Bulgarian system in terms of the acceptability of blanket data retention. Hence, this might be the benefit that stems from this legislative turbulence in the domain of personal data protection.

With regard to the national constitutional provisions, Art. 32 para. 1 of the Constitution provides the following with regard to privacy: 'The privacy of citizens shall be inviolable. Everyone shall be entitled to protection against any unlawful interference in his private or family affairs and against encroachments on his honour, dignity and reputation'. According to Art. 32 para. 2, '[n]o one shall be followed, photographed, filmed, recorded or subjected to any other similar activity without his knowledge or despite his express disapproval, except when such actions are permitted by law'. The secrecy of correspondence is provided by Art. 34 paras. 1 and 2 of the Constitution as follows: 'The freedom and confidentiality of correspondence and all other communications shall be inviolable. Exceptions to this provision shall be allowed only with the permission of the judicial authorities for the purpose of discovering or preventing a grave crime.'

2.5 *Unpublished or Secret Legislation*

2.5.1 As noted in Sect. 2.1.3 on the rule of law, the Constitution stipulates that all normative acts have to be published in the State Gazette to be valid (Art. 5 para. 5). There is no domestic case law on the issue of secret or unpublished EU legislation in Bulgaria. Hence, the problem of whether this is in compliance with the Bulgarian Constitution has not yet emerged. Under the previous 1971 Bulgarian Constitution, some international treaties did not necessarily need to be published.[28]

[27] Joined cases C 293/12 and C 594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[28] According to Decision No. 7 of 1992 of the Constitutional Court, these international treaties were part of the Bulgarian legal system, but they enjoyed the supremacy and direct effect that is granted to international treaties and the generally recognised norms of international law only after their publication.

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Unpublished or secret legislation infringes legal certainty and the legitimate expectations of citizens as well as of the holders of public office. It creates 'legislative swamps' with paths that are known only to the special circles of elites that have participated in the adoption of the secret legislation or are privileged to be informed about it. Secret legislation is to some extent a contradiction in itself, since the main purpose of all legislation is to create general and durable legal standards that have to be known by its addressees in order to enable them to behave in conformity with the law.

The decision of the Grand Chamber of the CJEU in the *Heinrich*[29] case resembles Decision No. 7 of 1992 of the Constitutional Court that has already been discussed above. It is unlikely that the Bulgarian Constitutional Court will use the arguments of Decision No. 7 of 1992 for legitimation of future secret or unpublished EU legislation. The reason is that Decision No. 7 of 1992 of the Constitutional Court had to resolve the issue of what was to be done with international treaties that were concluded under a very different political regime and the non-recognition of which might infringe the principle *pacta sunt servanda* and thus undermine the international credibility of Bulgaria. On the other hand, there is no legitimate ground to believe that there should be secret or unpublished EU legislation because both the EU and its Member States, Bulgaria included, are democratic regimes that observe the principle of the rule of law.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 There have been no cases relating to these issues in Bulgarian practice. However, as was seen above in Sect. 2.1.3 on the rule of law, these provisions are protected in the Bulgarian Constitution. Moreover, there are cases in which the Constitutional Court has used the principle of proportionality as an argument for declaring the unconstitutionality of legislative provisions that also concern EU measures.[30]

2.7 The ESM Treaty, Austerity Programs and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 The Republic of Bulgaria is not a party to the Treaty Establishing the European Stability Mechanism (ESM Treaty). Hence its provisions are not relevant

[29] Case C-345/06 *Heinrich* [2009] ECR I-01659.

[30] Decision No. 2 of 2011 of the Constitutional Court.

for Bulgaria at present. There has been no discussion about the constitutionality of the ESM Treaty or other proposed measures such as Eurobonds and the Banking Union.

So far Bulgaria has not been subject to an EU bailout or subsequent austerity programme. Hence, no constitutional issues have arisen with regard to democratic control, the rule of law, transparency, balancing the rights of citizens and residents with those of the international creditor community, or other aspects of a possible bailout programme.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1; 2.8.3–2.8.6 The Bulgarian courts have a reluctant approach to referring questions for preliminary rulings. The preliminary rulings that have been requested have predominantly concerned taxation issues. The right to submit a preliminary reference to the CJEU has been used mostly by the lower courts and especially by the administrative courts. The Constitutional Court, the Supreme Court of Cassation and the Supreme Administrative Court have still refrained from involvement in direct judicial dialogue with the CJEU. The Supreme Administrative Court has requested a preliminary ruling from the CJEU in only two cases.

It is very difficult to compare the trust in the CJEU and in the domestic courts. A typical attitude of Bulgarian society is that it trusts European institutions more than national institutions. But this is a very general assessment which is related much more to the *Zeitgeist* than to any reliable scientific data.

There have been very few cases in which the Constitutional Court has tackled issues concerning EU law and domestic legislation implementing EU law. In almost all of these cases, EU law has been used as the criterion for the annulment of potentially contravening domestic legislation. It is only in a case concerning the legislation implementing the EU Data Retention Directive that domestic legislation is being reviewed with regard to its constitutionality; however, at the time of writing in January 2015 this case is still pending in front of the Constitutional Court.

According to statistical data,[31] during the period 1991–2006, 158 Acts of Parliament have been challenged for their constitutionality in the Constitutional Court. Of these, 79 have been qualified as fully in compliance with the Constitution, 40 have been declared partially unconstitutional and 39 have been declared fully unconstitutional. Moreover, 25 decisions of the National Assembly, 3 decrees of the President of the Republic and 4 international treaties have been subjected to a review of constitutionality in the Constitutional Court. The outcome of the proceedings has been as follows: 15 of the decisions of the National Assembly as well as all of the presidential decrees and all challenged international treaties were

[31] Modeva 1997, p. 573 and Modeva 2010, p. 825.

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declared to be in compliance with the Constitution, 5 of the parliamentary decisions were declared partially unconstitutional and 5 of the parliamentary decisions were declared fully unconstitutional.

2.9 Other Constitutional Rights and Principles

2.9.1 No significant EU-related human rights issues have arisen in Bulgarian practice.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 When tackling the issue of common constitutional traditions, one has to take into account that this term might denote very different things, such as constitutional and legislative grounds, the jurisprudence of the courts, the empirical behaviour of the people and the state institutions and the legal consciousness and constitutional culture. Moreover, there is a thin and a thick version of the common constitutional traditions. The thin version consists of the resemblance between the legal provisions enshrined in the valid sources of law of the compared constitutional systems. The thick version comprises also the ways these normative provisions are internalised in the thinking and behaviour of the legal subjects. Here one may differentiate between the political and legal culture of citizens and institutional memory, which sometimes results in path dependence.

The thin version of the common constitutional traditions might seem very wide in scope. Due to its formality and the fact that it is focused on the 'law in books', it might include the main principles of constitutional law – democracy, rule of law, separation of powers, sovereignty and to a lesser extent the welfare state, all civil and political rights, some of the social and economic rights and key principles governing the different branches of state power, especially when it comes to the judiciary. To some extent the breadth of these formal and normative aspects of the common constitutional traditions result in the thinness of this version. The integration processes that started after World War II gained momentum from the beginning of the 1980s and reached their culmination in the establishment of a quasi pan-European legal space after the fall of the Berlin Wall led to the production of a series of constitutional reforms at EU, international, national and even subnational level. The increased resemblance between the formal constitutional systems of the European states and the even greater similarity between the constitutional systems of the EU Member States is the result of this intense approximation effort, which was accomplished by international and EU institutions, by nation state bodies, by NGOs and by other institutional and non-institutional actors.

On the other hand, the thick version of the common constitutional traditions is based on the shared belief of the legal subjects – both office holders and citizens –

that the constitutionally and legislatively enshrined rights, obligations, principles and institutions are justified and have to be observed and implemented in social and legal practice. In other words, the thick version of the common constitutional traditions comprises not only 'the law in books' but also 'the law in action'.

An important problem lies in the question of who is competent and at the same time has the legitimacy to delimit the common constitutional traditions of the EU Member States in a legally binding and valid manner. The functioning of the courts as representative spokesmen of the community of citizens clashes with the classic issue of their democratic legitimacy deficit. Judicial dialogue is a practicable and intelligible method for delimiting the common constitutional traditions and thus of the constitutional consensus in European constitutionalism. The problem is that if the judicial dialogue and its results lack democratic acceptance, it cannot lead to a legally valid result which is sustainable in the long term. In such a case the passive 'permissive consensus' of the citizens is not sufficient in order to guarantee the development of a real or thick version of the common constitutional traditions.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 There has been no extensive discussion in Bulgaria on Art. 53 of the Charter and the issue of the application of stricter constitutional standards. We believe that Art. 53 of the Charter is a sufficient legitimation for the application of national human rights standards if they are higher than EU standards. It is true that national law, including national human rights law, should not serve as an instrument for undermining EU integration. However, the achievements not only of the distinct Member States or the ECHR but also of European constitutional civilization in general might be endangered if the EU and its institutions start to systematically diminish the standard of human rights protection with teleological excuses based on efficiency arguments.

It has to be taken into account that Art. 53 of the Charter is to some extent a product of the judicial dialogue between the CJEU and the national constitutional courts. It codifies an important principle in EU primary law, namely that the national standards for human rights protection must be respected by the EU institutions, and that EU standards should not be lower than these national standards. Furthermore, Art. 53 permits the application of higher national human rights standards. Hence, although the decision in the *Melloni*[32] case has its logic in the context of the European Arrest Warrant, it gives rise to issues regarding its legitimacy in view of the principle of the rule of law.

[32] Case 399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

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2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 There has been no intense debate in Bulgaria either regarding the adoption and implementation of the European Arrest Warrant Framework Decision or with regard to the EU Data Retention Directive. These key events concerning the rule of law in the EU were passively received by the politicians, the academia, the legal community and the broader public. This is due to the general EU-optimistic attitude in Bulgaria in the pre-accession period and in the first years after EU accession, as well as the typical affirmative stance on EU integration issues. In this sense, the slogan 'Brussels wills it!' has functioned as a key explanatory strategy.

Democratic deliberation is a phenomenon that does not predominantly depend on the legal infrastructure. If there is no censorship, information and media pluralism are guaranteed and communication rights are enshrined in the constitution and legislation, then the quality and quantity of democratic deliberation results to a great extent from the maturity of the society, the willingness of its citizens to engage in public debate and the variety and sufficiency of available information. Hence, a lack or insufficiency of democratic deliberation on EU issues in general or in Bulgaria in particular is much more a result of deficits in the social preconditions than in the legal framework. One general problem which needs a common solution is the national fragmentation of EU related deliberation and the nonexistence of a common European deliberative space.

2.12.2 The adequacy and good functioning of the constitutional review of EU matters will be evaluated differently depending on the attitude of the commentator on issues such as judicial dialogue, the legitimacy of constitutional justice as a medium between the national and supranational levels and the nature, teleology and future of the EU. A federalist approach would generally dismiss claims for more constitutional control. A moderate pro-European stance would try to reconcile and balance the need for preservation of the national institutions, interests and values enshrined in the constitutions and guaranteed by the constitutional courts with the demands of efficient and smoothly functioning EU integration. A more EU-reluctant approach would emphasise the need for sufficient time and discretion for the national institutions and in particular for the national constitutional courts to scrutinize EU measures and safeguard national sovereignty and interests.

2.12.3 The idea of suspending the application of and reviewing EU measures where important constitutional issues have been identified by a number of constitutional courts is an interesting one. Its great advantage would be that it would enhance the role of the national constitutional courts as direct guarantors of the national constitutional identity but also as the providers of indirect safeguards for developing EU integration in a way that would ensure respect for the key constitutional principles and values that fall within the scope of the common European constitutional traditions. The introduction of such a system might enhance the legality, legitimacy and efficiency of EU measures.

On the other hand, it might additionally increase the complexity of the EU decision-making schemes and thus might contribute to the structural and functional gridlock of the EU. Moreover, the rather modest and unsatisfactory results of the system for control of subsidiarity and proportionality by the national parliaments might to some extent be reproduced also in the context of constitutional control. Of course, here one has to take into account the institutional, functional, substantial and motivational differences between the two types of control performed by the national parliaments and the national constitutional courts. One can suppose that these differences would work in favour of control by the national constitutional courts because they are better equipped and prepared for such activity in comparison to the parliaments.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1–2.13.2 It is very difficult to give a general assessment of whether EU integration has diminished or increased the protection of human rights. This is so because the influence of EU integration varies according to the different societal domains and the human rights that are supposed to serve as an instrument for the protection of specific interests and values. However, the objectives of EU integration should not serve as an excuse for an actual or potential reduction of the level of protection of human rights. A reduction is legitimate, as also pointed out in the Bulgarian Constitution, only in a state of war or a state of emergency and even then not all rights may be affected and the reduction should be accomplished in a proportionate manner. It is obvious that EU integration does not constitute such an extraordinary situation.

EU integration has produced certain negative effects on key constitutional principles such as the rule of law, democracy and the separation of powers. Some of them are side-effects that have emerged in the course of the establishment of the new constitutional infrastructure in Europe, others might and actually must be prevented, whereas a third group of negative factors stem from processes which are much deeper and broader than EU integration, such as globalisation, constitutional pluralism, disintegration of the nation state and the dismantling of cornerstone constitutional ideologies that were established in the earlier phases of the development of constitutional civilization.

Hence, reduction of the standard of human rights protection and infringements of the rule of law are in principle neither inevitable, nor should they be tolerated, even if they are legitimised by virtue of higher integration goals. The use of EU integration and its possible positive effects as an excuse for limiting the scope of people's freedom might result in a neopaternalistic European Leviathan.

The reduction of the standard of human rights protection is a result of different factors. These are the establishment of new arenas for policy-making which are

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difficult to subject to democratic control by the citizens and society through classical devices; the emergence of new areas of social activity and legal regulation which people are still not accustomed to; the focus on human rights infringements by states and the lack of sufficient attention to human rights infringements by international and supranational organisations such as the EU, and the durable Euro-optimism in the new EU member countries, in many of which people still believe that the EU is much more democratic and better based on the rule of law than are their own states.

The EU accession to the ECHR is a possible solution that could serve as a guarantee against human rights infringements by the EU institutions. However, there is the intrinsic danger of the emergence of contradicting practices by the European Court of Human Rights and the CJEU. If there emerges a significant disparity between the jurisprudence of these two courts and a divergent practice of the national constitutional courts, we will be confronted with an increasing pluralism of human rights standards that could be very difficult to co-ordinate. In addition, after a certain point of no return, the idea of judicial dialogue could also no longer contribute to the reconstruction of a consistent and sufficiently comprehensible and clear system of human rights.

The creation of a distinct European Constitutional Court in parallel to the already existing EU court system might create similar problems – divergent practice, differing standards for human rights protection, issues relating to legal certainty and equal treatment, etc. On the other hand, it may enhance the level of protection of human rights due to the development of a pro-human rights institutional ethos, logic and, over time, institutional memory. Moreover, it might serve as a check on and competitor of the CJEU.

The enhancement of the role of the national constitutional courts with regards to human rights protection cannot be a durable solution. It could produce divergences in practice and could tend to bring concerns stemming from the more or less specific context of a specific Member State's jurisdiction to the forefront. Thus, an institutional design with a reinforced national constitutional court would be recommendable from the viewpoint of protecting the human rights standards that have already been achieved and of compensating for loss of sovereignty, but would lead to the establishment of peaks and valleys in the geography of human rights protection in the EU. The stimulation of a proactive role for other national institutions, such as national parliaments and ombudsmen, in highlighting constitutional issues in European governance might be useful but cannot serve as a sufficient remedy for the diminishing level of human rights protection.

The achievement of a revised approach and enhanced responsiveness by the EU Courts would be a very recommendable way to proceed. It would not lead to an overburdening of the institutional scheme with an abundance of players in the field of human rights protection, would serve as a precondition for the establishment of co-ordinated and consistent practice and would be based on an already existing institution. Hence, the development of the CJEU as a constitutional court of the EU would be a positive trend.

2.13.3 No significant issues of constitutional importance have been raised by the Bulgarian courts in their preliminary ruling requests to the CJEU. The proposals for the usage of comparative method and for enhanced examination of the national constitutional traditions of the EU Member States by the CJEU are reasonable because they may lead to a more sincere development of a shared realm of European constitutional traditions in the field of human rights. Making the arguments of the parties and of the intervening governments fully available on the Court's website might not only increase the transparency of the constitutional courts' decision-making but might enrich the scope of legal argumentation and provide inspiration for arguments in future cases.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.3 The Constitution provides for two ways to introduce international treaties into the Bulgarian legal order. The most important treaties must be ratified by the National Assembly, whereas less important ones (in the opinion of the constitutional legislator) have to be introduced by approval of the Council of Ministers by a decision.

The first group of international treaties are exhaustively enumerated in Art. 85 of the Constitution, according to which the National Assembly shall ratify and denounce the following treaties: treaties with political or military character; treaties concerning Bulgaria's participation in international organisations; treaties concerning amendment of the state boundary; treaties providing financial obligations for the state; treaties that provide for the participation of the state in international arbitrage or international judicial dispute resolution; treaties concerning human rights; treaties concerning legislative measures and treaties that explicitly require ratification. Other treaties that do not fall into the scope of Art. 85 do not need parliamentary ratification and may be implemented by a governmental decree. It was seen above that in 2005, a new type of treaty was included in the list of treaties with compulsory ratification. These are treaties that transfer competences which stem from the 1991 Constitution to the EU.

The Constitution stipulates that treaties that are ratified by the National Assembly can be amended or denounced only through the procedure provided by the treaties themselves or in accordance with the generally recognised norms of international law. This constitutional provision is a safeguard for the principle *pacta sunt servanda*.

An additional guarantee for the same principle is the constitutional provision that treaties that contravene the Constitution and thus require its amendment can only be concluded after the completion of such amendment. The systematic interpretation

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of this provision in combination with the provision on the absolute supremacy of the Constitution, the primacy of treaties and the generally recognised norms and principles of international law over all sub-constitutional domestic legislation and the lack of any explicit provision regarding the relationship between the EU and domestic Bulgarian law, leads to the conclusion that the Constitution implicitly subsumes EU law under the category of international treaty or general principle of international law. This stance is the result not so much of a strategy to preserve national sovereignty but of the political and practical difficulty of summoning the Grand National Assembly, which is the only body that can reorganise the hierarchy of the sources of law with regard to the supremacy of the Constitution and the primacy of international treaties.

The EU is the only supranational organisation that is explicitly mentioned in the Constitution. The UN, Council of Europe, NATO, WTO and International Criminal Court are not explicitly mentioned. However there are constitutional provisions that have implicit relevance for the participation of Bulgaria in these forms of supranational and global governance. According to Art. 24 of the Constitution, the external policy of the Republic of Bulgaria should be based on the principles and norms of international law. This article, in combination with the primacy of treaties and the generally recognised principles of international law over all Bulgarian legislation except the Constitution, creates the legal foundation both for the participation of the state in international relations and for the strong influence of the international legal order in Bulgaria.

The 2005 constitutional amendment of Art. 25 para. 4 of the Constitution allowing for the extradition of Bulgarian citizens to other states and to international courts for the purpose of criminal prosecution on the basis of an international treaty that has been ratified, published and has entered into force for Bulgaria opens the way for the application of the European arrest warrant and for the recognition of the jurisdiction of the International Criminal Court in The Hague.

Article 24 para. 2 of the Constitution imposes several objectives that have to be pursued and taken into account in the course of pursuing the external policy of Bulgaria. According to this constitutional provision, 'the foreign policy of the Republic of Bulgaria shall have as its highest objective the national security and independence of the country, the well-being and the fundamental rights and freedoms of the Bulgarian citizens, and the promotion of a just international order'.

The Preamble of the Constitution contains the constitutional values that have to be upheld by public authorities. These values are: freedom, peace, humanism, equality, justice, tolerance, human rights, human dignity and security as well as the national and state unity of Bulgaria. Hence, these values might be interpreted as implicit limitations to the participation of the state in supranational and international policy-making and to the transfer of competences to supranational or international organisations.

However, there are no explicit substantial limits to the transfer of competences to supranational or international organisations. This is due to the fact that there are no unamendable clauses in the Bulgarian Constitution as well as no specific provisions regarding the eventual scope of the competences that might be transferred to

supranational and international organisations. There are only procedural requirements, i.e. qualified majorities, parliamentary ratification or convention of the Grand National Assembly, that have to be fulfilled.

The Bulgarian Constitution was adopted after the fall of the communist regime in Bulgaria. The main objective of the constitutional legislator was to open the Bulgarian constitutional statehood to the international legal order without undermining state sovereignty. In order to achieve this balance, the Constitution provides, on the one hand, for a monistic system for the introduction of international treaties into the Bulgarian legal system, gives priority and direct effect to international treaties that have been ratified by Bulgaria, published and have entered into force over Bulgarian legislation, apart from the Constitution, and proclaims the desire of Bulgaria to participate in the development of a just legal order. Moreover, in the course of preparing for EU accession, the Bulgarian Constitution was amended so as to allow for the integration of Bulgaria in this supranational constitutional community.

On the other hand, the Constitution seeks to preserve the control of the National Assembly over the vertical transfer of power towards supranational and international organisations in its capacity as the presumed guarantor of the people's sovereignty and state sovereignty.

3.1.4 Comments on the role of the Constitution were provided above in Sect. 1.5.3.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 It has already been explained that according to Art. 5 para. 4 of the Bulgarian Constitution, international treaties that have been ratified pursuant to the Constitution, published and have entered into force for the Republic of Bulgaria are part of internal Bulgarian law. The ratification act is a formal one. It does not have its own normative content because its only purpose is to introduce the international treaty. Thus, the ratification act is just a device for investing international treaties with internal legal validity. Hence, the international treaty itself has direct normative force and is directly applicable. It has direct effect and prevails over contravening sub-constitutional provisions of Bulgarian law. This is due to the fact that the Bulgarian Constitution provides for a monist system for the introduction of international treaties into the national legal order.

The idea of the constitutional legislator was that the Constitution should prevail over international treaties because it is the core of crystallisation of national sovereignty. However, no institution of the constituted powers – neither the Parliament, nor the Government, the judiciary, the President, etc. – can violate the international obligations of Bulgaria because their acts will automatically be invalid due to the primacy of international treaties over the legal acts they adopt.

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3.3 Democratic Control

3.3.1 The National Assembly is involved in the decision-making process concerning international treaties or international issues which are of crucial importance. The Parliament declares war and peace, gives permission for the sending and use of Bulgarian military troops abroad, for the stay and transit of foreign military troops on and through Bulgarian territory and approves the conclusion of state loan treaties. War can also be declared by the President if the Parliament is not in session and there is military aggression against the territory of the state or an urgent need to fulfil international military obligations. According to Decision No. 1 of 2003 of the Constitutional Court, if the National Assembly has given a general permission through ratification of an international treaty for the deployment and use of Bulgarian military troops abroad and for the stay and transit of foreign military troops on and through Bulgarian territory, the concrete subsequent orders for deployment of the military forces can be given by the Council of Ministers.

Apart from these key instances which concern military and financial matters, the National Assembly has no concrete competences for preliminary involvement in international policy making. The main actors in the negotiation and conclusion of international treaties are the Council of Ministers, the President, the Prime Minister, the foreign minister and, on some occasions, also other senior officials within the executive.

The National Assembly can always use the general instruments for parliamentary control in order to put pressure on the Government's external policy or to obtain information from the Council of Ministers for the participation of Bulgaria in the EU or international policy making. The Constitution does not permit the execution of secret international policy by the institutions of the executive power. Extensive parliamentary debates on governmental EU or foreign policy are not very frequent. They usually concern issues that are allocated high on the agenda of the political parties, i.e. the conclusion of international treaties with financial and strategic economic implications such as state loan and energy treaties. However, in principle, external policy making, including the initiation, preparation and conclusion of international treaties as well as their implementation, is dominated by the executive power institutions in general and the Government in particular.

This situation has been reinforced by the EU membership of Bulgaria, although this is not a Bulgarian peculiarity but rather a tendency that can generally be observed in all EU Member States. The participation of the National Assembly in EU policy making and its information and control competences relating to the Government as well as the international treaties that need parliamentary ratification for entry into force have already been discussed.

3.3.2 The accession or withdrawal from an international organisation or the ratification or denouncement of an international treaty has never been the subject of a referendum in Bulgarian history. Hence it is a tradition in Bulgaria that issues concerning the participation of the state in international relations are decided by the state institutions and not by the people, even if they concern crucial moments in the

nation's destiny. The Constitution does not provide for referendums or popular initiatives concerning international issues, but also does not prohibit them. However, it has already been explained that the Direct Participation of the Citizens in State Power and Local Self Government Act allows for referendums for ratification but prohibits referendums on denouncement of an international treaty. It has to be taken into account that these are facultative and not compulsory referendums, which may be either imperative or consultative.[33]

The intent of the legislator has not been to put the Bulgarian authorities in an embarrassing position by potentially having to withdraw from an international treaty or having to leave an international or supranational organisation. However, whether it is legitimate to allow Bulgarian citizens to directly decide the issue of joining international or supranational organisations but to prohibit the direct democratic decision of the issue of ending membership in such organisation is very doubtful from the point of view of the constitutional principle of democracy. This legislative decision is one-sided and does not take either representative or direct democracy seriously. It seeks to reconcile the logic that professional politicians and people's representatives can take more rational decisions when it comes to international and supranational politics with the logic that the sovereign people must have the chance to determine their own destiny, no matter what the result would be. The Direct Participation of the Citizens in State Power and Local Self Government Act would appear to presume, with a degree of paradox, that Bulgarian citizens are sufficiently mature to decide whether they want to ratify a treaty, but are less so with regard to possible dissatisfaction with that treaty leading to its denouncement. This situation becomes even more problematic from a democratic point of view if one takes into account the fact that no referendum has been held for either the NATO or EU membership of Bulgaria.

3.4 Judicial Review

3.4.1 International treaties are positioned above all domestic normative acts except the Constitution and the interpretative decisions of the Constitutional Court. The same is the situation with the case law of the European Court of Human Rights in Strasbourg. Hence, doubt regarding the application of an international treaty in a judicial or administrative process may only arise where there is doubt concerning its constitutionality. The 1991 Constitution provides for a preliminary control by the Constitutional Court of the constitutionality of international treaties before their ratification.

However, this control is not compulsory but facultative because it can be performed only following the initiative of one-fifth of the MPs, the President, the Council of Ministers, the State Prosecutor General, the Supreme Court of Cassation

[33] Belov 2009, pp. 422–507.

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or the Supreme Administrative Court. If these institutions do not make use of their competence to request a review of the constitutionality of an international treaty by the Constitutional Court, then according to Decision No. 9 of 1999, they may initiate *ex post* constitutional review. However, some authors stipulate that *ex post* control by the Constitutional Court can be carried out only on the constitutionality of the ratification procedure, but not on the content of the international treaty itself.[34] The problem is that the Act of Parliament adopted for ratification of an international treaty is a formal act and does not reproduce the text of the treaty. Consequently, according to this logic, there is no other way to stop the application of an unconstitutional international treaty but to denounce the treaty through the same procedure that has been used for its introduction into the Bulgarian system, although this is unlikely to happen in reality.

The *pacta sunt servanda* principle creates predictability in international relations. Thus, it is a guarantee for something resembling interstate rule of law which preserves the legitimate expectations of the states and their citizens. Hence, indirectly, the *pacta sunt servanda* principle is also a guarantee for the internal rule of law, especially if the international treaty concerns human rights as well as measures that have a more eminent impact on human welfare and behaviour. The importance of the *pacta sunt servanda* principle is increasing in the context of global governance at the beginning of the XXI century. No international or supranational co-operation is possible without it.

The activity of both the international and supranational courts and of the domestic courts could sometimes put the *pacta sunt servanda* principle into question. The practice of the courts may transform it from a rigid and clear obligation to observe international law into a vague and framework duty of general compliance with broad initial standards. On the one hand, the virtual amendment of the treaties by the supranational and international courts might profoundly change their initial scope and the meaning of their provisions in a way that cannot be predicted in advance. Moreover, the judicial 'mastering of the meaning' of treaty provisions may have a curving path or zig-zag trajectory and thus may lead to far-reaching shifts in the obligations the states initially intended to take. On the other hand, the national courts may take decisions for the non-application of international treaties in the national legal order of the respective state, i.e. due to their contradiction with the Constitution. Thus, the biased jurisprudence of the supranational, international and national courts may in the end produce 'judicial battles' and even 'judicial wars'. These would barely be reconcilable with the principle of representative democracy and detrimental to the observance of *pacta sunt servanda*, legal certainty and thus, ultimately, the rule of law principles.

The jurisprudence of the European Court of Human Rights in Strasbourg and of the CJEU, based on explicit judicial activism, allow for the virtual amendment of the treaties that these courts interpret and safeguard. The initial duties that the Member States of the Council of Europe and of the EU have undertaken have been

[34] Tashev 2004, pp. 64–65.

transformed and further developed by these two supranational courts. Notwithstanding the many positive effects of their case law, the activist jurisprudence of the ECHR and especially of the CJEU may lead to the undermining of the principle that international treaties have to be concluded, ratified and amended by democratically elected institutions, the national parliaments and governments.

The non-application of international treaties by the national courts can also put the *pacta sunt servanda* principle in danger. Key decisions of the supreme and constitutional courts that proclaim the unconstitutionality of international legal standards or that declare that such standards endanger core constitutional and national values, are manifestations of national sovereignty. Hence the judicial dialogue that could possibly emerge out of a 'case law ping-pong' played by the supreme national, international and supranational jurisdictions is actually an expression of a fight for sovereignty. It serves to delimit the seemingly flexible but in fact still very important boundaries between the history and the future of the national and supranational political communities and the core and periphery of the constitutional consensus. Such dialogue raises concerns from the viewpoint of democracy, but is usually legitimised by arguments based in constitutional politics.

The non-observance of the *pacta sunt servanda* principle due to the non-application of provisions of international treaties by the ordinary courts would be problematic in several aspects. It would undermine the capacity of the political institutions of representative democracy – the parliaments and the governments – to dispose of the realm of discretion needed for the accomplishment of their tasks in international relations. Moreover, such judicial practice may be manifested in a diffuse, polycentric and creeping form, undermining legal certainty, the principle of legitimate expectations and the international obligations of states.

On the other hand, the protection of core constitutional values and principles by both the national courts and the international and supranational courts may serve as an important guarantee for the ethical, social and political integrity of the communities for whom the relevant courts are presumed to speak, and may represent a safeguard for human liberty and human rights. At a time when the legitimate channels for democratic representation are malfunctioning, countermajoritarian institutions such as the courts may play an important and even crucial role in the preservation and development of the constitutional consensus, the constitutional identity and personal prosperity. In such case, however, the rule of law will prevail over the separation of powers and democracy.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 The issues raised by these questions are not directly relevant for Bulgaria.

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3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 The issues raised by these questions are not directly relevant for Bulgaria.

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The Constitution of Croatia in the Perspective of European and Global Governance

Iris Goldner Lang, Zlata Đurđević and Mislav Mataija

Abstract The report from the newest EU Member State – Croatia – explains that the constitutional system represents a break from the former socialist system, where the Constitution had been more 'political' and not directly applied in practice. The constitutional order is highly influenced by the German constitutional tradition, and the Constitutional Court often cites the German Constitutional Court. The Constitution has been amended with regard to the EU in a very extensive manner. No significant constitutional issues have arisen with regard to EU or international law. By way of some limited exceptions, trade unions and individuals unsuccessfully sought to contest austerity measures required as part of the EU Council's excessive deficit proceedings in the Constitutional Court. The Constitutional Court has additionally adjudicated questions on whether referendums regarding privatisation of certain public services are permissible, given that the referendum outcome

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could lead to incompatibility with EU law. The increased cost of water in relation to a relevant EU Directive was the object of the first reference for a preliminary ruling from Croatia. With regard to the European Arrest Warrant (EAW), some legislative guarantees (such as the statute of limitations) were removed from an implementing law following severe criticism and the threat of financial sanctions from the European Commission. The move through the EAW system towards *in absentia* judgments has also led to some debate, given the historical experience with a high number of *in absentia* judgments during the 1991–1995 war and the subsequent finding that a vast majority of these trials had violated fair trial rights.

Keywords The Constitution of Croatia · Constitutional amendments regarding EU and international co-operation · The Croatian Constitutional Court Constitutional review statistics · Fundamental rights and the rule of law European Arrest Warrant · Statute of limitations and *in absentia* judgments Excessive deficit proceedings · Austerity measures and social rights Privatisation of public services · Referendum · Data Retention Directive

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 In the socialist system of the former Yugoslavia the Constitution could have been characterised as falling more into the second category of 'political' constitutions, as it was considered to be a set of ideopolitical principles which were not linked to legal practice and which were not supposed to be directly applied in practice.[1] This perception still persists to a certain degree today with regard to the Croatian Constitution, but it has undergone a slow, but visible change, particularly in the last couple of years, with the growing importance of both the Constitution and the Constitutional Court. Different branches of the government and other actors on the Croatian political scene, such as trade unions and diverse interest groups, are using the Constitution and the important position of the Constitutional Court to advance their political agenda.[2] However, outside the political forum, Croatian

[1] Smerdel 2010, p. 6.

[2] E.g. for the applications of the Croatian Parliament to the Constitutional Court see Judgments U-VIIR-1159/2015, 8 April 2015 and U-VIIR-1158/2015, 21 April 2015, of the Constitutional Court, where the Croatian Parliament asked the Constitutional Court to determine whether it is constitutional to put questions on outsourcing and on giving highways in concession at national referendums (for the lowering of the referendum threshold, see the answer to question 1.2.3). On the other hand, former Croatian President Ivo Josipović stood for constitutional amendments in his 2013/2014 presidential campaign. See also the proposal for constitutional review initiated by nine trade unions as a response to Government austerity measures, discussed in more detail in the answer to question 2.7.3. (Judgment U-I-1625/2014 and others, U-I-241/2015, U-I-383/2015, U-II-1343/2015, 30 March 2015).

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judges are still extremely reluctant to use or rely on the Constitution in their judgments.[3]

Croatian constitutional tradition is and will surely continue to be highly and predominantly influenced by the German constitutional tradition, as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This influence is felt both at the level of constitutional provisions and of the judgments of the Constitutional Court. The latter is evidenced by the fact that by October 2013, the Constitutional Court had relied on the case law of the European Court of Human Rights (ECtHR) in more than 1,000 of its decisions.[4]

In the context of constitutional amendments which have been made under the influence of the ECHR, two examples can be provided. First, Art. 16 of the Croatian Constitution was amended in 2000 by inserting a new paragraph providing for the principle of proportionality which was previously not included in the Constitution.[5] As explained in the National Report provided by the Croatian Constitutional Court for the XVIth Congress of the Conference of European Constitutional Courts, this insertion was 'predominantly the result of a [previous] judgment … of the Constitutional Court …, which was based on the principle of proportionality' and in which the Constitutional Court 'carried out the proportionality test as performed in the case-law of the ECtHR'.[6] The other example is the 2000 constitutional amendment whereby Art. 29 on the principle of a fair trial was aligned to Art. 6(1) of the Convention.[7]

On the other hand, the influence of the German Federal Constitutional Court (*Bundesverfassungsgericht,* hereinafter *BVerfG*) is most visible in the judgments of the Croatian Constitutional Court, in which it often cites the relevant paragraphs of judgments of the *BVerfG* in Croatian and the original text in German. On the occasions that it finds it necessary to establish whether a common standard on a certain issue can be found in a number of signatory states to the Convention, the Constitutional Court performs a comparative overview.[8]

The influence of the *BVerfG* can be expected to continue to be felt in the reasoning of the Croatian Constitutional Court both in matters which are not related to EU law and in the context of the relation between Croatian constitutional law and

[3] For a rare example of a Croatian judge who decided to initiate a constitutional review procedure and a critique of the formalistic reasoning of the Constitutional Court, see the Report by T. Ćapeta in 'Member States' Constitutions and EU Integration' in the project coordinated by S. Griller, University of Salzburg, Hart, forthcoming in 2019.

[4] National Report of the Constitutional Court of the Republic of Croatia based on the Questionnaire for the XVIth Congress of the Conference of European Constitutional Courts, 2013, p. 18.

[5] The Vice-president of the Croatian Constitutional Court, Dr. Snjezana Bagić, recently wrote her Ph.D. thesis on the principle of proportionality in the case law of the European courts and its impact on the case law of the Croatian courts; Bagić 2013.

[6] National Report of the Constitutional Court of the Republic, n. 4, p. 14.

[7] Ibid., p. 14.

[8] Judgment U-I-295/2006 et al, 6 July 2011.

EU law. So far, there have been only two judgments where the Constitutional Court has invoked Art. 145 of the Croatian Constitution (which stipulates the relationship between national and EU law) by stating that 'the Constitution is, by its legal nature, supreme to EU law'.[9] One can expect future judgments of the Constitutional Court to take a more detailed stance on the relation between Croatian and EU law, as well as the further influence of the *BVerfG* in this segment of the Constitutional Court's reasoning.

1.1.2 The Croatian Constitution lays importance on both of these areas. Title III, which encompasses 57 articles, in a very detailed way provides for the protection of human rights and fundamental freedoms. On the other hand, there are several provisions invoking sovereignty. Article 2, as the crucial sovereignty provision, provides that '[t]he sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable' and that '[t]he Republic of Croatia may conclude alliances with other states, retaining its sovereign right to decide upon the powers to be so delegated and the right to freely withdraw therefrom'.[10] Further, Art. 142 entitled 'Association and Dissociation', which was used as the legal basis for EU membership (as explicitly stated in Art. 143 of the Constitution), provides for the procedure for associating Croatia into alliances with other states. It also contains a provision explicitly prohibiting Croatian association in alliances which could lead 'to a renewal of a South Slavic state union or to any form of consolidated Balkan state'.[11]

1.2 The Amendment of Constitutions in Relation to the European Union

1.2.1 Croatia acceded to the European Union on 1 July 2013. The act of accession was preceded by a lengthy and difficult process of accession negotiations. Croatia applied for EU membership on 21 February 2003, at the time when its Stabilisation and Association Agreement, signed in October 2001, was not yet in force. Having acquired candidate status in June 2004, accession negotiations were launched on 3 October 2005 and closed on 30 June 2011. The Accession Treaty was signed five months later on 9 December 2011. The constitutional amendment which paved the way for Croatian accession to the EU was adopted in June 2010 and was published in the Official Gazette of the Republic of Croatia 76/10 of 18 June 2010.

[9] For the discussion of these judgments, in terms of the relation of national and EU law, see the answer to question 1.2.1. All translations of Croatian court judgments are by the authors.

[10] All translations of the Constitution are from the English translation on the website of the Croatian Parliament. http://www.sabor.hr/Default.aspx?art=2405.

[11] Arguing that the crucial aim of this constitutional provision was dissociation from the former Yugoslavia, Sinisa Rodin suggested that a different legal basis for the transfer of powers to an international organisation or an association could be used for Croatian accession to the EU: see Rodin 2007, p. 23.

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The constitutional amendment had a threefold role. First, it inserted a separate Chapter VII, entitled 'European Union', into the Croatian Constitution. The purpose of this chapter is to provide the legal grounds for Croatian membership in the EU and to regulate the status of EU law in the national legal order. The provisions of Chapter VII regulate the legal grounds for membership and the transfer of constitutional powers (Art. 143);[12] representation of Croatian citizens and institutions in the EU institutions and decision-making process (Art. 144);[13] and the relationship of national and EU law (Art. 145);[14] and they reiterate the rights of EU citizens (Art. 146).[15] The amendment came into force on 1 July 2013, the date of Croatian accession to the EU.

[12] Article 143 of the Croatian Constitution, entitled 'Legal Grounds for Membership and Transfer of Constitutional Powers' provides:

'Pursuant to Article 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union. Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.'

[13] Article 144 of the Croatian Constitution, entitled 'Participation in European Union Institutions', stipulates:

'The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.

The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.

The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis on for the Government's actions in European Union institutions.

Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.

The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.'

[14] Article 145 of the Croatian Constitution is cited in the answer to question 1.3.1.

[15] Article 146, entitled 'Rights of European Union Citizens' stipulates:

'Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union acquis communautaire, and in particular:

– freedom of movement and residence in the territory of all Member States,

– active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,

– the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,

– the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the

Further, the 2010 Constitutional amendment was necessary in order to satisfy certain EU membership requirements, and a number of constitutional provisions were amended for this purpose.[16] Finally, the crucial amendment, which facilitated if not enabled Croatian accession to the EU, was the rule on the requirement of a referendum which had to take place as a necessary part of the accession procedure. Namely, for the positive outcome of a referendum, Art. 141 of the pre-2010 version of the Constitution, as the legal basis of accession,[17] required the majority vote of all voters in Croatia. This strict rule was toned down in order to prevent the possible failure of the referendum. The wording 'the majority vote of all voters in the state' was thus changed to 'the majority vote of all voters voting in the referendum'. The low turnout of only about 44% of eligible voters in Croatia at the referendum which took place on 22 January 2012 testified to the fact that the fear of not fulfilling the strict referendum requirement contained in the then Art. 141 had been reasonable. Out of all voters who took part in the referendum, more than 66% voted in favour of accession, which sufficed for a positive outcome.

1.2.2 The 2010 constitutional amendment followed the stipulated amendment procedure. Generally, amendments to the Croatian Constitution may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the Croatian President or the Croatian Government.[18] Accordingly, on 1 October 2009 the Croatian Government proposed the 2010 constitutional amendment. Based on this proposal and the proposal submitted by members of the Croatian Parliament on 16 October 2009, on 30 April 2010 the Croatian Parliament adopted the Decision on the Commencement of the Amendment of the Constitution of the Republic of Croatia.[19] Based on Art. 148(1) of the Constitution, such a decision must be

Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.

All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.

In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union.'

[16] Amendments included the provisions on the position of the Croatian National Bank (Art. 53) and the State Audit Office (Art. 54), as well as the abandoning of the previous rule of a complete ban on extradition of Croatian nationals which now became possible in order to comply with the European Arrest Warrant (Art. 9).

[17] There was no consensus on the question whether Croatian accession should take place on the basis of Art. 141 of the pre-2010 version of the Constitution (which regulated Croatia's association in and dissociation from international alliances with other states) or based on the general provision of Art. 139 of the pre-2010 version of the Constitution (which regulated the conclusion of international treaties and which, together with the then Art. 86, contained a more lenient referendum rule requiring a majority vote of all voters who took part in the referendum). Finally, Art. 141 was taken as the legal basis for accession. For the discussion on possible constitutional bases for EU accession, see Rodin, supra n. 11; Ćapeta 2008, pp. 1–3.

[18] Article 147 of the Constitution (Art. 142 of the pre-2010 version of the Constitution).

[19] Official Gazette of the Republic of Croatia 56/10.

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adopted by the majority of all Members of Parliament.[20] The decision to amend the Constitution has to be made by a two-thirds majority of all deputies.[21] Within the framework of the 2010 constitutional amendment, such a decision was made on 16 June 2010, whereby 133 deputies voted for the amendment, four deputies voted against it and one abstained.

1.2.3 The Republic of Croatia is a rather young state, as its establishment as a sovereign and independent state dates back to 25 June 1991 when the Croatian Parliament passed a Constitutional Decision on the Sovereignty and Independence of Croatia[22] – thus initiating the proceedings of dissociation from the other republics and from the Socialist Federal Republic of Yugoslavia – and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia.[23] On 22 December 1990, the Croatian Parliament passed the Constitution of the Republic of Croatia, which has undergone several revisions and amendments, and is still in force today.[24] The first amendment took place in 1997,[25] the second one in 2000[26] and the third in 2001.[27] The fourth amendment took place in 2010 and, as described in Sect. 1.2.1, its motif was the enablement and facilitation of EU accession.[28]

The last constitutional amendment to date took place in 2013[29] as the result of a controversial national referendum on the inclusion in the Constitution of the definition of marriage as a union between a woman and a man. Namely, based on Art. 87(3) of the Constitution, the Croatian Parliament 'shall call referendums' on proposals to amend the Constitution, a bill or any such other issue as may fall within its purview 'when so requested by ten percent of the total electorate of the Republic of Croatia'. Following a successful petition of the conservative, catholic initiative 'In the name of the family', which managed to collect the signatures of more than 10% of the eligible voters in Croatia, a referendum was held on 1 December 2013. The turnout was rather low, as only a little bit less than 38% of eligible voters took part in the referendum. However, the 2010 constitutional amendment had changed the referendum threshold from 'the majority of all voters in Croatia' to 'the majority of all voters in the referendum', for the purpose of securing Croatian accession to the EU. This constitutional amendment indirectly enabled a positive outcome in the 2013 referendum, as out of those who voted, 65% supported the amendment, which consequently led to the adoption of the 2013

[20] Article 143(1) of the pre-2010 version of the Constitution.

[21] Article 149 of the Constitution (Art. 144 of the pre-2010 version of the Constitution).

[22] Official Gazette of the Republic of Croatia 31/91.

[23] Official Gazette of the Republic of Croatia 31/91.

[24] Official Gazette of the Republic of Croatia 56/90.

[25] Official Gazette of the Republic of Croatia 135/97.

[26] Official Gazette of the Republic of Croatia 113/2000.

[27] Official Gazette of the Republic of Croatia 28/2001.

[28] Official Gazette of the Republic of Croatia 76/2010.

[29] Official Gazette of the Republic of Croatia 5/2014.

constitutional amendment. For this reason the 2010 lowering of the referendum threshold, which had been passed in order to ensure Croatian accession to the EU, directly enabled and led to the 2013 constitutional amendment.[30]

1.2.4 As explained previously, the EU-related amendment proposals did materialise in practice. There are currently no provisions of the Constitution that are considered to be in need of amendment in view of EU membership.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The transfer or delegation of powers to the EU Croatia is a monist state, based on Art. 141 of its Constitution.

Further, Art. 143(2) of the Croatian Constitution provides:

> Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

The supremacy and direct effect of EU law Article 145 of the Constitution, entitled 'European Union law', is the most important Constitutional provision in terms of application of EU law in the national legal order. It opens the Croatian legal order to EU law. It provides:

> The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.
>
> All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
>
> Croatian courts shall protect subjective rights based on the European Union acquis communautaire.
>
> Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

Paragraph 1 provides for the principle of equivalent legal protection based on EU law and national law. Paragraph 2, which states that EU legal acts have to be applied 'in accordance with the acquis communautaire', indirectly lays down the application of the principles of EU law such as supremacy, direct and indirect effect. Paragraph 3 provides for the principle of direct effect of EU law and paragraph 4

[30] For an analysis and a critique of the Croatia constitutional referendum defining marriage as a union between a man and a woman, see Orsolic Dalessio T. (2014, January 23) The Interplay of Direct and Indirect Democracy at Work: Croatia's Battle Over the Rights of Same-Sex Couples. Jurist forum. http://jurist.org/forum/2014/01/tina-dalessio-croatia-referendum.php.

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enables administrative direct effect, meaning that not only national courts but also national administrative bodies have to apply EU law.

Indeed, in a recent judgment the Croatian Supreme Court made it clear that EU law forms part of the Croatian legal order and 'must be applied, moreover it is superior to national law'. This duty to apply EU law concerns 'all legal relationships that fall within the scope of application of European Union law, and that [take] place after the accession of the Republic of Croatia into the European Union'.[31]

However, all these principles and rules exist based on the interpretations of EU law provided by the Court of Justice of the European Union (CJEU). For this reason Art. 145 of the Constitution can be understood as being of a declaratory and not of a constitutive nature.

1.3.2 In the past almost two years following the Croatian accession to the EU and the 2013 Constitutional amendment, there have been only two judgments in which the Constitutional Court has referred to Art. 145 of the Croatian Constitution.[32] However, the Court did so only in stating that it was not necessary to examine whether the issue disputed in the case complies with Art. 145 of the Constitution, due to the fact that the Constitution is, by its legal nature, supreme to EU law.[33] One could infer two conclusions based on this statement. First, if an issue is contrary to the Croatian Constitution, there is no need to address its compliance with EU law, as the Constitution is supreme to EU law. On the other hand, if an issue complies with the Croatian Constitution, it will be admissible based on the Constitution, regardless of whether the same conclusion would be reached based on EU law. In the latter example, the case might undergo an analysis of compliance with EU law, but the outcome of the compliance analysis would be irrelevant in the end due to the fact that compliance with the Croatian Constitution had already been established and the Constitution is supreme to EU law.

1.3.3 See the answers to questions 1.2.1, 1.3.1 and 1.3.2.

1.3.4 See the answers to questions 1.2.1, 1.3.1 and 1.3.2.

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[31] Revt 249/14-2, decision of 9 April 2015.

[32] The numbering provided by the Constitutional Court is different (Art. 141c) from the one provided in the Official Gazette, which can create misunderstandings and errors. Thus, the numbering of the newly inserted articles, as provided in the Official Gazette 85/10 (Art. 143–146) does not match the numbering provided in the version published on the website and cited in the judgments of the Constitutional Court (Art. 141a–141c).

[33] Paragraph 46 of Judgment U-VIIR-1159/2015, 8 April 2015, of the Croatian Constitutional Court on the application by the Croatian Parliament to the Constitutional Court to determine whether the question proposed to be put at the national referendum on outsourcing is in conformity with the Constitution; Para. 60 of Judgment U-VIIR-1158/2015, 21 April 2015, of the Croatian Constitutional Court on the application by the Croatian Parliament to the Constitutional Court to determine whether the question proposed to be put at the national referendum on giving highways in concession is in conformity with the Constitution.

As regards EU-friendly interpretation, the previously cited Art. 145(2) of the Croatian Constitution implies the duty to apply basic EU law principles in Croatia, including the indirect or interpretative effect of EU law. Nevertheless, there have not yet been many judgments in which Croatian courts have interpreted Croatian law in light of EU law. However, a 2014 order of the Croatian Supreme Court needs to be singled out, also due to its importance and the politically controversial context of the case, which was also based on the *Pupino*[34] judgment. In its order the Supreme Court stated:

> … for the achievement of the aims and the respect for the principles expressed by EU law, national courts are obliged to apply national law in light of the letter and spirit of EU provisions. This means that national law must in practice be interpreted as far as possible in light of the wording and purpose of the relevant framework decisions and directives, in order to thus achieve the result sought by those framework decisions and directives … (as expressly stated in the judgment of the ECJ in Case 105/03 P of 16 June 2005). By acceding to the EU, the Republic of Croatia has also taken on the duty to act in such a way.[35]

1.4 Democratic Control

1.4.1 The involvement of the Croatian Parliament in EU affairs is stipulated both by the Croatian Constitution and the Act on Cooperation of the Croatian Parliament and the Government of the Republic of Croatia.[36] Most importantly, the European Affairs Committee monitors the activities of the European Parliament in European affairs, adopts the Work Programme for considering the positions of the Republic of Croatia, and considers EU documents and the positions of Croatia on EU documents, with the authority to adopt conclusions thereon.[37]

The European Affairs Committee of the Croatian Parliament is in charge of conducting parliamentary scrutiny and subsidiarity checks, but the process may be initiated by any Member of Parliament, parliamentary committee, parliamentary party group or the Government. In 2014 the European Affairs Committee issued one reasoned opinion in the context of a national parliamentary subsidiarity check procedure. In this reasoned opinion, issued on 6 October 2014, the Committee considered that the Proposal for a Directive amending Directives 2008/98/EC on waste, 94/62/EC on packaging and packaging waste, 1999/31/EC on the landfill of waste, 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical

[34] Case C-105/03 *Pupino* [2005] ECR I-05285.

[35] Order of the Supreme Court Kž-eun 5/14-4 of 6 March 2014.

[36] Official Gazette of the Republic of Croatia 81/13.

[37] See the Report of the work of the European Affairs Committee for 2014. http://www.sabor.hr/fgs.axd?id=42829.

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and electronic equipment,[38] did not comply with the principle of subsidiarity.[39] Both the European Affairs Committee and the Environmental Protection Committee considered that the Proposal did not take into consideration the existing differences among national systems of waste management which prejudiced a balanced development of the European regions. The reasoned opinion was issued within the required 8-week period from the date of the publication of the proposal. However, there were not a sufficient number of reasoned opinions to initiate the 'yellow card' procedure, as only the Austrian, Croatian and Czech parliaments issued reasoned opinions. However, the Juncker Commission has since withdrawn the Proposal.[40]

Further, as part of the 'political dialogue', the Croatian Parliament sent three opinions to the European Commission in 2014 and received the Commission's responses. The first one related to the application of the principle of subsidiarity in the legislative procedure, the second opinion was on the Proposal of a Regulation on the establishment of the European public prosecutor's office,[41] and the third concerned the Proposal of a Regulation amending Regulation 1308/2013 and Regulation 1306/2013 as regards the aid scheme for the supply of fruit and vegetables, bananas and milk in the educational establishments.[42]

Apart from its role in the subsidiarity procedure and the 'political dialogue', the European Affairs Committee composes an annual parliamentary Work Programme which contains the list of EU acts that are to be scrutinised. The specialised parliamentary committees may propose draft acts from their area of responsibility to be included in the Work Programme. When a draft act, together with the corresponding Position of the Republic of Croatia, is delivered to the European Parliament, the relevant specialised committees may discuss them and send their opinions to the European Affairs Committee which may, by a majority of votes of its members, draw a Conclusion on the Position of the Republic of Croatia, on which the Government must base its actions in the EU institutions. So far, the Committee has not used this competence in practice.

1.4.2 Two of the referendums that have been held in Croatia have been directly or indirectly linked to Croatian accession to the EU. The first took place on 22 January 2012 and was part of the Croatian accession process. As explained in the answer to question 1.2.1, due to what proved to be a justified fear of a low turnout, the wording of the Constitutional provision previously requiring 'the majority vote of all voters in the state' had been amended to 'the majority vote of all voters in the referendum', which enabled a positive outcome of the accession referendum, despite the low turnout.

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[38] COM(2014) 397 final.

[39] Reasoned opinion of the Croatian Parliament on COM (2014)397. http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc548cd77e10148e4f3bf0f181a.do.

[40] Commission response. http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc54d4a5c3c014d4cc47c6b0237.do.

[41] COM(2013) 534 final.

[42] COM(2014) 32 final.

The second referendum, discussed in the answer to question 1.2.3, on the inclusion in the Constitution of the definition of marriage as a union between a woman and a man, took place in 2013 and, even though it was not directly related to Croatian membership in the EU, its positive outcome was a direct consequence of the 2010 Constitutional amendment which changed the previously high Constitutional referendum threshold of 'the majority of all voters in Croatia' to 'the majority of all voters in the referendum'. This 2010 Constitutional amendment of the referendum threshold, which was done in the context of securing Croatian accession to the EU, thus enabled a completely different Constitutional amendment not linked to EU membership.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 See the answer to question 1.2.1. As explained previously, the Croatian Constitution has a number of EU amendments. These are fairly extensive, and they were partly based on input from a working group of academics.[43]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 As was seen in Sect. 1.1.2, the Constitution regulates, in a detailed way, human rights and fundamental freedoms in title III, which encompasses 57 articles. Proportionality is a general requirement for governmental action limiting individual rights and freedoms (Art. 16). A specific rule prohibits the retroactive application of laws and other measures, except, as far as laws are concerned, in exceptional circumstances (Art. 90). More broadly, Art. 3 of the Constitution provides that 'freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia'. Article 3 of the Constitution has been applied by the Constitutional Court (CC) on a number of occasions.

In addition, the Constitution contains specific and relatively detailed chapters on civil and political rights and economic, social and cultural rights.

All constitutional provisions, including the ones cited above, are in principle enforceable in courts. There is no doctrine according to which certain parts of the

[43] See Smerdel 2010, p. 4. See also Rodin 2007 and Rodin 2010.

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Constitution are off limits to (some) courts. Nevertheless, the Constitution is almost never explicitly relied upon in adjudication, except in the practice of the Constitutional Court. There are two possible reasons for this. First, like in some other European legal systems, Croatian courts cannot disapply legislation or find norms unconstitutional in an individual case – if a court considers the legal norms in question to run counter to the Constitution, it must refer the case to the Constitutional Court.[44] The second reason is the legal culture: adjudication is largely seen as the application of laws. The Constitution, but also international agreements, case law, other sources of law as well as non-binding materials such as scholarly works, are very rarely used by ordinary courts, and have only been used by the Supreme Court in a few exceptional instances. In this respect, there is a strong divide between the Constitutional Court and other courts.

2.1.2 Article 16 of the Constitution provides:

> Freedoms and rights may only be curtailed by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.

2.1.3 Article 3 of the Constitution has been referred to above in Sect. 2.1.1. Article 3 and the principle of the rule of law have been relied upon by the Constitutional Court to impose general requirements on the legislator. Notably, the Constitutional Court has frequently pointed out that the legislator is authorised to independently regulate economic, legal and political relationships, but is required to respect the requirements imposed by the Constitution, and in particular those that 'arise from the principle of the rule of law' and the principle of legal certainty. Thus, the notion of the rule of law imposes general requirements on the legislator.[45]

Some decisions of the Constitutional Court have fleshed out this notion. For example, the rule of law requires that laws are 'general and equal for all', that their consequences must be foreseeable by the addressees and also that they must conform to the legitimate expectations of the parties in each specific case to which they are applied.[46] This concerns not only formal legality and constitutionality, but controls substantive as well as procedural aspects,[47] and requires laws to be sufficiently determinate.[48] The separation of powers is an aspect of the rule of law, meaning that the legislator cannot intrude into the constitutionally defined powers and duties of the 'highest State authorities', such as the State Council for the Judiciary, the body in charge of judicial appointments.[49] The rule of law is also connected to the rule allowing only for the exceptional retroactivity of laws as

[44] Constitutional Act on the Constitutional Court of the Republic of Croatia ('Narodne novine' 49/02), Art. 37.

[45] U-I-659/1994 et al, 15 March 2000, para. 10.

[46] Ibid., para. 11.1.

[47] Ibid., para. 11.

[48] Ibid., para. 19.2.

[49] Ibid., paras. 12–13.

outlined above.[50] The requirements of the rule of law are thus said to be especially strict in relation to the transitional provisions of laws (especially those which regulate the retroactive application of such laws), which 'best show the relationship of the legislator to constitutionally protected values and its respect for constitutional guarantees'.[51] In that sense, the rule of law may even prevent the legislator from limiting or eliminating previously recognised subjective rights, insofar as such restrictions are not justified by a legitimate aim in the public interest.[52]

The judgments of the ECtHR and, occasionally, of the CJEU, have been used in support of the Constitutional Court's conclusions in this respect. For example, the Court cited the ECtHR judgment *Kozlica v. Croatia*[53] and the CJEU judgment *Tsapalos*[54] to support the general point that procedural rules in new legislation can be applied immediately to pending proceedings.[55] The requirement that laws must be available, sufficiently precise and foreseeable, and that any discretionary powers given to State authorities must be circumscribed, was supported by invoking the ECtHR rulings in *Sunday Times* and *Silver and Others*.[56]

The right of access to courts is an aspect of what the Constitutional Court calls the 'right to a court', and is governed by Art. 29 of the Constitution, frequently cited alongside Art. 6 of the ECHR. Article 29 provides in its introductory clause that '[e]veryone shall be entitled to have his or her rights and obligations, or suspicion or accusation of a criminal offence decided upon fairly before a legally established, independent and impartial court within a reasonable period'. The analysis is usually conducted under this provision and not under a general principle of the 'rule of law', but the two are connected. The Court has pointed out that the 'principle according to which recourse to a court must be possible is one of the generally recognised basic principles of law'.[57]

Finally, the Constitution contains a general proportionality rule (Art. 16) according to which 'freedoms and rights may only be curtailed *by law* in order to protect the freedoms and rights of others, the legal order, and public morals and

[50] U-I-4113/2008 et al, 12 August 2014, para. 22.

[51] Ibid., para. 38.

[52] Ibid., para. 64, 'When [it] authorises the Croatian Parliament to directly and independently decide on the regulation of economic, legal and political relations in the Republic of Croatia "in accordance with the Constitution and laws", the Constitution lays down a requirement that those "decisions" must respect basic constitutional values and take account of protected constitutional goods. In that sense, generally speaking, whenever it limits or eliminates previously recognised rights the legislator must have a legitimate aim in the public interest capable of justifying such a measure, and must also respect other requirements arising from the principle of the rule of law, legal certainty and legal predictability that were not raised when those rights were recognised.'

[53] *Kozlica v. Croatia*, no. 29182/03, 2 November 2006.

[54] Joined cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-06405 (case number incorrectly cited as Joined cases C-121/91 and C-122/91, another judgment which makes a similar statement).

[55] U-I-663/2011, 15 October 2014.

[56] U-I-659/1994 et al, 15 March 2000, para. 19.5.

[57] U-III/760/2014, 13 November 2014, para. 7.1.

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health' (emphasis added), and Art. 31 provides that '[n]o one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law'. Article 90 provides for the publication of 'laws and other regulations of government bodies' in the official journal and requires that ordinances of bodies vested with public authority 'be published in an accessible manner, in compliance with law' before their entry into force. Laws can enter into force no earlier than the eighth day after publication, except in exceptionally justified cases. See also the answer to question 2.5.1 below.

2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 As of yet, there do not seem to be any examples of a Croatian court addressing a conflict between the EU fundamental freedoms and constitutional rights. For that matter, the rapporteurs are not aware of any high-profile conflicts between the EU free movement rules and Croatian law adjudicated before the Croatian courts.

The approach of the Constitutional Court to the adjudication of national constitutional rights may, however, be relevant. For example, Art. 50(2) of the Constitution provides that '[f]ree enterprise and property rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health'. In reviewing the constitutionality of laws in this respect, the Constitutional Court has loosely followed the approach of the ECtHR. In a recent decision, it applied a test containing the following questions: (1) does the provision at issue interfere in addressees' property rights?; (2) does it have a legitimate aim?; (3) is it proportionate to the legitimate aim?; (4) does it impose an excessive burden to its addressees?; (5) does it have discriminatory effects?[58]

In the majority of cases, the Constitutional Court tends to defer to legislative choices on issues related to freedom of entrepreneurship and property rights, at least as long as such measures are not discriminatory and do not violate rule of law guarantees such as predictability. One exception is a 2009 decision declaring certain provisions of the Retail Act on Sunday Trading to be unconstitutional.[59] First, the ban on Sunday trading with the aim of protecting workers failed the proportionality test, because the legislator cannot rely on the ineffective application of general labour law rules providing for minimum weekly rest as an argument for a specific working time regulation in retail trade. In addition, the detailed exemptions for certain categories of shops were held to violate Art. 49 of the Constitution (the 'equal legal status' of entrepreneurs on the market). The bar seems to have been set

[58] U-I-381/2014 et al, 12 June 2014.

[59] U-I/642/2009, 9 July 2009.

quite high here: the Court essentially found that the rules on exceptions were too detailed ('excessive normativism' in the Court's terms) which is inappropriate from the point of view of freedom of entrepreneurship, and that they violate Art. 49 of the Constitution because it could not be 'ruled out beyond any doubt' that the law resulted in the unequal treatment of different groups of traders.[60]

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

The relevant provisions of the Constitution of the Republic of Croatia are:

> Article 22
>
> Human liberty and personality shall be inviolable.
>
> No one shall be deprived of liberty, nor may such liberty be restricted, except when specified by law, upon which a court shall decide.
>
> Article 24
>
> No one may be arrested or detained without a written court order grounded in law. Such an order has to be read and presented to the person placed under arrest at the moment of said arrest.
>
> The police authorities may arrest a person without a warrant when there is reasonable suspicion that such person has perpetrated a grave criminal offence as defined by law. Such person shall be promptly informed, in understandable terms, of the reasons for arrest and of his/her rights as stipulated by law.
>
> Any person arrested or detained shall have the right to appeal before a court, which must forthwith decide on the legality of the arrest.
>
> Article 25
>
> …
>
> Whosoever is detained and indicted of a criminal offence shall have the right to be brought before a court within the minimum time specified by law and to be acquitted or convicted within the statutory term.
>
> A detainee may be released on bail to defend him-/herself.
>
> Whosoever is illegally deprived of liberty or convicted shall, in compliance with law, be entitled to indemnification and a public apology.
>
> Article 28
>
> Everyone is presumed innocent and may not be held guilty of a criminal offence until such guilt is proven by a binding court judgment.

[60] Ibid., para. 11.2.

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Article 29

Everyone shall be entitled have his or her rights and obligations, or suspicion or accusation of a criminal offence decided upon fairly before a legally established, independent and impartial court within a reasonable period.

…

Article 31

No one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law.

2.3.1 The Presumption of Innocence

2.3.1.1 In Croatia, criminal proceedings commence with the establishment of reasonable suspicion, which is a higher level of suspicion based on evidence and not only on indicia. Also, detention can be ordered only if there is reasonable suspicion that a person has committed a crime. Thus, in order to commence criminal proceedings or to order detention, it is necessary that a prosecutor and/or a judge verify on the basis of collected evidence that there is reasonable suspicion. The requirement of establishing reasonable suspicion based on evidence emanates from the presumption of innocence and protects the citizen from coercive state powers. The ECtHR has established that '[h]aving a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence'.[61]

The problem with the presumption of innocence in the context of a European Arrest Warrant (EAW) surrender is that there is a possibility that the issuing state does not require the establishment of reasonable suspicion based on evidence for conducting a criminal prosecution but rather a lower level of suspicion and, secondly, that the executing state might not assess whether there is evidence that proves the existence of reasonable suspicion. Therefore, it is possible that a person could be arrested in order to be surrendered to another state without reasonable suspicion being established either in the issuing state or in the executing state. The comparative research shows that EU states have different thresholds for the application of arrest and detention as well as for the commencement of criminal proceedings. Also, the notion of the judicial authority empowered to issue an EAW is not interpreted in all Member States as being a judge, rather in some Member States this may be the prosecuting authority, administrative authority, ministry of justice or police. Therefore, it can be said that suspects in EAW proceedings are not granted the same level of protection emanating from the presumption of innocence as suspects in national criminal proceedings or in traditional extradition proceedings.

[61] *Stepuleac v. Moldova*, no. 8207/06, § 68, 6 November 2007.

This issue has not been raised in the national case law or before the Constitutional Court.

2.3.1.2 According to the Croatian Law on the European Arrest Warrant,[62] a hearing in front of a court panel of three judges is obligatory. The suspected person and his/her defence counsel have to be invited to this hearing. The appellate courts have on several occasions vacated first instance decisions due to a substantial violation of procedural rules in cases where the suspected person or his/her defence lawyer were not summoned or present at the hearing.[63] However, the Law envisages that the defence may present evidence but only related to the grounds for refusal to surrender prescribed by law. In many cases the defence has tried to convince the court that the suspect is innocent and has corroborated its claims with evidence. Nevertheless, the courts have continuously refused to assess the existence of reasonable suspicion. The courts have taken the following standpoint:

> The European arrest warrant is an instrument of mutual judicial cooperation between the Member States of the European Union that is based on the principles of mutual recognition between Member States and effective cooperation, and contains a legal obligation and moral responsibility of the national courts of the Member State of execution to grant the surrender of the person requested, unless there are the few and expressly prescribed grounds for refusal to surrender (listed in Arts. 20 and 21 ZPSKS-EU). The existence of reasonable suspicion that the person sought committed the offence for which the surrender is requested is not among these grounds, and the court of the state of execution is not even entitled to question whether there is such a probability of committing a crime by the person sought, because it automatically derives from the fact that a European arrest warrant was issued against him/her.[64]

2.3.2 *Nullum crimen, nulla poena sine lege*

Judicial abolishment of prescription of criminal prosecution justified by the abolition of the double criminality requirement

2.3.2.1 The Croatian judicial interpretation of provisions regarding the surrender of citizens for the 32 categories of crimes for which the rule of double criminality has been abolished, is to my knowledge original in the European judicial space and has subjected Croatian citizens to unequal treatment in comparison with other EU citizens. It was preceded by a legislative manoeuvre by the Croatian Parliament related to the implementation of the EAW immediately prior to Croatian EU accession.

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[62] Act on Judicial Cooperation in Criminal Matters with the EU Member States (OG 91/10, 81/13, 124/13).

[63] E.g. VSRH, Kž-eun 6/13-4, 9 August 2013; VSRH, Kž-eun 13/13-4 21, October 2013.

[64] VSRH, Kž-eun 17/14-4.

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In Croatia the Framework Decision on the European Arrest Warrant (FD EAW) was implemented by the Act on Judicial Cooperation in Criminal Matters with the EU Member States (AJCEU) adopted in July 2010 during the accession negotiations. Although the Act was adopted correctly from the perspective of EU law, the priority of the Croatian legislator was to fulfil a benchmark for closing Chapter 23 'Justice, freedom and security' of the acquis communautaire and not to genuinely implement the EAW in practice. On 28 June 2013, three days before accession, the Croatian Parliament passed the extensive amendment of the AJCEU that established a new institutional and procedural framework for cooperation with EU Member States in criminal matters. Although this was a major problem for the Croatian courts and prosecutors who had to implement the new law in three days after it was passed, domestic and European political and public attention was focused on two amended provisions that allegedly violated EU law. One was the introduction of a temporal limitation on the EAW, which prevented authorities from surrendering anyone suspected of a crime committed before 7 August 2002. Under severe criticism and the threat of financial sanctions from the European Commission, the temporal limitation was removed on 1 January 2015. The second critical change was the transformation of the statute of limitations from a ground for optional non-execution of EAW into a ground for mandatory non-execution. The AJCEU expressly prescribes that the Court shall refuse an EAW if under domestic law the limitation period[65] for criminal prosecution or the enforcement of criminal sanctions has expired, and the act falls within Croatian jurisdiction under its own criminal law (Art. 20(2.7)). This amendment, which was exposed to criticism in Croatia but not from abroad, resulted in the infamous interpretation of the Croatian courts, which abolished the rule that the statute of limitations for criminal prosecution can bar the surrender of a person for an offence for which the rule on double criminality does not apply.

The Croatian Supreme Court has introduced the rule that in cases where the verification of double criminality is excluded (Art. 2(2) FD EAW), the verification of the statute of limitations is also excluded: 'When executing an EAW, the court shall not apply domestic legal provisions regarding the statute of limitations for criminal prosecution, because the court does not verify double criminality'.[66] The explanation was that in order to determine whether there is a statute of limitations for the criminal offence in the executing state, it is necessary to establish jurisdiction or to determine which punishable criminal offence the act qualifies as according to the criminal law of the executing state. This means that double criminality would have to be verified, as 'the statute of limitation is organically linked to the prescribed punishment for a criminal offence' and therefore 'the statute of limitations is

[65] The limitation periods are prescribed by the statutes of limitations, which set the maximum time period after the commission of an offence that criminal prosecution may be initiated or continued or that a criminal sanction can be enforced after the rendering of a final judgment.

[66] Kž-eun 11/13, 20 September 2013.

an integral part of the concept of double criminality'.[67] This interpretation was also challenged in the Constitutional Court, which held that the surrender procedure is not a criminal procedure, but rather a *sui generis* judicial proceeding the aim of which is to enable criminal prosecution and not to decide on the guilt of the suspect. Therefore, the scope of potential constitutional complaints is very narrow and the Constitutional Court 'is not allowed to question the interpretations of domestic courts regarding domestic law and its application in concrete cases of surrender on the basis of an EAW, unless reasons are presented indicating that the assessment of the courts in a concrete case was "flagrantly and obviously arbitrary"'.[68]

It is generally accepted in international and European law as well as in theory on mutual legal assistance that double criminality requires that the act constitute an offence under the law of both states (requesting and executing). Therefore, for determining whether the rule on double criminality permits extradition or surrender, it is enough to find the offence with the constituent elements that correspond to the behaviour which is criminalised in another state. In the theory on international legal assistance, a double criminality requirement is considered to be a substantive requirement while a statute of limitations is a procedural requirement for extradition. They are therefore different legal requirements of which the content is neither overlapping nor mutually exclusive, and thus both requirements have to be checked separately. This was also the interpretation of the Croatian courts in extradition procedures before the implementation of the EAW.[69] However, the Croatian Supreme Court has rightly pointed out that in order to find out whether the prosecution is time-barred, the executing state has to establish which offence according to its criminal law is relevant, for which prosecution could be barred, and this procedure presumes the verification of double criminality. The further question for EU law-makers is that if the executing state has to check the rule of double criminality in order to verify the statute of limitations in any case, why was the verification of double criminality abolished in the EAW procedure?

The generally accepted public opinion (from supporters as well as from critics) is that the interpretation of the Croatian courts was motivated by a desire to bypass the newly introduced implementing law, which made the statute of limitations for criminal prosecution a ground for mandatory non-execution. It is alleged that the aim was to enable the surrender of Josip Perković, a former Yugoslav and Croatian intelligence agent suspected of participating in the organisation of the murder of Stjepan Đureković, a Croatian emigrant in Germany, in Munich in 1983, for which Germany had issued an EAW.[70] However, in the meantime, this judicial interpretation has become established case law and e.g. it resulted in the recent surrender

[67] VSRH, Kž-eun 2/14-5, 17 January 2014; Kž-eun 8/14-4, 7 February 2014.

[68] U-III-351/2014, 24 January 2014.

[69] VSRH II-8 Kr-268/01-3, 16 May 2001; I KŢ-689/03-3, 29 July 2003.

[70] Josip Perković was surrendered to German authorities on 24 January 2014, and the criminal trial against him has commenced in October 2014.

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of a person for acts of theft that were committed from 1985 to 1987, i.e. almost 30 years ago.[71]

This development in Croatia only deepened the further violation of the fundamental rights to legal security and equality of EU citizens that was prompted by the different implementation of the grounds for mandatory and optional non-execution of the EAW in the EU Member States. Already in 2007, the European Commission claimed that one of the weakest points in the implementation of the EAW was the provision on optional grounds for refusal. It was described as 'a patchwork which is contrary to the Framework Decision'.[72] Initially, the intention of the FD EAW was that the grounds for optional non-execution should be determined by judges and not the national legislator, and it was considered to be mistake if a Member State made a ground for optional refusal mandatory.[73] However, the reality is that 15 states have introduced the statute of limitations as a ground for mandatory non-execution of an EAW (Austria, Belgium, Czech Republic, Finland, France, Greece, Italy, Lithuania, Hungary, Malta, Netherlands, Germany, Slovenia, Slovakia, Sweden), and 12 states have introduced the statute of limitations as a ground for optional non-execution of an EAW (Bulgaria, Cyprus, Denmark, Estonia, Ireland, Latvia, Luxembourg, Poland, Portugal, Romania, Spain, United Kingdom).

Such varied implementation of the EAW has been accepted by the European Court of Justice in its *Gasparini* and *Wolzenburg* decisions. In the *Gasparini* decision, the Court stated:

> Article 4(4) of the framework decision, …, permits the executing judicial authority to refuse to execute a European arrest warrant *inter alia* where the criminal prosecution of the requested person is time-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that State under its own criminal law. In order for that power to be exercised, a judgment whose basis is that a prosecution is time-barred does not have to exist.[74]

In the *Wolzenburg* judgment, the Court went even further and held that when implementing grounds for optional non-execution of an EAW as mandatory or '[w]hen implementing Art. 4 of the Framework Decision…, the Member States have, of necessity, a certain margin of discretion'.[75]

The different implementation and interpretation of grounds for non-execution of an EAW have resulted in the utterly unequal treatment of EU citizens depending on which state is executing an EAW. Germany and Croatia exemplify the two extremes. Croatia surrenders citizens in EAW proceedings for the 32 categories of

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[71] VSRH, Kž-eun 20/14-6, 15 April 2014.

[72] Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2007) 407 final], p. 11.

[73] See EU Council report on the practical application of the European Arrest Warrant and corresponding surrender procedures between member states, 28 May 2009, 8302/4/09 REV 4, pp. 13–14.

[74] Case C-467/04 *Gasparini and others* [2006] ECR I-09199, para. 31.

[75] Case C-123/08 *Wolzenburg* [2009] ECR I-09621, para. 61.

offences without verifying double criminality or the statute of limitations. In Germany, the statute of limitations is a ground for mandatory non-execution, and the German Constitutional Court, Federal Court of Justice and appeal courts unitedly agreed that a person shall not be surrendered, notwithstanding whether he/she is a German citizen,[76] if prosecution is time-barred according to German law. Certainly the most famous decisions of the German courts not to extradite a person because of the statute of limitations is the refusal to extradite Sören Kama, a member of the Danish SS unit and a Dane who acquired German citizenship in 1956. Denmark had asked for his surrender on the basis of a European arrest warrant for the murder of a number of journalists in Copenhagen in 1943. In 2007, the appeals court in Munich decided that the surrender did not relate to a case of qualified murder (*Mord*), which is not subject to a statute of limitations, but rather to a case of ordinary manslaughter (*Totschlag*) and that therefore the prosecution was time-barred.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The Croatian rapporteur for the questionnaire on the Area of Freedom, Security and Justice for the FIDE XXV Congress in 2012 stated that one of the major threats to defence rights in criminal proceedings arising from EU law was introduced by the 2009 Amendment of the FD EAW. According to the rapporteur, it is absurd to say that this FD has the aim of 'enhancing the procedural rights of persons' when its only aim is 'fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial'. The aim of fostering the principle of mutual recognition to decisions rendered in the absence of the person concerned should be fulfilled without restricting the procedural rights of the defendant.[77]

The ECtHR considers the right to be present at trial as an element of fair trial in the sense of Art. 6. of the ECHR, as it enables the realisation of other rights protected by Art. 6 (3.c, d and e). In general, trials *in absentia* are not acceptable, and thus criminal procedure is armed with various coercive instruments in order to secure the defendant's presence. The ECtHR differentiates between a trial *in absentia* that results from the accused person's free will,[78] and one which is the consequence of circumstances outside his/her control.[79] A waiver of the right to appear in person at the trial has to be unequivocally established, and this will not be the case where the accused person cannot reasonably foresee the consequences of

[76] OLG Karlsruhe Beschluss Az. 1 AK 102/11 vom 25. März 2013.

[77] Đurđević et al 2012, p. 251.

[78] *Poitrimol v. France*, 23 November 1993, § 30, Series A no. 277-A; *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 29, ECHR 1999-I.

[79] *Goddi v. Italy*, 9 April 1984, Series A no. 76; *Colozza v. Italy,* 12 February 1985, Series A no. 89; *Krombach v. France,* no. 29731/96, ECHR 2001-II.

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his/her absence at the trial.[80] In such a case, the accused has to be given the opportunity for a re-trial.[81] The ECtHR has also stated that it is of capital importance that the accused appears, and that legislation has to be capable of discouraging unjustified nonappearance.[82]

The requirements for execution of an EAW issued for the purpose of executing a custodial sentence following an *in absentia* trial, pursuant to the 2009 Amendment (Art. 4a FD EAW), do not satisfy either the ECHR standards or the Croatian standards. The FD EAW obliges the executing authority to surrender a person even if he/she was neither summoned in person and he/she has no right to a retrial.[83] The establishment of requirements for execution of an EAW for a trial *in absentia* is no longer under the jurisdiction of the executing state,[84] but rather of the issuing state, which simply ticks the relevant box in the form.[85] It is apparent that the execution of an EAW for the purpose of the surrender of a person convicted *in absentia* to serve a (final) custodial sentence without the possibility of a retrial puts the quality of justice in the EU at a lower level than standards recognised in ECtHR case law and in all states, including Croatia, where a person tried *in absentia* has the right to ask for a retrial. The exclusion of the possibility of a retrial undermines the existing fundamental procedural rights and paves the way for possible miscarriages of justice.

A trial *in absentia* in Croatia is considered to be contrary to the defendant's right to a fair trial and rights of defence, such as the right to be informed of the accusation, to be heard by the judge and to examine witnesses. Therefore, the Croatian Criminal Procedure Act guarantees a person sentenced *in absentia* the right to a retrial in his/her presence.[86] Furthermore, in proceedings for the execution of a foreign judgment according to the rules of mutual legal assistance in criminal matters, the national judge may examine whether the fundamental rights to be heard and to defence were respected.[87]

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[80] Harris et al. 2009, p. 142.

[81] Ibid.

[82] *Lala v. the Netherlands*, 22 September 1994, Series A no. 297-A; *Pelladoah v. the Netherlands*, 22 September 1994, Series A no. 297-B; *Van Geyseghem v. Belgium* [GC], no. 26103/95, ECHR 1999-I.

[83] See Morgan 2005, p. 207.

[84] Article 5(1) of the FD EAW, which laid down the rule that surrender of a person shall be subject to the issuing State giving 'adequate' assurances that the person will have an opportunity to apply for a retrial of the case, was deleted by the 2009 Amendment.

[85] See Open Europe Briefing note: EU strengthens trials in absentia – Framework Decision could lead to miscarriages of justice, 2008. http://archive.openeurope.org.uk/Content/documents/Pdfs/tia.pdf.

[86] Article 497(3) Criminal Procedure Act (Official Gazette No. 152/08, 76/09, 80/11, 91/12 – The decision of the Constitutional Court of the Republic of Croatia, 143/12, 56/13, 145/13).

[87] Article 4 of the Act on Mutual Legal Assistance in Criminal Matters (Official Gazette No. 178/04).

Additionally, the European legislator should have been warned by, and learned a lesson from, the Croatian experience twenty years ago with trials *in absentia* that shows that they may be perilous for fair trial rights. From the early 1990s, the Croatian courts rendered a high number of judgments *in absentia* for war crimes committed on the territory of Croatia during the war from 1991 to 1995, against Croatian Serbs, most of whom had fled to Serbia. Later, the international community and Croatia recognised that many of these trials violated fair trial rights and the rule of law. Unprofessional and biased criminal proceedings were manifested through unsubstantiated and incorrectly written indictments, the passiveness of defence lawyers, the failure to submit appeals and so on. Croatia has paid a very high price on the international level, and even higher domestically because of the errors that were made in the prosecution of war crimes.[88] The revision of these proceedings became one of the benchmarks for EU accession. In order to correct the illegal judgments, Croatia took a series of legislative and concrete measures. Thus, up to the end of 2010, the State Attorney's Office reviewed all the convictions made *in absentia* from the 1990s (465) and found that 20% (93) of the judgments were groundless, and therefore requested the reopening of the case. Reopening was permitted in all cases and the vast majority of these judgments were repealed (80%). In addition, although the Croatian Criminal Procedure Act prescribed the right to a retrial for any person tried *in absentia*, at the request of the European Union, in 2008 the right of persons convicted *in absentia* to apply for a retrial without returning to Croatia was introduced in the Croatian Criminal Procedure Act. Now, however, the EAW procedure requires the Croatian legislator and courts to give up the high procedural rights standards of persons tried *in absentia*, and requires the surrender of a person tried *in absentia* without establishing that the person will be entitled to a new trial in the requesting country.

The implementation of Art. 4a of the FD EAW in Croatia shows that the errors in the implementing law will further weaken defence rights and fair trial guarantees in trials *in absentia*. The Croatian implementing law establishes that it is sufficient for execution of an EAW that the requested person was represented at the trial by a defence lawyer appointed by the person concerned or by the requesting state.[89] The additional condition that the person had to be aware of the scheduled trial was mistakenly omitted.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 In Croatia, the state does not provide any kind of assistance to its surrendered citizens beyond standard consular assistance, and there is no public or non-governmental organisation that provides assistance to them.

[88] Hrvatin (2010).

[89] Article 21(2)(2) of the AJCEU.

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2.3.4.2 As Croatia only acceded to the EU on 1 July 2013, there are no final judgments regarding persons who have been surrendered to another EU state.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1–2.3.5.2 See Sect. 2.3.2.

2.3.5.3 In the case explained in Sect. 2.3.2, the only role of the Croatian courts was to be actors of loyal co-operation, efficiency and trust. They have expressly assumed this role themselves. By way of examples from court decisions:

> To achieve the goals and to respect the principles expressed in EU law, national courts are bound to apply national law in the light of the letter and spirit of EU law. This means that national law must be interpreted in the application as much as possible in the light of the wording and the purpose of relevant framework decisions and directives, in order to achieve the result pursued by such framework decisions and directives;[90]
>
> Criminal proceedings in another state have priority over criminal proceedings conducted before a Croatian court;[91]
>
> The European arrest warrant is an instrument of mutual judicial cooperation between the Member States of the European Union that is based on the principles of mutual recognition between Member States and effective cooperation, and contains a legal obligation and moral responsibility of the national courts of the Member State of execution to grant the surrender of the person requested, unless there are the few and expressly prescribed grounds for refusal to surrender.[92]

2.3.5.4 The opinion of the author is that a proportionality test should be introduced. The author does not recommend the reinstatement of verification of sufficient evidence that an offence has been committed.

2.4 The EU Data Retention Directive

2.4.1 The Data Retention Directive has not raised constitutional issues in Croatia. This is probably, at least partly, due to the fact that Croatia acceded to the EU only recently so that the implementation of the Directive in the Croatian legal system took place as part of the process of alignment of the national system with the *acquis*. Probably for this reason, the Directive was not viewed separately or

[90] VSRH, Kž-eun 5/14-4, Kž-eun 14/14-4.

[91] County court in Varazdin, Kv-eun 2/14, 9 January 2014.

[92] VSRH, Kž-eun 17/14-4.

differently from other, less controversial EU measures which required amendments of national legislation. Discussion started only upon the annulment of the Directive on 8 April 2014. Logically, the central point of the discussion at that point was not the constitutionality of the Directive but the effects of its annulment on Croatian rules which regulate data retention in Croatia. The Ministry of Foreign and European Affairs asked the Department of European Public Law of the Faculty of Law of the University of Zagreb for a legal opinion in the matter, as there was well-founded concern that certain national norms could be contrary to EU law for the same reasons provided by the Court of Justice in its judgment in Joined Cases C-293/12 and C-594/12.[93]

Further, the Ministry gathered the analyses of different national bodies in charge of data retention. Each body had to analyse national rules within its competence in terms of the compatibility of such rules with the four criteria set by the judgment of the Court of Justice. In its analysis, the Ministry of Maritime Affairs, Transport and Infrastructure identified the provisions of the Law on Electronic Communications which need to be amended, and it is expected that this will be taken into account when the Law, which needs to be aligned with the new Directive 2014/61 of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, is amended. Also, the amendment of the Criminal Procedure Act from December 2014 narrowed down the cases in which it is possible to conduct checks to determine whether communications have taken place, allowing for such checks only in relation to criminal offences for which the prescribed sentence is more than five years of imprisonment.

The relevant constitutional provisions provide as follows:

> Article 34
>
> The home is inviolable.
>
> …
>
> Article 35
>
> Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.
>
> Article 36
>
> The freedom and privacy of correspondence and all other forms of communication shall be guaranteed and inviolable. Restrictions necessitated by the protection of national security and the conduct of criminal prosecution may be prescribed solely by law.
>
> Article 37
>
> The safety and secrecy of personal data shall be guaranteed for everyone. Without consent from the person concerned, personal data may be collected, processed, and used only under the conditions specified by law.

[93] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

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> Protection of data and oversight of the operations of information systems in the state shall be regulated by law.
>
> The use of personal data contrary to the express purpose of their collection shall be prohibited.

2.5 Unpublished or Secret Legislation

2.5.1 Article 90 of the Croatian Constitution provides that laws and other regulations of government bodies as well as ordinances of bodies vested with public authority have to be published in the Official Journal of the Republic of Croatia (*Narodne novine*) before their entry into force. In judgment U-II-296/2006 of 27 October 2010, the Constitutional Court reviewed the constitutionality of the Decree on the Internal Structure of the Ministry of the Interior, which came into force in 2001, but had not been published in *Narodne novine* and was marked as a 'state secret'. The Constitutional Court ruled that a decree cannot be a 'state secret' and, therefore, cannot be exempt from the obligation to be published in the official journal. The Constitutional Court stated that any other conduct is contrary to both Art. 90 of the Constitution and to the rule of law and the principle of legal certainty. The Court, therefore, ruled that the Decree had to be published in *Narodne novine* and ordered the Croatian Government to ensure such publication within 90 days of the publication of the Court's decision.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 No such issues have yet arisen in Croatia in relation to EU measures, which is primarily due to Croatia's relatively short EU membership.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Croatia has not signed the Treaty Establishing the European Stability Mechanism (ESM Treaty) due to the fact that Croatia is not a euro area state. It has also not signed the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact) due to the fact that the Fiscal Compact was signed before Croatian accession to the EU. For this reason, the Croatian position vis-à-vis the Fiscal Compact is unique in comparison to all other

EU Member States and remains open. The Croatian Government has, so far, not given any official position in respect of possible signature of the Fiscal Compact in the future.

2.7.2 There has not been any public discussion about the constitutionality of other proposed measures. This is (probably) due to the fact that Croatia has decided not to enter the banking union prior to adopting the euro. Therefore, there is no additional financial exposure for Croatian citizens above other costs associated with EU membership.

2.7.3 Croatia has not been subject to any EU bailout or subsequent related austerity procedures which would initiate a strong negative reaction in the state. However, as all other EU Member States, Croatia is subject to economic governance procedures, which require the adoption of policies and measures recommended by the Council. Excessive macroeconomic imbalances identified by the Commission led to strong policy recommendations for Croatia. The Excessive Deficit Procedure, initiated on 28 January 2014, obliges Croatia to correct its excessive deficit by the end 2016.[94] The EU recommendations are mostly in line with domestic policy priorities – fiscal consolidation and return to a path of sustainable growth. Croatia is adhering to these recommendations. In this context, the Croatian Government has not (yet) imposed aggressive austerity measures which would disproportionately hurt Croatian citizens. So far, only modest measures have been taken, the most visible being the adoption of two laws of temporary character: the Law on the Denial of Payment of Certain Material Rights to Employees in the Public Service,[95] in force as of 31 March 2015, and the Law on the Denial of the Right to Increase Salaries Based on Seniority,[96] in force as of 1 April 2014. The former act denies public servants the right to a 2015 Christmas bonus and the regress for using annual leave in 2015, while the latter denies the right to increase the coefficient for the complexity of work in the public service based on the number of years of service. The latter act was subjected to a constitutional review procedure initiated by nine trade unions and a number of Croatian citizens. In its judgment, dated 30 March 2015, the Constitutional Court rejected the proposal and declared that denial of the right to increase salaries based on seniority is in accordance with the Croatian Constitution.[97] The Court based its judgment on the argument that 'there are imperative reasons of public interest which justify its application (correction of excessive deficit in accordance with the Council recommendations)'.[98]

[94] The Excessive Deficit Procedure was initiated at the Economic and Financial Affairs Council meeting on 28 January 2014, based on Council decision 17908/13, dated 21 January 2014, establishing the existence of an excessive deficit in Croatia, and Council recommendation 17904/13 dated 21 January 2014.

[95] Official Gazette of the Republic of Croatia 36/15.

[96] Official Gazette of the Republic of Croatia 41/14, 157/14 and 36/15.

[97] Judgment U-I-1625/2014 and others, U-I-241/2015, U-I-383/2015, U-II-1343/2015, 30 March 2015.

[98] Ibid., para. 66.

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Nevertheless, the Constitutional Court warned that potential further extension of the application of the law in question could turn the measure into a permanent one, which would raise the question of the functioning of the rule of law and the principle of legal certainty and could call the citizens' confidence in pubic authority into question.[99] If further austerity measures are introduced, further constitutional review procedures can be expected.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Due to its relatively recent EU membership, there have so far only been a few preliminary references from Croatia, all dealing with the interpretation of EU law. Two of them concern public notaries in the context of judicial cooperation in civil matters,[100] two deal with EU rules on consumer credit,[101] and one with the price of water consumption in the context of the EU water policy.[102]

There are also four actions for damages, dealing with similar issues, which are currently pending before the General Court,[103] as well as an action for annulment initiated by the ferry port Split asking for the annulment of a Commission decision[104] stating that the measure subject to the complaint does not constitute state aid within the meaning of Art. 107(1) TFEU.[105]

2.8.2 There has been no public debate on the standard of review of the EU Courts in Croatia.

2.8.3 The Croatian Constitutional Court has in certain instances taken a rather vigorous approach to the review of constitutionality of Croatian legislation. In the most recent controversial case the Constitutional Court suspended the new Family Law.[106]

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[99] Ibid., para. 67.

[100] Case C-484/15 *Zulfikarpašić* [2017] ECLI:EU:C:2017:199 and C-551/15 *Pula Parking* [2017] ECLI:EU:C:2017:193.

[101] C-511/15 *Horžić* and C-512/15 *Pušić* [2016] ECLI:EU:C:2016:787.

[102] C-686/15 *Vodoopskrba i odvodnja* [2016] ECLI:EU:C:2016:927. This reference follows on an earlier one, from the same court, on the same issue, which was inadmissible since the facts preceded accession (C-254/14 *VG Vodoopskrba* [2014] ECLI:EU:C:2014:2354).

[103] Case T-108/14 *Burazer and Others v. European Union*; Case T-109/14 *Škugor and Others v. European Union*; Joined Cases T-546/13, T-108/14 and T-109/14 *Šumelj and Others v. European Union* [2016] ECLI:EU:T:2016:107; Case T-507/14 *Vidmar and Others v. European Union* [2016] ECLI:EU:T:2016:106.

[104] C(2013) 7285 final.

[105] Case T-57/15 *Trajektna luka Split v. Commission* [2016] ECLI:EU:T:2016:470.

[106] Decision of the Constitutional Court U-I-3101/2014, U-I-3173/2014, U-I-3264/2014, U-I-6341/2014, U-I-6401/2014, U-I-6541/2014, U-I-6701/2014, U-I-6907/2014, U-I-7133/2014 of 12 January 2015.

Based on the statistical data available to the rapporteurs, out of the total number of cases received by the Croatian Constitutional Court in 2014, 19.5% were proceedings to review the constitutionality of laws, while 14.8% were proceedings to review the legality of other regulations. The majority of cases, i.e. 62.7% were constitutional complaints regarding violations of human rights and fundamental freedoms guaranteed by the Constitution. Interestingly – when compared to 2011, 2012 and 2013–2014 is marked by a visible increase in the percentage of cases involving review of the constitutionality of laws and the legality of other regulations. In the total number of cases received by the Constitutional Court in 2011, 6% were reviews of the constitutionality of laws, while there were only 2% of such cases in 2012 and 3.6% in 2013. Similarly, in 2011 only 2% of cases were reviews of the legality of other regulations, while in 2012 such cases represented only 1% of the total, and in 2013 they represented 2.4% of the total. On the other hand, the percentage of constitutional complaints relating to violations of human rights and fundamental freedoms guaranteed by the Constitution decreased in 2014 when compared to the percentages in 2011, 2012 and 2013. In 2011 such complaints represented 88% of the total, in 2012 they amounted to 91%, and in 2013 they represented 89% of the total number of cases before the Constitutional Court.

Out of the total number of 5,820 cases for review of the constitutionality of laws launched in the Constitutional Court between 1991 and the end of 2014, the application was rejected in 5,354 cases, while in 466 cases a law or some of its provisions were repealed. On the other hand, in the period from 1991 until the end of 2014, the Constitutional Court reached 3016 decisions on the review of the legality of other regulations. Out of 3,016 cases, 2,778 applications for review were rejected, while in 238 cases a regulation or some of its provisions was repealed.

2.8.4 There have not yet been any judgments in Croatia in which the national constitutional court or supreme court would have reviewed measures that implement EU legislation, nor have there been any such doctrinal statements or debates.

2.8.5 Not applicable.

2.8.6 The issue of equal treatment of citizens falling under the scope of EU law and falling under the scope of domestic law has not (yet) arisen in Croatia.

2.9 Other Constitutional Rights and Principles

2.9.1. Issues such as those described in this question have so far not arisen in the context of the implementation of EU law in Croatia, at least to the knowledge of the rapporteurs. If they were to arise, the constitutional disciplines described in the answer to question 2.1.3 would be relevant.

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2.10 Common Constitutional Traditions

2.10.1–2.10.2 'Common constitutional traditions' are generally recognised values that can be accepted by a supranational adjudicator without attracting controversy or opening fissures with the constitutional orders of the Member States. Formulated at a sufficient level of generality, many aspects of the constitutions of the Member States could be described as such. In our view, it is neither possible nor desirable, and it actually misses the point of the whole exercise, to formulate a catalogue of 'core' rights and principles that qualify and others that do not. 'Common constitutional traditions' are primarily a vehicle for judicial dialogue and pluralism, enabling European and national constitutional courts to engage in dialogue beyond the controversies of simple supremacy of EU law, and without retrenching themselves in national categories. They are not meant to differentiate 'important' from 'unimportant' constitutional rules.

Interestingly, whereas 'common constitutional traditions' were initially used by the CJEU as an integration tool – building up European fundamental rights protection as a guarantee of the legitimacy of EU law – today's debates on 'constitutional identity' seem to pull in the opposite direction.[107] Yet both seem to be a way of reinforcing judicial dialogue, and there is some promise in that. In that light, the increased reliance of national constitutional courts on preliminary references would certainly be made more fruitful by including references to national constitutional law, without however framing them as 'ultimatums'.

For a possible indication of the Croatian Constitutional Court's approach to these issues, see the discussion of its comparative approach in the answer to question 1.1.1.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 As a general proposition, both the ECHR and the EU Charter allow Member States to protect a particular fundamental right to a higher degree. In reality, of course, rights tend not to be adjudicated in isolation, but in cases of conflict with other rights or legitimate interests. The problematic issue is precisely how to deal with conflicts between two different fundamental rights, or between a fundamental right and a rule of EU law. Can a higher national standard prevail over supranational norms in some cases? Can a national constitution protect, for example, the right to privacy *more* if that means that it protects freedom of expression *less* than the EU/ECHR benchmark provides? The CJEU *Melloni*[108] decision would argue

[107] See Millet 2014.

[108] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

against such an interpretation, even when the EU norm is not in itself a fundamental right, at least as long as we are not talking about a trivial or purely technical EU provision.

In Croatia, there does not seem to have been much debate on these issues. The Constitutional Court rarely deals with EU law in any depth, but it tends to rely heavily on the case law of the ECtHR. It often reproduces, in applying national constitutional law, the legal tests developed by the ECtHR in the context of analogous provisions of the Convention. In doing so, it usually does not discuss whether the standard of protection in Croatian law could or should be higher or lower. It even employs the ECtHR language of granting a margin of appreciation to national legislators when simply addressing the Croatian legislator.

Some good examples include several Constitutional Court decisions on extradition proceedings and the right to a fair trial, in which the Court found no violation of constitutional rights by relying largely on ECtHR case law, even though the latter was developed in the context of a general unavailability of Art. 6 ECHR in (administrative) extradition proceedings (i.e. the ECtHR doctrine was developed to expand Art. 6 protection but was used by the Constitutional Court to narrow protection under the Croatian Constitution).[109] The Constitutional Court cited the *Soering v. UK*[110] argument that extradition is usually not an issue under Art. 6, unless a petitioner has suffered a flagrant denial of a fair trial in the requesting country. Also, the court relied on a definition of the concept of flagrant denial of a fair trial in *Ahorugeze v. Sweden*[111] to support its finding of no violation. There is nothing in the Croatian constitutional provisions that would suggest that only 'flagrant denials of a fair trial' fall under the relevant constitutional provisions. Therefore, these cases would seem to be good candidates for establishing a higher level of protection than the one granted by the ECHR. Nevertheless, the Constitutional Court did not venture into that discussion.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Both developments referred to in this question took place before Croatia's accession to the EU and did not lead to a significant debate at the time, even though there was considerable academic discussion about the EAW. More generally, there was extensive debate on the EAW immediately upon Croatia's accession, but this was not really principled deliberation, rather, it concerned the politically salient issue of EAWs against former Yugoslav-era intelligence agents and whether Croatian legislation could prevent the execution of those EAWs, in potential

[109] See, most recently, U-III-1358/2014, 17 April 2014, para. 6.

[110] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

[111] *Ahorugeze v. Sweden*, no. 37075/09, 27 October 2011.

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violation of EU law.[112] As for the Data Retention Directive, there has been some public discussion on whether or not data must be, may be or cannot be retained in the aftermath of the decision of the CJEU in *Digital Rights Ireland*,[113] i.e. before Croatian legislation is harmonised with the Court's interpretation of the requirements of EU privacy rules. As in other Member States, there seems to be some confusion on the part of Croatian authorities on how to deal with a situation where the implementing legislation that the EU Commission previously insisted on is now considered to be contrary to EU law (see also the answer to question 2.4.1).[114]

2.12.2–2.12.3 The first suggestion is intuitively attractive, but there seem to be many practical or institutional problems. While some constitutional courts may object, other Member States may have already implemented EU measures or may have themselves faced legal challenges for violating them. Such a mechanism might therefore affect certain legitimate expectations of private parties and create legal uncertainty, especially if it would lead to suspending the application of EU law. Another problem is who exactly should suspend and/or review the EU measure. In our view, while the Commission or even relevant national authorities could usefully analyse and report on a measure, and while the Commission could file a legislative proposal, it should ultimately be for the EU legislator to decide that an EU measure should be suspended or changed. Perhaps something like a 'yellow card' procedure for legislative proposals could be sensible – if numerous constitutional courts were to consider a piece of EU legislation to be unconstitutional, it should be reviewed by the EU legislator. Whether and how this could be operationalised is a different matter – in all likelihood, given the diversity of national judicial systems and the unpredictability of judicial review, it is hard to imagine a formal procedure. Finally, of course, it is for the CJEU to ensure the conformity of EU law with fundamental rights, and constitutional courts – individually – are always free to take that road, which can in fact lead to the suspension of the application or review of an EU measure.

As for the second suggestion, it should not be supported. It has in fact already been rejected by the CJEU on numerous occasions, not least in *Simmenthal*,[115] and more recently in *Kücükdeveci*:[116] national rules on constitutional review cannot detract from the binding nature of EU law. The fact that a Member State has delayed implementation because of constitutional review could at best be taken into account when addressing the gravity of an infringement or deciding on sanctions.

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[112] See (2013, August 27) Justice row over arrest warrant sours EU-Croatia ties. BBC news. http://www.bbc.com/news/world-europe-23847788.

[113] Supra n. 93.

[114] See Srdoč, S. (2014, July 23). *Podaci o komunikaciji Hrvata zadržavaju se unatoč presudi europskog suda* (Croatian's communications data retained despite of European Court judgment). Tportal. http://www.tportal.hr/vijesti/svijet/343337/Podaci-o-komunikaciji-Hrvata-zadrzavaju-se-unatoc-presudi-europskog-suda.html.

[115] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* (1978) ECR 00629.

[116] Case C-555/07 *Kücükdeveci* [2010] ECR I-00365.

Some space for domestic constitutional processes could, in that sense, be also created in the context of infringement proceedings (with regard to question 2.12.2). On the other hand, with the average duration of infringement proceedings currently at 27 months and the average period Member States take to comply with CJEU findings of an infringement (not necessarily covering further CJEU proceedings on sanctions) at 20 months,[117] infringement proceedings are hardly lightning-fast.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 Insofar as it is possible to generalise, EU accession seems to have bolstered, rather than weakened the protection of fundamental rights in Croatia (see however the remarks in Sect. 2.3). On the level of legislation protecting fundamental rights, EU accession has led, e.g. to far better and more detailed anti-discrimination rules, as well as the formation of institutions in charge of the protection of fundamental rights (such as the Ombudspersons for gender equality and children's rights). At the same time, though not necessarily as a consequence of accession, the ECHR has become a much more widely used instrument in the adjudication of constitutional rights, at least in the case law of the Constitutional Court (see above).

Broadly speaking, the encounter with EU and ECHR fundamental rights has improved, rather than diminished the legitimacy of the Constitutional Court in adjudicating fundamental rights. In addition, there seems not to have been any pronounced conflicts between Croatian constitutional rights and EU law, at least not yet. Such a conflict could of course happen.

2.13.2 Not applicable.

2.13.3–2.13.4 The case of the EAW has been debated in detail in other sections of this Report. Double criminality, similarly as in *Advocaten voor de Wereld*,[118] has been a salient issue, albeit not in the sense of a direct conflict with fundamental rights, but as a way of re-interpreting a seemingly mandatory ground for refusal to execute an EAW.

There have, however, been no constitutional conflicts between Croatian and EU law, as of yet. EU law seems, for the time being, largely 'off the radar' for the Croatian Constitutional Court, in contrast to the frequent references to the judgments of the ECtHR.

More broadly, the likelihood of conflict, but also of cooperation and dialogue, in the adjudication of fundamental rights has increased along with the expansion of EU law across policy fields and territorially, with EU enlargement. National

[117] See http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm.

[118] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633.

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constitutions and EU law now intersect at a wider variety of points. The direct effect of third-pillar law and the broader ability to refer to the CJEU will certainly add to this.

This has already had its consequences in EU law. The debate on national constitutional identity can be read in the light of an increasing encounter with national constitutional rights. This debate has not yet had a major impact in Croatia. Some academics have suggested possible changes to the interpretation of constitutional provisions, or a richer understanding of constitutional disciplines in terms of 'constitutional identity', rather than new amendments to the constitutional text. Smerdel, for example, has argued that 'full membership accentuates the importance of a well justified theoretical position on the part of the Croatian legal community, towards the issues of its constitutional identity within the compound community of states'.[119]

More generally, the recent CJEU opinion on accession to the ECHR could also be seen as a way of protecting the dialogue with national constitutional systems. From the point of view of the national courts, the recent trend of constitutional courts referring to the CJEU can also be seen in this light.

Perhaps EU law is only in the very early stages of a development similar to what took place with the introduction of fundamental rights through CJEU case law as a response to *Solange*[120] in the 1970s. More concrete mechanisms of accommodation for national constitutional rights may emerge. Beyond salutary statements, not much has been developed so far – *Melloni* being a good example of a judgment that seemingly pays tribute to national constitutional rights but reverts to the supremacy of EU law. This could also be understood in the context of relatively weak implementation of the EAW in the Member States, and perhaps a fear of further fragmentation in a nascent area of EU policy. The case law may develop in different directions, but what seems clear is that judicial dialogue between the CJEU and national courts, especially with a fundamental rights dimension, must be further developed. In practice, the CJEU is likely to include more detailed references to national constitutional rights in its judgments.

Recent developments such as the expansion (and deepening) of EU law in domains such as criminal law, foreign affairs and third-country migration, the process of EU accession to the ECHR and the complex relationship between the ECtHR and the CJEU, as well as the increasingly high-profile dialogue between the CJEU and the highest national courts, will necessitate a level of accommodation both on the national and EU level. The CJEU is likely to take national courts and their concerns more seriously in its judgments. More general procedural reforms like introducing dissenting opinions do not seem probable, but increasing judicial dialogue is likely to affect the nature and quality of its reasoning.

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[119] Smerdel 2014, p. 516.

[120] BVerfGE 37, 271 (Solange I); BVerfGE 73, 339 (Solange II); Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 01125.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.2 The Constitution (Arts. 139 and 140) provides that treaties may be concluded, depending on their nature and content, by the Parliament, the President of the Republic or the Government. The Parliament ratifies treaties that require laws or legislative amendments, those of a 'military and political nature', and those that give rise to financial commitments. The President signs the documents of ratification, accession, approval or acceptance of treaties ratified by the Parliament. Treaties not subject to ratification by the Parliament are concluded by the President on a proposal by the Government, or by the Government. If a treaty grants an international organisation or alliance powers derived from the Constitution, the ratification by the Croatian Parliament is by a two-thirds majority of all deputies. There are separate rules for the entry into associations and alliances with other states, which ultimately require the approval of two-thirds of all deputies in Parliament, as well as a positive outcome of a referendum (Art. 142).

The only provisions of this nature that contain some references to values and objectives are those that pertain to the European Union. Article 143 provides that, in the EU, Croatia will 'participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union'.

3.1.3–3.1.4 EU accession has been the only event in recent history to have provoked a significant debate on the relationship between the Constitution and transnational or global governance. This has resulted in new constitutional provisions (see Sect. 1.2).

3.2 The Position of International Law in National Law

3.2.1 The application of treaties is governed by Art. 141 of the Constitution:

> International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.

Some constitutional provisions refer to international law other than treaties. Article 2, for example, provides that 'the Republic of Croatia, in accordance with international law, shall exercise sovereign rights and jurisdiction over the maritime zones and seabed of the Adriatic Sea outside its state territory up to the borders of

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neighbouring countries'. Article 31 provides that 'no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law' and that the statute of limitations shall not apply to 'those not subject to the statute of limitations under international law'.

3.2.2 The split between monism and dualism can be seen as describing two deeply opposed understandings of international law and national sovereignty. On the other hand, the two notions may not be much more than two techniques by which international law is given effect in national legislation. The real test of the openness of a legal order to international law, in our view, should rather take place before courts and administrative bodies.

Legal commentary is largely committed to the view that Croatia accepts monism, citing the clear constitutional provisions cited above. Doctrine also tends to hold the view of a Kelsen-like hierarchy of legal sources, with the Constitution superior to international law and international law superior to legislation. On the other hand, some sources of international law, and in particular the ECHR, are held in higher esteem. The President of the Constitutional Court has, for example, written that 'the case-law of the Croatian Constitutional Court shows that international treaties actually enjoy a quasi-constitutional status in the Croatian constitutional legal order: international treaties do not formally have the power of a constitutional law, but nevertheless their role is the same as that of the Constitution because they serve as standards for the review of the national legislation, in particular of the acts of Parliament'.[121] The Constitutional Court has indeed found that a law violating the Convention is also contrary to the principle of the rule of law contained in Art. 3 of the Constitution, as well as to the principle of legality (Art. 5) and the principle of legal monism.[122]

Others have noted that, in practice and depending on the area of law in question, the principle of monism is not always strictly followed and is sometimes combined with a dualist understanding.[123] Indeed, empirically speaking, it is quite rare for courts, especially if the Constitutional Court is taken out of the picture, to make any use of international law whatsoever.

3.3 Democratic Control

3.3.1 For the involvement of the Parliament in ratification, see above. The Act on the Conclusion and Execution of International Treaties[124] does not foresee a specific role for Parliament in the negotiation stage. The negotiation is conducted by a delegation that is named by the President or by the Government. The Parliament

[121] Omejec 2009, p. 2.

[122] Ibid., p. 11.

[123] Rudolf 2014, p. 569.

[124] Zakon o sklapanju i izvršavanju međunarodnih ugovora (Narodne novine 28/1996).

does, however, have a role in scrutinising the execution of a treaty: the Government is required to report on the execution of a treaty upon the Parliament's request. A special and much more detailed law regulates the involvement of the Parliament in European Union issues (for details, see the answer to question 1.4.1).

3.3.2 Only the EU Accession Treaty has been subject to a referendum, as per specific constitutional requirements (see Sect. 1.2).

3.4 Judicial Review

3.4.1 There are no explicit constitutional provisions of any kind regarding the judicial review of international law. The Constitutional Court's authority extends to laws and other national measures. Indeed, the Constitutional Court considers substantive challenges to international treaties as inadmissible,[125] but it is unclear whether this extends to challenges to laws on the ratification of treaties.[126] In practice, there have not been many challenges to provisions of international law, and certainly not high-profile ones. In time, this may change, as EU accession exposes Croatia to a greater variety of sources of transnational law in a broader range of domains.

3.5 The Social Welfare Dimension of the Constitution

3.5.1–3.5.2 See the answer to question 2.7.3.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 No significant issues have arisen in Croatia.

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[125] Omejec 2009, p. 12.

[126] Ibid., pp. 13–15.

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Part V
Traditional or Hybrid Legal Constitutions: Combining Strict and Flexible Aspects, e.g. an Older or ECHR-Based Bill of Rights

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The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved

Laurence Burgorgue-Larsen, Pierre-Vincent Astresses and Véronique Bruck

Abstract In terms of the French constitutional culture, the Constitution (of the Fifth Republic), adopted in 1958, grew out of specific circumstances relating to the previous regime, with the aim to ensure the primacy of the executive. Fundamental rights protection emerged later and is mainly based on the ECHR; the main domestic instrument is the 1789 Declaration of the Rights of Man and of the Citizen. The possibility for individuals to challenge the constitutionality of legislative provisions that violate their rights was introduced by a constitutional amendment of 2008 establishing *ex post* control of constitutionality. Judicial review is regarded as deferent to the political institutions. With regard to EU law, the Constitution has extensively been amended, typically following a finding by the Constitutional Council that a new treaty affects 'the essential conditions for the exercise of national sovereignty'. The report observes a reluctance of French institutions to fully participate in a dynamic dialogue with the EU integration process. Although this has recently changed with a more constructive approach on the part of the Constitutional Council, the report observes deficiencies in democratic

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deliberation and the reluctance to push for a solid fundamental rights protection in the EU. The report advocates a so-called *pro homine* clause, which has been considered in France, to guarantee that the individual would always benefit from the highest level of protection, whether it is provided for by European, international or national instruments. The report also notes a more general concern amongst a part of the French population about a barefaced economic liberalism in the EU and its effect of deteriorating their living conditions.

Keywords The French Constitution of the Fifth Republic · Constitutional amendments regarding EU and international co-operation · The Constitutional Council · Constitutional review · Fundamental rights and the ECHR European Arrest Warrant and the time limits for appeals · Data Retention Directive and implementation by a governmental regulation · Judicial dialogues Judicial deference · Sovereignty · Supremacy · Referendum · *Koné* International extradition treaties and political offences · *Pro homine* clause

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The French Constitution of 4 October 1958 grew out of a 'set of circumstances'[1] which include the following. First, in 1958, Algeria was a French department in crisis due to the outbreak of an insurgency at the end of 1954. This war revealed flaws in the Constitution of the Fourth Republic, and led to the birth of the Constitution of the Fifth Republic. The regime did not have the necessary institutional strength to deal with the consequences of the insurgency. Politically, the regime was unable to forcefully assert that the Fourth Republic could come out of such a crisis. As regards the economy, mention should be made of the numerous difficulties successive Governments encountered in voting the budget.

Secondly, these developments resulted in conflicting relationships between the Government and Parliament and help to explain the agony of the Fourth Republic. This Republic was characterised by a weak Constitution, in which ministerial crises and governmental instability reigned without apparent remedy. In other words, Parliament was all-powerful and it determined the Government's birth and survival. From the mid-1950s, most politicians were convinced that a major revision of the Constitution was needed in order to put an end to the gradual paralysis of the decision-making mechanisms.

Finally, the birth of the Fifth Republic can also be explained by the *coup de grâce* delivered by General De Gaulle. In his 16 June 1946 Bayeux Speech, General De Gaulle showed his hostility towards a regime such as the one established by the

[1] Carcassonne 2013, p. 17 (as translated by the authors).

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Fourth Republic. Thus, his lack of support for the Fourth Republic in 1958 was not a surprise. A number of Gaullists worked for the return of De Gaulle, notably providing him with the support of the army. By succeeding in presenting himself as the providential man for the French people, his intervention became increasingly essential.

Thus, the Constitution of the Fifth Republic is the result of an 'adjustment of the previous regime'.[2] The current Constitution is characterised by a real *parlementarisme rationalisé*: by disciplining the legislative power, the Government has the necessary means to carry out its mandate.

1.1.2 According to Art. 16 of the French Declaration of the Rights of Man and of the Citizen, 'any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'.[3] Pursuant to this fundamental provision, the Constitution sets up a separation of powers between the legislature, the executive and the judiciary (horizontal separation of powers) on the one hand, and between the state and sub-national entities (vertical separation of powers) on the other. It also guarantees the rights and freedoms of the people, ensuring effective protection as a corollary.[4]

Title 1 of the Constitution deals with sovereignty. Although some provisions relate to organisation of the state, they are not essential. Nevertheless, the constituent power initially wished to avoid repeating the mistakes of previous regimes, and therefore sought to ensure the primacy of the executive over the legislative power by giving specific attention to the rules governing the separation of powers. Originally, the space reserved for the protection of rights and freedoms seemed to be secondary. It was not until a decision of 16 July 1971 delivered by the Constitutional Council that the situation evolved.[5] According to the *Liberté d'association* ruling, the Constitutional Council acknowledges the constitutional value of the Preamble of the Constitution and, in doing so, to the texts that are referenced in this Preamble – the French Declaration of the Rights of Man and of the Citizen, the Preamble of the Constitution of the Fourth Republic and, more recently, the Charter for the Environment. In this way, the control of constitutionality is exercised against the yardstick of the *bloc de constitutionnalité*, i.e. a set of norms at the top of the hierarchy of norms. Thus, as it has been commented, 'the Constitutional Council changes … roles: it is not only the regulator of the activities of the public powers, it especially becomes, according to the usual wording, the guardian of rights and freedoms against the legislative will of a governmental majority'.[6] The constitutional amendment of 23 July 2008 took a step in this direction, and can be

[2] Ibid., p. 19 (as translated by the authors).

[3] As translated on the Constitutional Council's website. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html.

[4] Gicquel 2013, p. 57.

[5] Constitutional Council, 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*, Decision No. 71-44 DC.

[6] Rousseau 2013, p. 36 (as translated by the authors).

considered from that day forward as proof of the prominent place of the protection of rights and freedoms in the French constitutional order. This constitutional amendment introduced an *ex post* control of constitutionality, the so-called priority preliminary reference mechanism on issues of constitutionality, into French constitutional law, allowing individuals to challenge the constitutionality of provisions violating their rights.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 In France, the Treaties establishing the European Communities were ratified by the President of the Republic with the consent of Parliament in accordance with the relevant provisions of the Constitution of the Fourth Republic.[7]

Starting with the Treaty on the EU and the subsequent constitutional amendment of 1992, the French Constitution has been regularly amended with a view to 'authorise the process of European integration and to strengthen the control of the French Parliament over the activities of the European Union'.[8] To date there have been seven constitutional amendments more or less linked with the development of the European construction, the content of which will be explored in greater detail in Sect. 1.2.3. By way of a summary, the amendments are as follows:

- The Constitutional Law of 25 June 1992 related to the Treaty of Maastricht created a new title entitled 'On the European Communities and the European Union', adding Arts. 88-1 to 88-4 to the Constitution;
- The Constitutional Law of 25 November 1993 related to international agreements in the field of asylum concerning the Schengen Agreement created Art. 53-1 of the Constitution;
- The Constitutional Law of 25 January 1999 related to the Treaty of Amsterdam changed some provisions in Arts. 88-2 and 88-4, and added a second paragraph to Art. 88-2 of the Constitution;
- The Constitutional Law of 25 March 2003 related to the European Arrest Warrant further amended Art. 88-2 of the Constitution (see below Sect. 2.3.2);
- The Constitutional Law of 1 March 2005 related to the Treaty establishing a Constitution for Europe created Art. 88-5 and changed Art. 88-1 of the Constitution;
- Finally, the Constitutional Laws of 4 February 2008[9] and 23 July 2008,[10] adopted several months apart, close this list.

[7] Rideau 2010, p. 1224.

[8] Boyron 2013, p. 220.

[9] Constitutional law No. 2008-103 of 4 February 2008 modifying Title XV of the Constitution.

[10] Constitutional law No. 2008-724 of 23 July 2008 to modernise institutions of the Fifth Republic.

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It should be borne in mind that Art. 53-1 of the Constitution, which refers to agreements with European states in the field of asylum, does not concern the EU amendments listed above, contrary to a large number of provisions contained in Title XV.

Title XV, entitled 'On the European Union', currently reads:

> Article 88-1: The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.
>
> Article 88-2: Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.
>
> Article 88-3: Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.
>
> Article 88-4: The government shall lay before the National Assembly and the Senate drafts of or proposals for European Community and European Union acts as soon as they have been transmitted to the council of the European Union.
>
> In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union Institution.
>
> A committee in charge of European affairs shall be set up in each parliamentary assembly.
>
> Article 88-5: Any government bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the president of the republic.
>
> Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the bill according to the procedure provided for in paragraph three of article 89.
>
> [Article 88-5 is not applicable to accessions that result from an Intergovernmental Conference whose meeting was decided by the European Council before July 1, 2004].
>
> Article 88-6: The National Assembly or the Senate may issue a reasoned opinion as to the conformity of a draft proposal for a European Act with the principle of subsidiarity. Said opinion shall be addressed by the President of the House involved to the Presidents of the European Parliament, the Council of the European Union and the European Commission. The Government shall be informed of said opinion.
>
> Each House may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity. Such proceedings shall be referred to the Court of Justice of the European Union by the Government.
>
> For the purpose of the foregoing, resolutions may be passed, even if Parliament is not in session, in the manner set down by the Rules of Procedure of each House for the tabling and discussion thereof.

> Article 88-7: Parliament may, by the passing of a motion in identical terms by the National Assembly and the Senate, oppose any modification of the rules governing the passing of Acts of the European Union in cases provided for under the simplified revision procedure for treaties or under judicial cooperation on civil matters, as set forth in the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on December 13, 2007.[11]

1.2.2 A distinction must be drawn between the normal constitutional amendment procedure provided by Art. 89 of the Constitution, and a procedure, developed on the basis of Art. 11, that is not expressly laid down in the text of the Constitution.

In the light of Art. 89, the right of initiative is shared and belongs to the President of the Republic on a proposal from the Prime Minister (hereinafter Government Draft), as well as to parliamentarians (hereinafter MP Draft). An initiative requires a vote in identical terms by the National Assembly and the Senate, which is followed by an approval stage. A referendum is compulsory in the case of an MP Draft. The situation is different in the case of a Government Draft, where the President of the Republic has a choice. He can decide to adopt a constitutional amendment either by referendum, or he can submit it to Parliament convened in Congress, i.e. a joint session of both Houses. In this latter scenario, the bill is approved if it is supported by a three-fifths majority of the votes cast.

Out of a total of 24 constitutional amendments undertaken since 1958, 22 have been approved pursuant to Art. 89 of the Constitution. It should also be noted that 21 constitutional amendments have been ratified in Congress. The seven constitutional amendments linked with the European construction have been adopted under Art. 89 of the Constitution and approved by Congress.

The controversial use of Art. 11 of the Constitution is noteworthy in this respect. The latter allows the President of the Republic to submit a bill on several matters to a referendum. This procedure provides the President of the Republic with the advantage of circumventing potential parliamentary opposition. Although it was used twice by General De Gaulle in 1962 and 1969, Art. 11 should nonetheless not be considered as an appropriate procedure for amending the Constitution.[12]

1.2.3 By way of background to the EU-related constitutional amendments, the Constitutional Law of 25 January 1999 enabled France to ratify the Treaty of Amsterdam after the Constitutional Council found the Treaty to be unconstitutional. In a decision of 31 December 1997, the Constitutional Council, seized by both the President of the Republic and the Prime Minister, indicated that several provisions of the Treaty of Amsterdam – in particular those providing for the transition from unanimity to qualified majority rule and for the procedure of co-decision for some measures related to asylum, immigration and the crossing of the internal and external borders of the Member States – 'affect the essential conditions for the

[11] As translated on the Constitutional Council's website. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html.

[12] Pierré-Caps 1998, pp. 412–416. For an overview of this controversy, see Fekl 2008, pp. 43–49.

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exercise of national sovereignty' and must therefore be declared unconstitutional.[13]

In order to ratify the Treaty of Amsterdam, the Government Draft allowed for transfers of competence regarding the free movement of persons. The draft was passed by Parliament in identical terms and approved in Congress by 759 parliamentarians, whereas the required majority would have been attained with 522. It is noteworthy that the Government Draft only addressed the issues of unconstitutionality raised by the Constitutional Council. Some members of the National Assembly considered nonetheless that the draft needed to be expanded. A large number of amendments were proposed, including one adopted by a National Assembly Commission and approved by the Senate. This was amendment No. 19, aimed at revising Art. 88-4 of the Constitution to extend the obligations of the Government to inform the parliamentary assemblies.[14] This parliamentary intervention brought to light the role played by Parliament in the constitutional amendment procedure, which cannot be reduced to a mere chamber of registration of the will of the executive power.

The Constitutional Law related to the European Arrest Warrant of 25 March 2003 enabled the transposition of the Framework Decision[15] into French law. In an advisory opinion of 26 September 2002, the Council of State, seized by the President of the Republic (rather than the Constitutional Council, which confers a rather unique aspect on this constitutional amendment) was asked whether the transposition of the Framework Decision might collide with obstacles based on constitutional principles and rules. The Council of State declared this transposition to be in conformity with the constitutional rules, but noted that the Framework Decision did not seem to ensure the principle that the state ought to reserve the right to refuse extradition in respect of political offences.[16] In order to allow for the adoption of the rules on the European Arrest Warrant (EAW), a Government Draft was tabled in Parliament, passed in identical terms and approved in Congress by 826 parliamentarians (the minimum required was 525 votes).

The Constitutional Law of 1 March 2005 aimed at bringing the Constitution in line with the Treaty establishing a Constitution for Europe. By way of background, in a decision of 19 November 2004, the Constitutional Council, seized by the President of the Republic, declared that a constitutional amendment was necessary on the grounds that some provisions hindered the essential conditions for the exercise of national sovereignty and that the new prerogatives granted to Parliament by the Treaty, in respect of subsidiarity and the simplified revision procedure, called

[13] Constitutional Council, 31 December 1997, *Traité d'Amsterdam modifiant le Traité sur l'Union européenne, les Traités instituant les Communautés européennes et certains actes connexes*, Decision No. 97-394 DC.

[14] National Assembly, Report on the constitutional amendment bill modifying Art. 88-2 of the Constitution, No. 1212, 20 November 1998, available at: http://www.assemblee-nationale.fr/11/rapports/r1212.asp.

[15] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[16] Council of State, 26 September 2002, Advisory opinion No. 368-282.

for the intervention of the constituent power to implement them into French law. Based on this decision and with a view to overcoming the unconstitutional provisions identified by the constitutional judge, a Government Draft was tabled in Parliament, passed in identical terms and approved in Congress by 730 parliamentarians (with the required minimum having been 478 votes).

It should, however, be noted that this constitutional amendment 'partially remained in suspension'.[17] Indeed, the Constitutional Law basically consisted of two parts: one establishing the participation of France in the European Union and one creating the duty to hold a referendum for the accession of any new state to the European Union after Croatia. This provision is not a consequence of the decision of the Constitution Council, but purely aims to 'reassure French people about the prospect of a potential accession of Turkey by enabling them to decide ultimately on this accession'.[18] Legal doctrine voiced criticism with regard to this provision.[19] Secondly, the Constitutional Law provided for a new wording of the dispositions contained in Title XV of the Constitution, notably including two articles allowing the Parliament to exercise the new rights recognised by the Treaty. These modifications were conditional on the ratification of the Treaty, which was submitted to a referendum. As the Treaty was rejected, this part did not see the light of day.

The Constitutional Law of 4 July 2008 enabled France to ratify the Treaty of Lisbon. In a decision of 20 December 2007, the Constitutional Council, seized by the President of the Republic, took the same position as reached in its previous decision related to the Treaty establishing a Constitution for Europe. Given that some provisions hindered the essential conditions for the exercise of national sovereignty and new prerogatives granted to Parliament called for the intervention of the constituent power, the constitutional judge declared that the ratification of the Treaty must be preceded by an amendment of the Constitution.[20]

In order to ratify the Treaty of Lisbon, a Government Draft was tabled with amendments of a scope beyond the observations expressed by the Constitutional Council. The draft was passed in identical terms and approved in Congress by 560 parliamentarians, whereas the required majority would have been attained with 445.

Finally, the Constitutional Law of 23 July 2008 aimed at modernising the institutions of the Fifth Republic by improving the control of the executive power, strengthening the powers of Parliament and allocating new rights to citizens. This constitutional amendment was unusual in the sense that it was the only amendment to be adopted spontaneously, without being a consequence of a decision of the Constitutional Council or an advisory opinion of the Council of State.[21] The Constitutional Law was narrowly approved in Congress by 539 parliamentarians

[17] Rideau 2010, p. 1238 (as translated by the authors).

[18] Dero-Bugny 2009, pp. 1957–1958 (as translated by the authors).

[19] Ibid., pp. 1956–1963. See also Carcassonne 2013, p. 386.

[20] Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*, Decision No. 2007-560 DC.

[21] Rideau 2008.

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(the minimum required was 538 votes). The amendment further enhanced the involvement of the Parliament in the EU decision-making process. Indeed, the Government's duty to inform Parliament was extended by deleting the sole reference to provisions of legislative nature. As a consequence, Parliament may scrutinise any future EU act, regardless of its content. Moreover, this constitutional amendment softens the duty to hold a referendum for the accession of any new state to the EU. Henceforth, Parliament may authorise accession according to the procedure applicable for adoption of a Government Draft to amend the Constitution.

1.2.4 Strictly speaking, there are no EU-related amendment proposals that have not materialised in practice. It is however possible to evoke the particular case of the ratification of the Treaty establishing a Constitution for Europe. Most of the approval process in Congress for the Constitutional Law aimed at bringing the French Constitution in line with this Treaty had been completed. However, in order to complete ratification, the President of the Republic decided to submit the Government Bill to a referendum of the French people. On 29 May 2005, 55% of voters responded 'No' to the question: 'Do you approve the bill authorising the ratification of the Treaty establishing a Constitution for Europe?'. Several more and less rational arguments have been offered to explain this failure. For part of the population, the EU is considered as a cause of their deteriorating living conditions and the expression of an economic liberalism they fear. Moreover, the very expression 'European Constitution' has opened a Pandora's Box, spreading fears of a general loss of national sovereignty. There are also external considerations, such as the Turkish accession issue. Despite the introduction of a duty to hold a referendum for any future accession of a state to the EU in the constitutional text, fear of Turkish accession undoubtedly had an impact on the outcome of the referendum.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1–1.3.4 It seems appropriate to us to give a single response to the questions in this sub-section.

With a view to European integration, the French Constitution has been significantly adjusted in order to allow transfers of competences to the European Communities and the European Union. In this regard, Art. 88-1 is now viewed as the 'basis for participation in the European Union and transfers of competences'.[22] The consent for these transfers is considered to be at a basic level, beyond which all new transfers of competences that are not covered by this provision call for a constitutional amendment. The role of the Constitutional Council appears essential. Based on the relevant case law of the constitutional judge, its position can be outlined as follows. First of all, the relevant case law is cited to recall the

[22] Ibid. (as translated by the authors).

constitutional provisions related to the principle of national sovereignty. The constitutional judge then typically sets out the ability of France to consent to limitations of sovereignty.[23] In other words, such a limitation exists, particularly in the light of the participation of France in the European Union, as integrated into the French Constitution through its now omnipresent Art. 88-1. In its case law prior to 1992, the constitutional judge used to draw a distinction between *limitations* of sovereignty which were allowed, and *transfers* of sovereignty which were not. In a decision of 9 April 1992 on the Treaty of Maastricht, as well as in subsequent decisions, the constitutional judge abandoned this rather theoretical distinction.[24]

However, this is far from giving blanket approval to any transfers of competences. The Constitutional Council holds that respect for national sovereignty does not preclude France from consenting to transfers of competences, with the requirement that there be no contradictory constitutional provisions and so long as such transfers do not constitute a breach of the 'essential conditions of the exercise of national sovereignty'.[25] To test this, the constitutional judge looks at the matter under review, the extent of the transfer as well as the safeguards protecting the exercise of sovereignty. Put in another way, as Boyron has clearly stated,

> the test of 'the essential conditions of the exercise of national sovereignty' has therefore two aspects: a substantive one – whether the subject matter of the transfer compromises national sovereignty – and an institutional one – whether the institutional design still guarantees the exercise of sovereignty. This two-stage reasoning helps the Council identify the concrete implications of transfers or limitations of competences and avoid vague theoretical pronouncements.[26]

The primacy of EU law over national law has to be considered from two different points of view. On the primacy of EU law over French law, there is indeed no longer any debate.[27] The relationship between EU law and the Constitution is, however, to be defined in a different way. In this context, both the Council of State[28] and the Court of Cassation – especially in its *Fraisse* ruling[29] – have rejected the primacy of international norms, including EU law, over the Constitution. However, the way in which the *Fraisse* ruling is commonly understood may be nuanced. While the Court of Cassation explicitly rejected the primacy of international commitments in general over the Constitution, the Court of Cassation only concluded that the right relied on by the applicant did not fall within

[23] Paragraph 15 of the Preamble of the 1946 Constitution states that '[s]ubject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace'.

[24] Boyron 2013, p. 220.

[25] Rideau 2010, p. 1230.

[26] Boyron 2013, p. 222.

[27] Court of Cassation, 24 May 1975, *Société des cafés Jacques Vabre*, No. 73-13556; Council of State, 20 October 1989, *Nicolo*, No. 108243.

[28] Council of State, 30 October 1998, *Sarran et Levacher*, No. 200286, 200287.

[29] Court of Cassation, 2 June 2000, *Fraisse*, No. 99-60274.

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the scope of Community law. It is not clear how the Court of Cassation would have reacted if the alleged right had fallen within this scope.[30]

For the constitutional judge, the French Constitution is the supreme norm in the domestic legal order, which is clear from the decision of the Constitutional Council on the Treaty establishing a Constitution for Europe.[31]

The case law of the Constitutional Council in relation to the transposition of EU directives is important in this regard. In a 2004 decision, the Constitutional Council considered that the transposition of directives into internal law results from a constitutional requirement, but added that a conflict with an 'express clause of the Constitution' can constitute an obstacle.[32] Two years later,[33] the Constitutional Council rephrased this reservation in response to criticism of the previous wording.[34] Thus it held that transposition results from a constitutional requirement unless it is in contradiction with 'a rule or a principle inherent to the constitutional identity of France, except when the constituent power consents thereto'. The Council of State shares this view.[35] The scope of the constitutional identity is not easy to define. Most legal scholars mention the principle of religious neutrality (the famous French *laïcité*), without further clarification. The above development in the case law can be considered as a reaffirmation of the primacy of the French Constitution over EU law for two reasons. First, the duty to transpose directives, and thus the primacy of EU law over national law, is based on Art. 88-1 of the French Constitution. The place of the Constitution at the top of the Kelsenian pyramid of norms is not called into question. Secondly, the reservation as formulated by the constitutional judge provides the constitutional judge with the possibility to set aside the primacy of EU law, and in so doing to stress the 'kingdom of the Constitution'.[36]

Finally, the *IVG* case law of the Constitutional Council should be mentioned.[37] Since this decision, the constitutional judge has held that assessing the compatibility of Union law with French law is not a matter of constitutional control, and has left this control to the ordinary courts. However, this does not mean that the judge sits

[30] Roux 2010, p. 265.

[31] Constitutional Council, 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Decision No. 2004-505 DC. See also, for example, Constitutional Council, 20 December 2007, *Traité modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne*, Decision No. 2007-560 DC; Constitutional Council, 3 December 2009, *Loi organique relative à l'application de l'article 61-1 de la Constitution*, Decision No. 2009-595 DC.

[32] Constitutional Council, 10 June 2004, *Loi pour la confiance dans l'économie numérique*, Decision No. 2004-496 DC.

[33] Constitutional Council, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Decision No. 2006-540 DC.

[34] Burgorgue-Larsen 2011, p. 216.

[35] Council of State, 22 February 2007, *Société Arcelor Atlantique et Lorraine*, No. 287110.

[36] Camby 2004, p. 888 (as translated by the authors).

[37] Constitutional Council, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse*, Decision No. 74-54 DC.

in an ivory tower, totally impermeable to EU law. In this regard, the so-called *Melki* saga is evidence of a conciliatory attitude towards EU law. Indeed, after the Court of Cassation requested a preliminary ruling but before the Court of Justice of the European Union (CJEU) responded as to whether the French priority preliminary ruling procedure on the issue of constitutionality violates EU law, the constitutional judge attempted to give an interpretation of this new French mechanism that would not conflict with EU law principles, and was successful.[38]

1.4 Democratic Control

1.4.1 The power of Parliament relating to the EU decision-making process has increased following a number of constitutional modifications enshrined in Arts. 88-4 to 88-7 of the Constitution.

On the one hand, the Government has a duty to inform Parliament, which has steadily increased. Indeed, the Government must lay before the National Assembly and the Senate EU drafts or proposals for acts, whether or not they are legislative acts,[39] on which these Assemblies may adopt a so-called European resolution. Although Parliament is ever more involved in the EU decision-making process, the normative value of such resolutions remains weak. Thus, as Professor Carcassonne has pointed out, 'even though their content clearly indicates to the executive power the position of one Assembly on the subject …, they have no legal effects, and are not in the nature of a mandatory instruction sent to the Government'.[40]

On the other hand, two other provisions introduce new rights for the parliamentary assemblies. First, Parliament checks respect of the subsidiarity principle. For this purpose, the French Parliament can pursue a direct dialogue with the European Parliament, the Council of the European Union and the European Commission by issuing a reasoned opinion as to the conformity of the relevant proposal for a European act with the subsidiarity principle. Moreover, if a European act breaches the subsidiarity principle – or is suspected of doing so – the French Parliament can bring an action before the ECJ.[41]

Finally, under Art. 88-7 of the Constitution, Parliament is granted the possibility to oppose the modification of rules governing the passing of certain EU acts by reference to the simplified procedure or to judicial cooperation in civil matters, by means of adopting a motion voted by both Assemblies in identical terms.

The role that could be played by Parliament in any future accession of a state to the EU should also be underlined. In order to short-circuit the duty to hold a

[38] Constitutional Council, 12 May 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*, Decision No. 2010-605 DC.

[39] Jacqué 2014, p. 231.

[40] Carcassonne 2013, p. 384 (as translated by the authors).

[41] Ibid., p. 289.

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referendum, the constitutional amendment of 23 July 2008 provides that Parliament may issue authorisation for any accession by passing a motion adopted in identical terms by a three-fifths majority.

1.4.2 Since the adoption of the Constitution of 4 October 1958, nine referendums have been held. Three of them have stood out due to their European subject matter.

The first such referendum was held on 23 April 1972, in order to authorise the accession of Denmark, Ireland and the United Kingdom to the European Communities. The explanation for the choice to submit these accessions to popular approval may be found in the conflicting relationships reigning between France and the United Kingdom at that time, after the first accession attempt had been refused by General De Gaulle in 1961. French voters were asked whether they approved of Denmark, Ireland and the United Kingdom joining the EEC. The wishes of President Georges Pompidou in favour of massive support were apparently heard, as the accession of these states was approved by some 60% of the votes. It should be mentioned that the use of Art. 11 of the Constitution in this context was contested in French legal doctrine according to which this accession did not alter the functioning of French institutions.[42]

In 1992, France was one of the few Member States that chose a referendum in order to ratify the Treaty of Maastricht. On 20 September 1992, the Treaty was narrowly approved with 51% of the votes. A lack of consensus within the French political class may explain the nearly tied result. The boundaries were clearly set between those who considered the ratification to be necessary for a step further in the integration process, and those who understood ratification as a step towards a loss of national sovereignty and galloping economic liberalisation.

In 2005, France was again one of the few Member States to require a referendum for ratification of the Treaty establishing a Constitution for Europe. A favourable consensus seemed to reign this time within the political class, apart from some deviant voices coming from traditional parties and the classic hostility coming from the radical left and right. Although a positive result had been expected, the No side collected some 55% of the votes at the referendum organised on 29 May 2005. The reasons for this failure have already been identified. Some were recurrent, such as a loss of national sovereignty and barefaced economic liberalism.

To predict whether future referendums will be organised is a bit like staring into a crystal ball. It should, however, be stressed that in principle any new accession of a state to the EU is to be approved by a referendum, as already explained above. While this requirement has been moderated by the constitutional amendment of 23 July 2008, it remains entirely possible.

[42] Dero-Bugny 2009, p. 1957.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 Most of the constitutional amendments related to the EU in France have been the consequence of judicial decisions. Professor Rideau has summed up the situation as follows: 'A total of five constitutional amendments out of seven are due to decisions of the Constitutional Council, one was considered as necessary following an advice of the Council of State, only the last one [the constitutional amendment of 23 July 2008] was adopted spontaneously'.[43] Traditionally, if a competent judicial body identifies inconsistencies between the French Constitution and an EU Treaty, the constituent power puts an end to this conflict by proceeding with a constitutional amendment.

Such a technique is only effective with a flexible Constitution. It is thus necessary to highlight the link between the frequency of constitutional amendments in this context and the ease with which the Constitution can be amended.

It is difficult to assert that the opinion of legal scholars has been taken into account. It is however possible to mention a plausible exception. The constitutional amendment of 25 March 2005 introduced the duty to hold a referendum on any further accessions of a state to the EU into the constitutional marble. This provision, which provides a good example of the 'inclusion of politics into the legal field',[44] incited the wrath of a significant proportion of legal scholars, as emphasised above. The constitutional amendment of 23 July 2008 came to soften this duty by providing for parliamentary authorisation under certain conditions. In this respect, it is not unreasonable to think that the legal doctrine may have had an impact on this adjustment.

1.5.2 Not applicable.

1.5.3 It is imperative that constitutional norms gradually adjust to the progress of the European construction, while nevertheless ensuring that Parliament does not see its role reduced to a minimum. Overall, we find that the French Constitution responds to these goals satisfactorily.

In France, the constitutional amendments in relation to the growing impact of EU law can be understood by the role played by the Constitutional Council. Indeed, when the constitutional judge finds an incompatibility between an EU Treaty and the French Constitution, the constituent power is expected to correct it. It is in this way that all European treaties negotiated since the Treaty of Maastricht have required an amendment of the Constitution, with the exception of the Treaty of Nice.

In this context it may be worth mentioning that there has been a long-standing proposal to introduce a 'general Europe clause' in the Constitution. Such a provision would be consistent with the previous observation. Professor Carcassonne has set out the problem in the following terms: as 'France has clearly made its choice

[43] Rideau 2008.

[44] Dero-Bugny 2009, p. 1956 (as translated by the authors).

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[to participate in the EU], would it not be better to put this in the Constitution once and for all?'.[45] However, as Professor Carcassonne has also pointed out, the psychodrama of the failure of the ratification of the Treaty establishing a Constitution for Europe has disturbed the apparent quietude around the EU. To this day the proposal continues to be part of a long-running story. We fully share the opinion of Professor Carcassonne that 'when the situation is stabilised, there will still be time to … introduce the "general Europe clause". Until then, Europe merits some hesitation in Versailles or some referendums, even if they are not successful.'[46]

Another proposal, which will be further explained in Part 3 (Sect. 3.1.4), may also be worthy of mention here. It relates to the introduction of a *pro homine* clause in the Constitution, which aims to guarantee an extensive protection of human rights to every individual.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Preamble of the French Constitution contains a direct reference to the protection of fundamental rights by proclaiming recognition of the rights enumerated by the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble of the 1946 Constitution and the 2004 Charter for the Environment. Even though they are not formally incorporated in the Constitution, these rights have a constitutional rank. Indeed, the Constitutional Council declared in its 1971 *Liberté d'association* decision that it conceived itself as the guardian of fundamental rights,[47] and thus deployed the full potential of the reference contained in the Preamble. These guarantees are developed by a case law that has manifestly been inspired by the judgments of the European Court of Human Rights (ECtHR).

Protection is not limited to the rights contained in the aforementioned instruments, since the Constitutional Council also declared that it would protect the *principes fondamentaux reconnus par les lois de la République* (fundamental principles recognised by the laws of the Republic), which receive constitutional rank by virtue of the recognition of their particular importance by the judge. Other general principles, such as proportionality, are elements of the judicial review performed by the constitutional judges. As the French Republic has opted for a concentrated constitutionality control, it is the Constitutional Council that enforces these rights. Since the 2008 revision of the Constitution, this type of control is

[45] Carcassonne 2013, pp. 377–378 (as translated by the authors).

[46] Ibid., p. 378 (as translated by the authors).

[47] Constitutional Council, 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*, Decision No. 71-44 DC.

triggered either before the entry into force of a legislative act, if 60 members of the Senate or the Parliamentary Assembly or the President of the Republic seize the Council, or *a posteriori*, if a citizen invokes the violation of his rights as guaranteed by the Constitution during judicial proceedings.

Furthermore, the Council of State can invalidate governmental and administrative acts if they violate constitutional rights without having any legislative basis. If such acts do have a legislative basis, a violation of fundamental rights can only be neutralised either by interpreting the act in conformity with the Constitution or a general principle of law, or with reference to violation of similar rights protected by a treaty. The Court of Cassation enforces constitutional rights as well as general principles of law in civil and criminal trials. General principles of law (which are to be distinguished from the category of 'fundamental principles recognised by the laws of the Republic') can be invoked against governmental or administrative acts, but not against statutory laws.

2.1.2 The relevant constitutional instruments expressly provide for some restrictions that can be imposed on rights, for example Art. 1 guaranteeing the principle of liberty and equality. However, absolute rights such as the right to life or the right not to be subjected to torture or inhumane or degrading treatment cannot be subject to exceptions.

A general principle can be derived from Art. 4 of the Declaration of the Rights of Man and of the Citizen, which provides that 'the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.'[48]

In practice, however, the Constitutional Council as well as the administrative, civil and criminal jurisdictions apply a relatively classical test to verify the adequate, necessary and proportionate character of a restriction, similar to the analysis conducted by the CJEU.

2.1.3 The French concept of *État de droit* is comparable to the rule of law.[49] It is firmly grounded in Art. 16 of the Declaration of the Rights of Man and of the Citizen, which provides that 'any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'.

Since the Declaration of the Rights of Man and of the Citizen, dating from 1789, was incomplete, its Art. 16 became the basis for important evolutions. This was particularly true for the right to a fair trial and the procedural safeguards deriving from it, which the Constitutional Council found to be implicitly guaranteed by Art.

[48] As translated on the Constitutional Council's website. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html.

[49] For a comparative analysis, cf. Heuschling 2002.

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16.[50] This firmly established case law confirms the strong link between the concept of *État de droit* and the notion of *justiciabilité* or access to courts.

Laws come into force on the condition of their prior publication. Article 34 of the Constitution determines the matters that can only be regulated by statute, including the imposition of obligations, administrative charges or penalties and criminal punishments. While matters that are not included in the list set out in Art. 34 fall, according to Art. 37 of the Constitution, into the domain of regulations, the Constitutional Council sanctions cases of *incompétence négative*, that is, the failure of the legislative power to fully respect its competence as determined by Art. 34 by failing to provide sufficient guarantees to ensure the respect of individual rights.

The granting of constitutional rank to legal certainty has evolved implicitly through case law, as the Constitutional Council has progressively recognised derivatives of the principle of legal certainty: it has consecrated the principle of clarity and intelligibility of statutes,[51] promoted codification as a tool for the rationalisation of legislation and censured non-normative provisions.[52] Although the principle of non-retroactivity is a constitutional principle, there have been some problems in fully guaranteeing its effectiveness, especially concerning tax law. While the Constitutional Council does allow some limitations of the principle of non-retroactivity, a sufficient general interest is required to validate a retroactive provision. Furthermore, the French legislative power has sometimes tried to discard case law that it does not agree with by passing so-called validation laws, basically stating that an interpretation given by a judge has been erroneous. The Constitutional Council has accepted these laws on six conditions: (i) respect of the principle of separation of powers and *res judicata*; (ii) respect of the right to an effective remedy; (iii) respect of the principle of non-retroactivity of criminal sanctions; (iv) existence of a sufficient general interest or a constitutional obligation; (v) the validation law cannot be based on an unconstitutional law; and, finally (vi) rigorous definition of its scope.[53] Since the *Zielinski* case before the ECtHR sanctioned this French practice,[54] the Constitutional Council has applied a stricter control oriented towards legal certainty and the guarantee of fundamental rights.[55]

[50] Constitutional Council, 20 January 2005, *Loi relative aux compétences du tribunal d'instance, de la juridiction de proximité et du tribunal de grande instance*, Decision No. 2004-510 DC.

[51] Constitutional Council, 12 January 2002, *Loi de modernisation sociale*, Decision No. 2001-455 DC.

[52] Constitutional Council, 29 July 2004, *Loi organique relative à l'autonomie financière des collectivités territoriales*, Decision No. 2004-500 DC.

[53] Cf., *inter alia*, Constitutional Council, 21 December 1999, *Loi de financement de la sécurité sociale pour 2000*, Decision No. 99-422 DC.

[54] *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.

[55] Valembois 2005.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 We have not found any relevant national case law on this issue. No preliminary ruling dealing with the balancing of fundamental rights with economic free movement rights has been sent to the ECJ by French courts. Nevertheless, it is entirely possible that this will happen in the near future.

Having said that, there is no doubt that such a balancing has raised constitutional issues. Over the years, the Court of Justice has faced several doctrinal criticisms that its rulings give prominence to economic aspects, which needless to say are inherent in the European construction, over fundamental rights. These assertions may not necessarily result from a permanent fanatical dogma of the CJEU, but rather from a case by case analysis. The reasoning of the CJEU, developed in *Schmidberger*,[56] is eloquent in this respect. In this case, the Court of Justice stated that the rights in question, the free movement of goods on the one hand and the right to demonstrate on the other hand, allow restrictions where these are justified. Thus, it has been noted that 'as the rights at stake were derogable, the Court of Justice considered this as an opportunity to use the balance of interests technique and to check the respect of an appropriate balance between them' in order to know if 'an overriding requirement of protection of fundamental rights [is able to] justify restrictions imposed on the exercise of a fundamental freedom guaranteed by the Treaty'.[57] Such was the case here, which leads us to believe that the Court of Justice would listen to demands for an effective consideration of fundamental rights when faced with requirements resulting from the enjoyment of basic freedoms. However, another commentator has added certain nuances to this, since 'it is reasonable to think that if the demonstration had been banned by the Austrian authorities on grounds of the respect of the principle of free movement of goods, the Court of Justice would have been sensitive to assessments made by the national authorities'.[58] More broadly, and as Professor Marguénaud has clearly stated, it is up to the Court of Justice to establish, in the light of the special circumstances of each case, the right balance between the interests in issue.[59]

[56] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[57] Rigaux and Simon 2003, p. 16 (as translated by the authors).

[58] Belorgey and al. 2003, pp. 2150–2151 (as translated by the authors).

[59] Marguénaud 2003, pp. 773–774.

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2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 There has been no substantial debate in France concerning the presumption of innocence and the European Arrest Warrant. The departure from the classical extradition procedure certainly implies a departure from a political to a judicial reasoning based on the principle of mutual trust, and thus to an increased tendency to accept arrest warrants. However, as we will explain in the next section, the Court of Cassation has also provided for the possibility to refuse to abide by an arrest warrant if there is a threat to the individual's rights.

2.3.1.2 In general, according to the principle of mutual recognition enshrined in the EAW Framework Decision, judicial review is minimal.[60] However, the Court of Cassation decided to provide for an additional guarantee when it declared that arrest warrants would be refused if the fundamental rights of the individual or the fundamental principles of Art. 6 TEU were violated.[61]

It should be noted, however, that the arguments of the applicant would have to be substantial, since simple allegations would be rejected. Furthermore, a judge's grounds for refusing the execution of an EAW could be strictly controlled by the Court of Cassation and should therefore be well developed. This can be illustrated by the case law of the criminal chamber, which censured the decision of an appellate court that had refused to surrender an individual prosecuted by Belgium unless its authorities guaranteed that he would be offered psychiatric care, a condition that is not included in the Framework Decision.[62]

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 French judicial authorities as well as legal commentary have been particularly sensitive to the risk of a politicisation of certain types of offences. Indeed, a specific provision regarding the EAW had to be included in Art. 88-2 of the Constitution, worded as follows: 'Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions of the European Union.'[63] This is due to the fact that one of the 'fundamental principles recognised

[60] Chavent-Leclere 2010, p. 33.

[61] Thellier de Poncheville 2013 p. 292.

[62] Court of Cassation, criminal chamber, 28 February 2012 – AJ pénal 2012. 425.

[63] As translated on the Constitutional Council's website. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleXV.

by the laws of the Republic' prohibits extradition on political grounds, a condition that is not included in the EAW Framework Decision, which has therefore been criticised by the Council of State.[64] Thus, there is indeed a risk that individuals prosecuted on political grounds will be extradited, which should be carefully monitored. To fully guarantee the respect of mutual recognition while at the same time substantially relying on this principle, the offences should be determined more precisely to ensure a uniform approach to the European arrest warrant.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 After the finding of a breach of Arts. 6(1) and 6(3)c) of the European Convention on Human Rights (ECHR) by the European Court of Human Rights in the *Krombach* case,[65] France replaced its legislation on *in absentia* judgments with a more suitable procedure in the Perben II law of 9 March 2004.

Concerning the execution of a European Arrest Warrant by French authorities in the case of an *in absentia* judgment, recent case law stresses the vigilance of the Court of Cassation. Indeed, in one case an individual had been condemned in Florence to seven years in prison for a drug-related offence.[66] The accused had not been present at the trial because he had not been properly notified of the date and place of the hearing. The Italian authorities issued an EAW for the execution of the sanction, and assured that Italian criminal procedure would allow for the applicant to request a new trial. Although the applicant asserted that the possibility of a retrial was uncertain, the Court of Cassation confirmed the decision of the appellate court to execute the arrest warrant. Thus, the arguments of the applicant were examined seriously and the principle of mutual recognition came into play only after the Italian authorities had provided additional information.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 In France, individuals subject to an EAW can benefit from a state-appointed lawyer to challenge the warrant in court. We suggest that legal aid should be available in the state that receives the arrest warrant as well as the state to which the person risks being extradited.

2.3.4.2 To date we have not been able to gather sufficient statistical data on extraditions.

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[64] Council of State, 26 September 2002, advisory opinion No. 368-282.

[65] *Krombach v. France*, no. 29731/96, ECHR 2001-II.

[66] Court of Cassation, criminal chamber, 15 October 2013 – AJ pénal 2014. 193.

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2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 There have been no similar constitutional issues regarding the principle of mutual recognition.

2.3.5.2 There has been no thorough debate about a generalisation of the *Cassis de Dijon* principle of mutual recognition to criminal law and civil and commercial disputes. However, as the European Arrest Warrant as well as the mechanism of the Dublin Convention show, the principle of mutual recognition is at the centre of the new areas of EU law. This expansion, although a necessary step for further collaboration, cannot exclusively be met with enthusiasm. Indeed, NGO reports on matters such as the incarceration of asylum seekers and the state of detention facilities in other Member States clearly show that focusing exclusively on mutual recognition is not an adequate response to every scenario. Thus, before the principle of mutual recognition can be generalised, there would first need to be a thorough evaluation of the prevailing standards in all Members States, as well as regular screenings and an alert mechanism in case of a degradation of the relevant standards regarding criminal law and civil and commercial disputes. Member States should also have the right to refuse to respect or to suspend the principle of mutual recognition where there are sufficient grounds to do so (for example on the basis of NGO reports or case law regarding prevailing conditions in prisons or juridical proceedings).

2.3.5.3 In our opinion, the principle of mutual recognition certainly risks transforming the role of the judge into a more passive one. However, this transformation is not inevitable and should in any case not be easily accepted by the judges themselves. Continuous attention to NGO reports, requests for additional information by local authorities as well as the definition of general standards regarding the effective respect of human rights in the other Member States should ensure that loyal cooperation does not trump the protection of fundamental rights.

2.3.5.4 Although there have been no specific discussions about reintroducing national judicial review, the ability to refuse to surrender an individual on the grounds of a possible human rights violation should be included in the concept of the right to a fair trial.

2.3.6 Constitutional Rights Regarding Other Aspects of EU Criminal Law

One particularly important case regarding the right to an effective remedy has been widely discussed in France.[67] Jeremy F., a teacher who was criminally charged for

[67] See also Burgorgue-Larsen and Bruck 2014.

child abduction after leaving the UK with an underage student, was the subject of a European arrest warrant addressed to the French authorities. Furthermore, the British authorities sought consent to surrender also with regard to new criminal proceedings for acts of sexual activity with a child under the age of 16. Although Arts. 27 and 28 of the EAW Framework Decision provide for a maximum period of 30 days to reply to an EAW, there were no precise rules as to the possibility of a suspensive appeal. Pursuant to Art. 88-2 of the Constitution, the Constitutional Council held that it had to determine whether the Framework Decision precluded national authorities from providing for such an appeal before addressing constitutional issues. The Grand Chamber of the CJEU[68] heard the case under the urgent preliminary ruling procedure and held that the wording of the Framework Decision did not preclude Member States from providing for a right to appeal. However, it also stated that 'to ensure the consistent application and interpretation of the Framework Decision, any appeal with suspensive effect provided for by the national legislation of a Member State … must, in any event, comply with the time-limits laid down in Art. 17 of the Framework Decision for making a final decision.'[69] Thus, the judgment of the CJEU hinted at practical difficulties that the Constitutional Council failed to address in its request for a preliminary ruling. The Constitutional Council concluded that the absence of any right of appeal in the given context was unconstitutional.[70]

The case was immediately praised as an example for judicial dialogue. As a first gesture of judicial cooperation, this approach of the Constitutional Council must indeed be welcomed, as opposed to its usual refusal to go beyond a defensive attitude insisting on respect of the French constitutional identity.

However, one cannot but notice the limited consequences of the Constitutional Council's request for a preliminary ruling for the evolution of judicial dialogue as well as for substantive EU law fostering human rights guarantees. First, the President of the Constitutional Council insisted on the very specific basis of the decision, i.e. Art. 88-2 of the French Constitution.[71] In no way does the approach in *Jeremy F.* guarantee a more proactive use of Art. 267 TFEU in any other context than the EAW.[72] Furthermore, the CJEU only accepted the request for the urgent procedure in light of the personal situation of Jeremy F.,[73] not because of the delays imposed on the Constitutional Council. Finally, although the brief period imposed on judicial authorities to take a decision makes it virtually impossible to provide for an appeal, the Constitutional Council purposely refused to question the validity of this EU provision. This restraint can be explained by the fact that the Constitutional

[68] Case C-168/13 PPU *F.* [2013] ECLI:EU:C:2013:358.

[69] Ibid., para. 74.

[70] Constitutional Council, 14 June 2013, *Jérémy F.*, Decision No. 2013-314 QPC.

[71] Debré 2013, p. 5.

[72] Except perhaps for cases relating to the Constitutional Council's aforementioned competence as an electoral judge.

[73] Case C-168/13 PPU *F.* supra n. 68, paras. 29–32.

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Council does not consider itself as a judge concerned by Art. 267 TFEU.[74] It takes more than just one preliminary reference to participate in a constructive dialogue.

2.4 The EU Data Retention Directive

2.4.1 In France, the constitutionality of Directive 2006/24[75] has not been challenged before the Constitutional Council. The Directive had to be implemented into national law by no later than 15 September 2007; for certain aspects the transposition deadline was extended until 15 March 2009. For once, France did not take long to transpose the directive. It has been noted that 'the reason is that France still has a national legislative package dealing with data retention; the publication of the decree of 24 March 2006 is to be seen as a continued development'.[76] Thus, in France, Directive 2004/26 was transposed by decree. For this reason an action against the decree – a *recours pour excès de pouvoir* – was brought before the Council of State. In its ruling, delivered under the ambit of the Directive amongst other rules, the Council of State rejected the claims. The applicants notably relied on the principle of *nullum crimen, nulla poena sine lege*, and on a disproportionate interference with the right to privacy. As regards the first ground, the Council of State stated that

> the duty to keep traffic data is based on precise rules, which deliberately exclude the retention of information on the content of communications exchanged; the decree distinguishes in a sufficiently clear and precise manner the categories of data which have to be stored, and those which have to be erased or made anonymous.

As regards the second ground, the Council of State stated that 'the challenged decree does not affect the right to privacy in a manner that is disproportionate to the public security objectives pursued and does not consequently infringe the provisions of Art. 8 of the European Convention on Human Rights'.[77]

It is difficult to clearly know what the position of the Constitutional Council would have been in a purely domestic context without the constraints of the EU legal order. It should be noted that in a domestic context, such national measure would be in the form of a statute, which would likely be challenged before the constitutional judge, who would check its conformity with the Constitution. A decision of the Constitutional Council of 22 March 2012 may hint at a likely

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[74] Debré 2013, p. 5.

[75] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[76] Lorrain and Mathias 2006, p. 36 (as translated by the authors).

[77] Council of State, 7 August 2007, *Association des fournisseurs d'accès et de services internet*, No. 293774 (as translated by the authors).

solution. In this particular case, the constitutional judge was asked to check the constitutionality of the Identity Protection Act. Two provisions were challenged from the viewpoint of the right to respect for private life. Under the first provision, the Act provided for the establishment of a database containing personal data in order to facilitate the collection and conservation of data required for the issuing of French passports and national identity cards. The second challenge provision of the Act enabled officers from the national police departments to gain access to the database for the purpose of preventing or punishing several offences, such as acts of terrorism. The reasoning followed by the Constitutional Council is interesting to the extent that it echoes the reasoning used by the Court of Justice in its *Digital Rights Ireland and Seitlinger* ruling.[78] In the view of the Constitutional Council, 'the collection, registration, conservation, consultation and communication of personal data must be justified on grounds of general interest and implemented in an adequate manner, proportionate to this objective'. Having said that, the constitutional judge stated that the establishment of a database containing personal data pursues a general interest, since it notably improves the efficiency of the fight against fraud. However, 'having regard to the nature of the data registered, the scope of this processing, its technical characteristics and the conditions under which it may be consulted, the provisions [under review] violate the right to respect for privacy in a manner which cannot be regarded as proportionate to the goal pursued'.[79] As a consequence, these provisions were ruled unconstitutional.

If we go back to the premise of a specific national measure dealing with the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the right to respect for private life, the right to freedom of expression and possibly the right to presumption of innocence could be raised by applicants. The constitutional judge could effectively protect these constitutional requirements.

However, we cannot fully guarantee that the approach adopted by the constitutional judge would be followed as such in this hypothetical case. Indeed, some decisions of the Constitutional Council are open to criticism with regard to the protection of human rights and freedoms. In this respect, the police custody saga serves as an example. Indeed, the constitutional judge declared some important challenged provisions to be unconstitutional, yet simultaneously stated that its finding of unconstitutionality would only take effect one year later.[80] This had not been the position adopted by the Court of Cassation.[81] Thus it can be said that the Constitutional Council, unlike some of its European counterparts, frequently exercises excessive judicial restraint.

[78] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger* [2014] ECLI:EU:C:2014:238.

[79] Constitutional Council, 22 March 2012, *Loi relative à la protection de l'identité*, Decision No. 2012-652 DC.

[80] Constitutional Council, 30 July 2010, *M. Daniel W*, Decision No. 2010-14/22 QPC.

[81] Court of Cassation, 15 April 2011, No. 10-30316; 10-30242; 10-17049.

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In any case, it is not unreasonable to think that if the French constitutional judge were to check the constitutionality of such a national measure, the judge would without much difficulty conclude that a legitimate general interest exists, but that some provisions cannot be regarded as proportionate to the goal pursued. It would remain to be seen whether this finding of unconstitutionality would take effect immediately or at a later time.

Finally, there are grounds to question whether all French legislation respects EU law, since the Directive has been declared invalid by the CJEU. In a communication, the French Data Protection Authority (CNIL) stated that 'competent authorities have to examine in full detail the impact of the ruling of the CJEU on national law'.[82] In any event, the French legislation is fragile, for example because it provides for a blanket rule on the retention of data.

2.5 *Unpublished or Secret Legislation*

2.5.1 It is worth noting that the CJEU ruling on *Heinrich* did not lead to controversial discussions within French legal doctrine.[83] This may be explained by the fact that the solution proposed by the Court of Justice in this case is not that different from the French practice on this matter. As Dupont-Lassalle has stated, 'the failure to publish an act makes it unenforceable. This is the traditional approach in the case law of the French Council of State'.[84] The Council of State, in a decision delivered on 24 February 1999, confirmed this analysis:

> In the absence of a decision by the government which prescribes the immediate application of the order, the publication of the act in the Official Journal of 30 November 1996 could not have brought about its entry into force by 30 November 1996 at noon. However, the measures envisaged by this order had also been made public on 29 November 1996 by a *communiqué*. In the circumstances in question, both in view of the urgent nature of the measures and of their subject, this type of publication made them immediately enforceable.[85]

More broadly, as Bobek has stated, in France 'the publication of legislation is a condition for its enforceability, but not for its validity'. According to Bobek,

> [t]he condition for the validity of an act is its promulgation by the President of the Republic, not its publication. The publication is just a necessary condition for the latter imposition of an obligation on the individual on the basis of the act (*opposabilité*). Even if not published

[82] CNIL, 'La directive 2006/24/CE contraire aux articles 7 et 8 de la Charte des droits fondamentaux de l'Union européenne', 18 avril 2014, available at: http://www.cnil.fr/nc/linstitution/actualite/article/article/la-directive-200624ce-contraire-aux-articles-7-et-8-de-la-charte-des-droits-fondamentaux-de-lun/ (as translated by the authors).

[83] Case C-345/06 *Heinrich* [2009] ECR I-01659.

[84] Lassalle 2009, p. 11 (as translated by the authors).

[85] Council of State, 24 February 1999, *Alain X*, No. 188154 (as translated by the authors).

in the *Journal Officiel*, the act is valid by virtue of its promulgation. It is binding upon the public administration and administrative acts adopted on its basis are lawful, although they cannot be enforced against an individual (*ne sont pas opposables*).[86]

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 We have not found any relevant case law with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality in France in relation to EU measures.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.2 In France, the ratification of the Treaty establishing the European Stability Mechanism (ESM Treaty) has been less controversial than in other states. A bill was presented to the National Assembly on 8 February 2012 by the Government, which had opted for an accelerated procedure. The bill stresses that 'this Treaty does not affect the essential conditions for the exercise of national sovereignty: it does not lead to transfer of competences and does not limit the sovereignty of Member States'.[87] The discussion held before the parliamentary bodies, particularly before the National Assembly, has been rightly qualified as 'heated'.[88] Members of Parliament (MPs) mainly debated the necessity of the Treaty, as opposed to the financial implications at stake, which were largely ignored. A handful of MPs of the extreme left expressed their concerns to the National Assembly about an unacceptable questioning of national sovereignty and a democratic regression,[89] without this being discussed further. A motion to reject the Treaty was refused by a large majority. Ultimately, an overwhelming majority passed the bill both in the National Assembly and the Senate.

Some developments regarding the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union can be mentioned insofar as this Treaty was brought in front of the Constitutional Council

[86] Bobek 2009, pp. 2081–2082.

[87] Draft law authorising ratification of the Treaty establishing the European Stability Mechanism, No. 4336, available at: http://www.assemblee-nationale.fr/13/projets/pl4336.asp.

[88] Demunck 2012 (as translated by the authors).

[89] To that effect, see the statements of both Mr. Brard and Mr. Lecoq in the course of the discussion in open session held on 12 February 2014 available at: http://www.assemblee-nationale.fr/13/cri/2011-2012/20120133.asp.

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before the relevant law was drafted. In a decision of 9 August 2012, the constitutional judge, seized by the President of the Republic, stated that the ratification of the Treaty did not necessitate a constitutional amendment.[90] Two points deserve to be highlighted. On the one hand, as regards the rules on balanced public finances, the Constitutional Council indicated that respect of the rules on budgetary discipline did not affect the essential conditions for the exercise of national sovereignty – especially since France already had the duty to respect such rules by virtue of the Treaty of Maastricht. On the other hand, as regards the application in national law of the rules on balanced public finances, the Constitutional Council examined the option laid down in Art. 3(2) of the Treaty on Stability, Coordination and Governance, according to which these rules shall come into force 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. The foregoing shows two diametrically opposed consequences as to the need to amend the Constitution: in the first case an amendment of the Constitution is necessary; in the second case, it is not required.[91]

2.7.3 France has not been subject to a bailout and austerity programme.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Based on the data available in French official sources, it has not been possible for us to identify the number of cases in which applicants have requested a preliminary ruling with regard to the validity of an EU measure since 2001.
From 2006 to the time of writing in January 2015, thirteen preliminary rulings on validity have been sent to the CJEU by French courts. Among these, two cases have been struck off the register of the Court of Justice.[92] In one case the CJEU held that the action was manifestly inadmissible,[93] and in a further case the CJEU found that it clearly did not have jurisdiction to reply to the questions referred by the *Prud'homie de pêche* of Martigues.[94] Nevertheless, it should be noted that the validity of a Directive was questioned in four cases,[95] the validity of a Regulation

[90] Constitutional Council, 9 August 2012, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire*, Decision No. 2012-653 DC.

[91] For more information on this ruling, see Oliva 2012; Roux 2012; Levade 2012.

[92] Joined cases C-411/09 to C-420/09 *Tereos* [2010] ECLI:EU:C:2010:156, and Case C-618/12 *Société Reggiani* [2013] ECLI:EU:C:2013:211.

[93] Case C-368/12 *Adiamix* [2013] ECLI:EU:C:2013:257.

[94] Case C-109/07 *Pilato* [2008] ECR I-03503.

[95] Case C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-09895; Case C-59/11 *Association Kokopelli* [2012] ECLI:EU:C:2012:447; Case C-618/12 *Société Reggiani* [2013] ECLI:EU:C:2013:211; Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

was questioned in six,[96] and the validity of a Decision of the European Commission was questioned in three of the cases from this period.[97] It is important to first highlight that only one reference regarding validity was truly initiated by an individual[98] and secondly, that only one EU measure, namely a decision of the European Commission, has been declared invalid by the CJEU. Of the thirteen preliminary rulings on validity identified, two merit particular attention.

First, in *Arcelor*, Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community[99] was under challenge. Although the preliminary ruling of the Council of State did not have the effect of declaring Directive 2003/87 invalid, it is noteworthy that the equal treatment principle was involved.[100] In this particular case, a company seized the Council of State for annulment of the decree transposing the Directive. Pursuant to the decree, the scheme for greenhouse gas emission allowance trading was applicable to installations in the steel sector, but not to aluminium and plastic companies. The Council of State referred a question on validity on the grounds of the equal treatment principle to the Court of Justice for a preliminary ruling. As Professor Simon has explained, 'the difficulty lay in the fact that in EU law, the general principle of equality of treatment includes the prohibition of different treatment in identical situations and of an identical approach to different situations, whereas the French principle, as interpreted on the basis of the relevant constitutional provisions, does not preclude an identical approach to different situations'.[101] This was unproblematic. The Court of Justice simply noted in this regard that 'the reference for a preliminary ruling therefore relates solely to the question whether the Community legislature breached that principle by applying unjustifiable different treatment to comparable situations'.[102] In response to the preliminary ruling, the CJEU first noted that steel, aluminium and plastic companies faced similar situations and, secondly, that the difference of treatment between them is likely to involve a disadvantage for steel companies. However, the Court of Justice found that this difference of treatment can be justified. Thus, 'by opting, at least in the initial phase, for a sector-specific

[96] Case C-109/07 *Pilato* [2008] ECR I-03503; Case C-466/06 *Société Roquette Frères* [2008] ECR I-00140; Joined cases C-175/07 to C-184/07 *SAFBA* [2008] ECR I-00142; Joined cases C-362/07 and 363/07 *Kip Europe* [2008] ECR I-09489; Joined cases C-411/09 to C-420/09 *Tereos* [2010] ECLI:EU:C:2010:156; Case C-348/11 *Thomson Sales Europe* [2012] ECLI:EU:C:2012:169.

[97] Case C-333/07 *Regie Networks* [2008] ECR I-10807; Case C-368/12 *Adiamix* [2013] ECLI:EU:C:2013:257; Case C-202/14 *Adiamix SAS* [2014] ECLI:EU:C:2014:2420.

[98] Case C-109/07 *Pilato* [2008] ECR I-03503.

[99] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32.

[100] Council of State, 8 February 2007, *Société Arcelor Atlantique et Lorraine*, No. 287110.

[101] Simon 2009, p. 14 (as translated by the authors).

[102] Case C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-09895.

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differentiation … the Directive has not breached the principle of equal treatment guaranteed as a general principle of Community law'.[103]

Lastly, the preliminary ruling sent by the Administrative Court of Appeal of Lyon[104] deserves mention with regard to the result reached. In this particular case, the applicant company claimed a refund of sums it had paid under the heading of a tax levied in order to finance an aid scheme in favour of local radio stations. The applicant company alleged that the decision of the European Commission (State aid No N 679/97 – France), in which the Commission decided not to raise any objections against this aid scheme, was invalid. Seized of this issue, the Court of Justice stated that the tax under examination formed an integral part of the aid scheme which that charge was intended to finance.[105] As a consequence, the contested decision was invalid.[106]

2.8.2 As we have previously explained, the French Constitutional Council is not known for a particularly activist approach. However, we still think that a number of cases – challenging the EU Returns Directive[107] and the Dublin Regulation[108] – show a certain reluctance by the CJEU to fully play its role as a guardian of fundamental rights. This is especially true for the naïveté with which the Court of Justice appears to ignore the practical impact of directives, and validates them based on a general reference to the respect of fundamental rights. Instead, the Court of Justice could adopt a strategy similar to the doctrine of *incompétence négative* in French law, that is, it should sanction the EU legislator for failure to provide for sufficient guarantees for the protection of fundamental rights in order to ensure that the application of a directive or regulation and of the principle of mutual recognition respects the Charter of Fundamental Rights.

2.8.3 As we have previously stated, French judges are not known for a particularly vigorous approach to fundamental rights protection, unlike some of their European counterparts. However, there are some unique instruments, such as the 'fundamental principles recognised by the laws of the Republic' that are welcome signs of a will to guarantee rights corresponding to core values. Furthermore, the administrative jurisdiction, which is also an advisor to the executive, is stereotypically considered to be more deferential than the judiciary. Indeed, Art. 66 of the Constitution only mentions the judicial authority as the guarantor of fundamental

[103] Simon 2009, p. 15.

[104] Administrative Appeal Court of Lyon, 12 July 2007, *Régie Networks*, No. 06LY01447.

[105] Case C-333/07 *Regie Networks* [2008] ECR I-10807.

[106] Idot 2009, pp. 37–38.

[107] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

[108] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31.

rights. In the end, although there are sometimes divergent approaches due to jurisdictional dualism, there is no solid scientific data by which to measure the degree of vigour or deference of either one of these judges.

2.8.4 We refer to our previous explanations concerning the primacy of EU law as well as the various human rights requirements established in French case law.

2.8.5 Although the standard of review practised by the Constitutional Council is not particularly progressive and can at times, especially concerning fundamental rights, be rather deferential, the general standard of review by the CJEU still has to be criticised. Indeed, the fairly low level of national judicial review, combined with the presumption of equivalence established by the *Bosphorus* judgment of the ECtHR, result in a clear gap in judicial review. The review of the CJEU should fully honour its role as a guardian of the respect of human rights, an approach that should be combined with a non-deferential control by the ECtHR once the accession of the EU to the ECHR is completed.

2.8.6 A judgment delivered by the Council of State has provided some clarification on the issue of equality.[109] In the case in question, a decree of 1980 exclusively granted charge of all restoration work on classified monuments to the chief architects of historical monuments. France, warned by the European Commission of the lack of compliance of this provision with the freedom of movement, had to re-examine its position in a decree of 28 September 2008. The decree provided that restoration works on classified monuments belonging to public law persons other than the state or private persons could be carried out by architects from other Member States. In doing so, however, this provision excluded architects established in France. The Council of State found in favour of the applicant with a historical handling of the equal treatment principle, by which it pointed out that the difference in treatment had nothing to do with the purpose of the decree, and that there were no general interest reasons to justify it.[110] It has been commented that, with the annulment of this provision on the basis of the equal treatment principle,

> the Council of State has drawn the necessary conclusions from the gradual shift of the Court of Justice towards a reduction of purely internal situations and towards the suggestion sent to the national courts to impose sanctions in cases of reverse discrimination pursuant to the equal treatment principle as enshrined in the national constitutional or administrative law.[111]

[109] Council of State, 6 October 2008, *Compagnie des architectes en chef des monuments historiques*, No. 310146.

[110] Iliopoulou and Jauréguiberry 2009, pp. 132–144.

[111] Simon 2008, p. 1 (as translated by the authors).

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2.9 Other Constitutional Rights and Principles

2.9.1 Two points should be stressed. First, use by the Government of the procedure of delegated legislation in order to implement directives in due time has to be mentioned. This procedure, which is provided for by Art. 38 of the French Constitution, is an exception to the provisions of Art. 34. It empowers the Government to 'ask Parliament for the authorization, for a limited period, to take measures by ordinance that are normally the preserve of statute law'. Ordinances 'shall come into force upon publication', but Parliament is not totally bypassed since the ordinances 'shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act'. Secondly, directives may also be implemented by decree. This was the case, for example, with transposition of the EU Data Retention Directive 2006/24. While transposition of such a Directive by decree may, at first sight, seem misguided in view of the distinction drawn by the French Constitution between matters that fall under Arts. 34 and 37 of the Constitution (regulating matters that can only be dealt with by parliamentary statute), this choice is easily understood if one takes into account the fact that France already had a body of national legislation on the matter before the transposition (see Sect. 2.4). Therefore, the Directive was perceived not as an act imposing a duty to create legislation *ex nihilo*, but as a means to specify existing legislation.

2.10 Common Constitutional Traditions

2.10.1 There has indeed been 'a shift away from the national to the European context'. However, we believe that the 'European consensus' approach of the ECtHR is different due to the underlying conceptualisation of both legal systems. Indeed, the case law describing the EU as an autonomous legal order, integrated in the legal orders of the Member States, leads the way for the logical consequences in terms of the choice of the relevant 'common constitutional traditions'. As the CJEU has stated in its *Internationale Handelsgesellschaft* judgment, 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.[112] This clearly explains the reason for the shift from the national to the European context. In our opinion, the cardinal features of the common constitutional traditions are already enshrined in the Charter of Fundamental Rights of the EU (Charter). The next step is for the CJEU to develop them in dialogue with national judges. However, in the context of EU law, the highest possible level of protection is not a question of common constitutional traditions, but rather of a stricter and more progressive judicial review by the CJEU. The reaction of the

[112] Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 01125, para. 4.

CJEU in the Data Retention case shows that it is perfectly capable of defending fundamental rights by referring solely to the Charter.

2.10.2 We do not agree that there is insufficient comparative law analysis, especially since the research division of the CJEU frequently accomplishes this task. Rather, as previously explained, the CJEU simply chooses the standards it deems most appropriate for the EU legal order. In order to achieve a clear shift to higher standards of fundamental rights protection, the CJEU needs to fully understand its role in a post-Charter era and conceive this role as essential to an integration process that has ceased to be purely economic in nature.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 Although there have been no specific national cases regarding Art. 53 of the Charter, the *Melloni* judgment[113] in itself is reason enough to be critical of the approach of the CJEU. We believe there should be no opposition to stricter national standards, as well as tolerance towards *Solange* approaches by national judges in order to create a creative dynamic between the CJEU and national courts that will ultimately be beneficial to the protection of rights throughout the EU.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 Political debates on the European Arrest Warrant Framework Decision and on the EU Data Retention Directive were very limited, if not virtually nonexistent. The French situation thus unfortunately echoes the concerns of Fair Trials International.

According to the Council of State, a constitutional amendment was needed to introduce the EAW into French law. Based on the minutes of the proceedings in Parliament, it is apparent that the MPs preferred to simply follow the recommendations made by the Council of State, without engaging in a deeper discussion on constitutional rights. As the Robert Schuman Foundation has rightly stressed, this constitutional amendment 'went largely unnoticed by the general public'.[114]

As mentioned above in Sect. 2.4, Directive 2006/24 was transposed into French law by decree, thereby denying Parliament of a potential democratic debate. Thus, one can hardly blame Parliament for its lack of activism. However, whenever

[113] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[114] Boucher 2003 (as translated by the authors).

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democratic review is possible, Parliament should not lose sight of its mandate to represent the People, and should not get involved in political squabbles. Democratic control is effective only if it is carried out conscientiously. Finally, some associations and authorities (such as the French Data Protection Authority) have an important warning role to play in supporting constitutional debate.

2.12.2 In our opinion, concerns do not lie in the existence of room for democratic deliberation as such (even if for example the number of requests for a preliminary ruling on the validity of EU measures sent by French courts to the Court of Justice is low, or that democratic deliberations are poorly developed), but in the real effectiveness that such a space offers. On the one hand, we have already stressed that very few EU measures have been held to be invalid by the CJEU (see Sect. 2.8.1). On the other hand, although regrettable, this can be explained by the requirements for the immediate implementation of EU measures, and for uniformity in implementation. Without a relative elasticity of these two requirements, any room for deliberation cannot be used beneficially.

2.12.3 In principle, we are supportive of a recommendation to suspend the application and carry out a review of EU measures, where important constitutional issues have been identified by a number of constitutional courts. Special attention should, however, be given to the conditions under which this could be applied.

First of all, there should be the requirement of an appropriate number of constitutional courts that raise a constitutional issue for an EU measure to be suspended, in order to avoid excessive threats of suspension but also the risk of the mechanism remaining inefficient if too many courts are required for a veto.

Another question to be addressed is whether suspension would have to be automatic once the necessary number of constitutional courts were involved. In our opinion, this would be unwise. It would also require consideration as to which institution, the European Commission or the Council, would have the right to initiate suspension, or if they would share this right.

In considering such a proposal, an important point to be discussed is whether the review of the EU measure would be a political review in the hands of the European Commission and the Council, or a judicial review before the Court of Justice. This second option would be preferable.

Finally, an intelligent coordination between this mechanism and the preliminary ruling procedure must be ensured, without diminishing the efficiency of the latter, which provides a direct, effective and essential dialogue between the national judge and the Court of Justice.

On the question of defences, if one bears in mind that the EU has an obligation to respect national and constitutional identities, the Commission should take a finding of unconstitutionality by a constitutional court into account as a valid defence. However, such a possibility would have to be subject to all necessary precautions so as to curb potential abuse.

It is up to the European Commission to assess which defences may justify failure to implement a directive, and the Commission should therefore elaborate an explicit

analysis grid for this purpose. This analysis grid could in particular allow the European Commission:

- to identify reasons for suspension. The consequence of this would be a distinction between minor and essential issues;
- to determine the position of the competent authorities following a declaration of unconstitutionality in order to respect their European obligations;
- to check whether the respective constitutional court has used the preliminary ruling procedure in order to reconcile the requirements of EU law and of the national constitution.

It follows from the above that the European Commission should take a case-by-case approach instead of rejecting this defence consistently.

Finally, assuming that the European Commission would consider such defence to be valid, the defence should not exempt the Member State from its obligations, but should be taken into account in order to reduce the amount of any penalty imposed.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 As previously explained, we do share concerns about the reduction in the standard of protection of constitutional rights, especially due to the unnecessary self-restraint on the part of the CJEU.

2.13.2 There has indeed been a substantial and in our view unjustified reduction in the standard of protection of constitutional rights in the EU. However, this is certainly not an inevitable process but rather the consequence of an excessive focus on the autonomy of EU law, the integration process and the necessity of a uniform application of EU law provisions. A stricter control by the CJEU on matters related to fundamental rights as well as more dedicated national judges would help raise these standards.

Once the accession of the EU to the ECHR is completed, the *Bosphorus* presumption of equivalent protection should be abolished and a strict external control ensured. As we have previously noted, the CJEU should not only apply a stricter control but also engage in a dialogue with the national courts – which should also proactively question the interpretation or validity of relevant EU law provisions. Furthermore, national parliaments in collaboration with NGOs, national bodies for the protection of fundamental rights and ombudsmen should monitor the application of EU law and debate its impact on fundamental rights. We do not think that an EU Constitutional Tribunal will be necessary once the CJEU and the national courts engage in a dialectic dynamic that is not strictly focused on questions of primacy.

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2.13.3 We agree with the criticism of an overly reluctant Court of Justice that is mostly concerned with defending the primacy of EU law, at the expense of human rights protection. The Court should make an effort to take the national points of view into account. One example of such dialogue is the previously mentioned *Melki* case, in which the Court engaged in direct dialogue with national judicial authorities. However, national judges also have a role to play.

Indeed, when the French Constitutional Council had the chance to seize the CJEU for a preliminary ruling request in the *Jeremy F.* case (see Sect. 2.3.6), it limited its question to the interpretation of the relevant dispositions. Its role at a European level would have been more constructive if, like the Spanish Constitutional Tribunal in the *Melloni* case, it had questioned the validity of the provision and thus engaged in a dynamic dialogue with the Court of Justice. Other judges should follow the Spanish example and opt for EU-wide vigilance to guarantee the respect of fundamental rights.

In our opinion, it is crucial to foster dialogue between the CJEU and the national judges in order to properly address national constitutional concerns. However, no tool can replace the necessity for the Court of Justice to apply a stricter standard of judicial review of EU measures.

2.13.4 As previously mentioned, national judges should be more proactive and question not only the interpretation but also the validity of EU law provisions and systematically address the CJEU in this regard, while other institutions should play their monitoring role more effectively and address difficulties encountered in the application of EU law provisions.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 All matters related to the international commitments of the French Republic (except its membership in the EU) are dealt with in Title VI of the Constitution. Article 52 provides that the competence to negotiate and ratify treaties lies with the President of the Republic, while emphasising that the President must be kept informed of all negotiations concerning treaties which do not need ratification. Although the competence of the French President is not exclusive, it should be noted that due to the particular configuration of the Fifth Republic, the influence of the President is predominant.[115]

However, as provided by Art. 53, the ratification of 'peace treaties, trade agreements, treaties or agreements relating to international organization, those

[115] Isidoro 2009, p. 1306.

committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament'. The Act of Parliament referred to in Art. 53 entails authorisation to ratify, but is in itself an authorisation to ratify rather than the act of ratification itself, which is adopted by the executive.[116]

Article 53§3 provides for a supplementary condition, which can be viewed as a limit to transfers of competence, i.e. the necessity of a referendum for any proposal to cede, exchange or acquire territory. Furthermore, Art. 53-1§2 provides that although France can conclude agreements in the area of asylum, these agreements cannot deprive the French authorities of their right to examine any asylum case, regardless of whether they have competence in virtue of the agreements. Thus, France cannot consent to an international agreement that would lead to a relinquishment of this competence. However, the most important limit is set out in Art. 54, which provides that in the case of a finding of unconstitutionality by the Constitutional Council, a treaty cannot be ratified unless the Constitution is amended. In practice, the solution commonly adopted is a revision of the Constitution.

There are no formal guidelines as to the values and principles that ought to be upheld by states when participating in international cooperation. However, §14 of the Preamble of the 1946 Constitution – which is part of the set of provisions referred to in the control of constitutionality – provides that 'the French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people'. Furthermore, the Preamble of the 1958 Constitution reaffirms the commitment of the French Republic to human rights. These provisions relating to peace and human rights could in theory lead a judge to perform a particularly strict review of certain treaties. However, this has not been the case until now, with affirmation of the respect for public international law having only led to the consecration in Art. 55 of the primacy of international law over national laws.

There is only one constitutional provision regarding an international institution, i.e. Art. 53-2 which authorises the Republic to recognise the jurisdiction of the International Criminal Court (ICC) as defined by the Rome Statute.

3.1.2 Article 53-2 providing for recognition of the jurisdiction of the ICC is the consequence of a declaration of unconstitutionality delivered by the Constitutional Council on 22 January 1999.[117] As a matter of fact, the very objective of the ICC's jurisdiction was problematic, since it allows for prosecution of any criminal, regardless of the person's official capacity. Thus, it could apply to the French President, which was contrary to Art. 68 of the Constitution. However, since the

[116] Burgorgue-Larsen 2009, p. 1316.

[117] Constitutional Council, 22 January 1999, *Traité portant statut de la Cour pénale internationale*, Decision No. 98-408 DC.

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French Constitution also declares its broader commitment to peace and human rights,[118] the Constitution was amended as a pledge in the fight against impunity.

3.1.3 Along with the suggestion of a general reference to its commitment to the European Union, some scholars have highlighted the necessity of a general reference to the international commitments of France, particularly in the area of human rights. This proposition was in fact formally examined by a commission that was convened to identify potentially useful amendments to the preamble of the current Constitution, chaired by former minister and member of the Constitutional Council Simone Veil. However, in its report, the commission ultimately rejected the idea, since any special mention of European or international human rights law would create a specific constitutional obligation, giving the relevant treaties a privileged status.[119] Furthermore, it was feared that such mention would force the Constitutional Council to examine the compatibility of laws with the European Convention on Human Rights, although it had consistently delegated this competence to the ordinary jurisdictions. Finally, the authors of the report have surmised that any special mention of European and international human rights law would deprive the French Republic of the ability to maintain its constitutional specificities. It should be noted, however, that the refusal of the Constitutional Council to examine the compatibility of laws with European law has been severely criticised by some scholars.[120]

3.1.4 As previously stated regarding European Union law (see Sect. 1.5.3), a clause determining the principles and values governing the participation of the French Republic in international co-operation could be useful. Indeed, such a clause would have a particular resonance in the context of international law, which is currently less efficient than are EU treaties. However, it should again be noted that, although symbolically important, such a clause would risk having no concrete effects in practice, since it is not clear how a judge would evaluate and sanction the violation of such a broad guideline.

Nonetheless, one type of clause, the so-called *pro homine* clause, seems particularly appealing. The consecration of such a clause would guarantee that the individual would always benefit from the highest level of protection, whether it is provided for by European or international treaties or national legislation. As underlined by the Veil Commission, a provision of this type could entail major consequences regarding the control performed by the Constitutional Council, while clearly attributing a privileged status to human rights. As to the threats to France's constitutional specificities, it is the experts' opinion that such specificities should never trump the Republic's commitments to human rights, which would be the sole objective of the *pro homine* clause.

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[118] We refer to §15 of the 1946 Constitution.

[119] Comité de réflexion sur le préambule de la Constitution, '*Redécouvrir le préambule de la Constitution: rapport au Président de la République*', 2009, p. 54.

[120] For example Carcassonne 1999, pp. 93–100.

3.2 The Position of International Law in National Law

3.2.1 In conformity with §14 of the Preamble of the 1946 Constitution, according to which France respects the rules of public international law, Art. 55 of the Constitution provides that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. Thus, there are three conditions to the primacy of treaties in domestic law: formal ratification or approval, publication and reciprocity. However, it should be noted that the condition of reciprocity has been abolished for European Union law[121] as well as human rights treaties.[122] However, the Council of State has found that customary law does not benefit from primacy.[123] Most importantly, it has stressed that no treaty or international agreement, including EU law, can be superior to the Constitution.[124]

Whereas the Constitutional Council refuses to examine the conformity of domestic legislation to treaties and international agreements, arguing that this type of control falls foul of its competence[125] and should be exercised by courts of ordinary jurisdiction, the Court of Cassation as well as the Council of State have recognised the primacy of international treaties and agreements over domestic law, even law posterior to the agreement in question.[126] Concerning the application of treaties and with the exception of EU law provisions and the ECHR, which benefit from direct effect in the French legal order, the judge confronted with an international treaty will examine the nature of the invoked provision according to its precision, the intention of the authors, the general economy of the treaty as well as whether it may be directly applicable without an intermediate act.[127]

3.2.2 According to the conditions determined by Art. 55 of the Constitution, a treaty or international agreement comes into force by virtue of its ratification and publication, without the need of its incorporation into the legal order by an act of domestic law. Thus, the French legal order identifies with the monist tradition. Formally, French law still insists on the absolute primacy of the Constitution. However, the constant practice of amending the Constitution rather than

[121] Constitutional Council, 20 May 1998, *Loi organique déterminant les conditions d'application de l'article 88-3 de la Constitution*, Decision No. 98-400 DC.

[122] Constitutional Council, 22 January 1999, *Traité portant statut de la Cour pénale internationale*, Decision No. 98-408 DC.

[123] Council of State, 6 June 1997, *Aquarone*, No. 148683.

[124] Council of State, Ass., 30 October 1998, *Sarran et Levacher*, No. 200286, 200287.

[125] Constitutional Council, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse*, Decision No. 74-54 DC.

[126] Court of Cassation, 24 May 1975, *Société des cafés Jacques Vabre*, No. 73-13556; Council of State, 20 October 1989, *Nicolo*, No. 108243.

[127] Council of State, Ass., 11 Avril 2012, *GISTI et FAPIL*, No. 322326.

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abandoning a conflicting international treaty is a sign of a de facto primacy of international law.

Concerning the distinction between monism and dualism, the experts are not entirely convinced of its complete irrelevance. The disadvantage is a focus on purely formalistic criteria regarding the incorporation of international law. In this sense, doctrines such as pluralism seem better able to conceptualise the relations between legal orders and systems, as they allow both to cooperate in the elaboration of a solution. However, pluralism provides no clear criteria as to what solution should prevail in the end, since the international as well as the national orders have an equally legitimate standing. This conception falls short on the fact that international courts are established for a reason, which is to guarantee the existence of an external control over domestic law.

In our opinion, a more substantial criterion should prevail, i.e. the development of international co-operation which in a sense would strengthen the protection of human rights. This would lead to a monist approach with primacy of international law, with one important exception, i.e. the *Solange*-scenario. Indeed, since the fostering of international co-operation is not an end in itself but a path chosen to provide for a harmonised guarantee of fundamental rights, national authorities would be legitimate in their refusal to apply international or European law whenever this goal is threatened. However, this exception needs to be conditioned by two limitations: first, a general scope limited to a broader protection of human rights, and secondly, a willingness for dialogue with other national authorities as well as regional and international organisations and institutions in order to trigger a dialectic process allowing for the elaboration of a more adequate rule.

3.3 Democratic Control

3.3.1 According to Art. 52 of the Constitution, the President of the Republic has a negotiation competence that is shared with his Government, as well as in some cases with local authorities. Thus, the involvement of Parliament in the initial negotiation process is relatively minor. However, as stated before and according to Art. 53 of the Constitution, the consent of MPs is required for the ratification of 'peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory'. It should be stressed that although MPs can debate at this stage, they cannot propose amendments. In the end, they generally vote for a single-article text simply stating consent to the ratification. Their last chance to intervene is if sixty members of the Senate or the *Assemblée nationale* seize the Constitutional Council to examine the conformity of the treaty with the Constitution. As explained above, a treaty can only validly come into force in the national legal order if there is no declaration of unconstitutionality or if such declaration is followed by an amendment of the Constitution.

3.3.2 The referendums organised in France have been related either to strictly domestic constitutional matters (such as the election of the President of the Republic by direct universal suffrage or the reduction of the presidency to a five year term), to the accession of independence of former colonies or to EU-related matters. None have concerned international organisations or treaties. However, this does not mean that referendums on treaties are banned, since Art. 11 of the Constitution expressly mentions treaties as a possible subject of a referendum.

3.4 Judicial Review

3.4.1 First of all, it should be mentioned that matters concerning diplomatic relations as well as the decision to negotiate a treaty or to refuse to do so cannot be subject to judicial review.[128] However, the validity of the ratification process, especially concerning the conditions of consent by Parliament for certain treaties, is examined by the Council of State[129] – although failure to abide by the Constitution is of course by no means a way for the state to be exonerated from international responsibility. As we have seen, a further option for judicial review of international treaties is to seize the Constitutional Council on the grounds of the unconstitutionality of some of its provisions, which would, however, in most cases lead to an amendment of the Constitution.

One particularly original technique (albeit rarely) used in France to refuse the application of an international treaty consists in stressing the necessity to abide by the *principes fondamentaux reconnus par les lois de la République* (fundamental principles recognised by the laws of the Republic). Indeed, although laws and treaties can trump general principles of law, the fundamental principles recognised by the laws of the Republic have constitutional rank, granting them primacy over treaties. A prominent example is the *Koné* case,[130] in which the Council of State refused to extradite an individual due to his being prosecuted for political reasons, with reference to said fundamental principles recognised by the laws of the Republic, although the extradition agreement between France and Mali had not addressed the issue. This can be seen as a concrete example of a best practice for a national *Solange* or *Kadi* approach focusing on the need to foster the protection of fundamental rights.

[128] Council of State, 16 November 1998, *Lombo*, No. 161188; Council of State, Ass., 29 September 1995, *Association Greenpeace France*, No. 171277.

[129] Council of State, 18 December 1998, *SARL du parc d'activités de Blotzheim et SCI Haselaecker*, No. 181249.

[130] Council of State, Ass., 3 July 1996, *Koné*, No. 169219.

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3.5 The Social Welfare Dimension of the Constitution

3.5.1 Besides a mention of social objectives in national policy in the Preamble of the 1946 Constitution as well as a general declaration according to which France is a 'democratic and social Republic' (Art. 1), there are no guidelines as to the social values that the Republic must uphold in its international cooperation. However, while this latter provision could theoretically be mobilised in a proactive strategy concerning European and international treaties, French judges have to date been quite reserved in their judicial review. Again, one could suggest a general clause guiding the international cooperation of France, but its effect in practice would be uncertain.

3.5.2 France has not been subject to a bailout and austerity programme.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 In our opinion, the combination of a general conception allowing for monism with primacy for international law, with the exception of a broader national human rights protection, would be a suitable solution to most difficulties that are likely arise.

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The Belgian Constitution: The Efficacy Approach to European and Global Governance

Patricia Popelier and Catherine Van de Heyning

Abstract The Belgian Constitution dates back to 1831 but became more prominent with the introduction of the Constitutional Court in 1980. While initially tasked with adjudication of federal competences, the Court gradually turned into a fundamental rights court. The protection of fundamental rights is predominantly based on the ECHR. The Belgian constitutional system demonstrates a singular openness towards international influences and, in particular, the European integration project. A monist approach, adopted by the Supreme Court in 1971, ensures the smooth implementation and priority of international and EU law, whereas only few instruments exist to temper their impact on constitutional values and fundamental rights or to ensure legitimacy. The disintegration of the Belgian State weakened the concept of national sovereignty, referendums for the approval of treaties are unconstitutional, and ratification of a treaty is not subjected to specific requirements other than a majority vote in Parliament. Overall, the Belgian Constitutional Court gives evidence of a strikingly Europe-friendly attitude, in line with attitudes at the political level and in society. Consequently, both the Europeanisation of constitutional rights and the implementation of international and EU law that potentially restrict fundamental rights, hardly trigger public debate. This approach, however, may change in the future. Surveys demonstrate that confidence in the European integration project is in decline amongst young adults. In 2016, after the submission

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of this paper, the Constitutional Court for the first time adhered to the constitutional identity doctrine, so far without further consequences. Also, it can be expected that the Constitutional Court would not easily accept external interference that would upset the delicate linguistic balances that are crucial for the stability of a divided Belgian State. Already, (Flemish) political parties are hesitant to join international treaties that they perceive as a threat to such balances.

Keywords The Constitution of Belgium · Constitutional amendments regarding EU and international co-operation · The Belgian Constitutional Court Europe-friendliness · 'Efficacy' approach · Constitutionalisation of the ECHR Europeanisation of constitutional rights · European Arrest Warrant *Advocaten voor de Wereld*, *nullum crimen nulla poena sine lege*/legality principle and access to the legally provided tribunal · Balancing of fundamental rights and market freedoms · Monism · Lack of public debate · Linguistic balances Constitutional review statistics · Absence of review of treaties · Constitutional challenge regarding independent regulatory agencies

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1–1.1.2 Belgium was created in 1830, when the southern region separated from the United Kingdom of the Netherlands. Its Constitution, enacted in 1831, built on the Constitution of the United Kingdom of the Netherlands, the French *Charte octroyée* of 1830 and the French 1791 Constitution. Only 10 percent of the Belgian Constitution could be considered truly novel.[1] Still, the Belgian Constitution was a model of liberal constitutionalism[2] that influenced subsequent constitutions in Greece, Spain, Italy, the Netherlands, Luxembourg, Prussia and Romania.[3]

The Belgian Constitution was drafted as a pragmatic constitution, devoid of a preamble. Underlying principles such as national sovereignty, representative parliamentary democracy, the separation of powers and the rule of law were not explicitly mentioned, but were made concrete in provisions that enumerated fundamental rights and organised the legislative, executive and judicial powers. Initially, the Constitution relied on the elected Parliament and expressed its mistrust of the executive. While it empowered courts to not apply executive acts that are contrary to higher law, it introduced constitutional review of parliamentary acts only in 1980 through the establishment of a Constitutional Court (then 'Court of Arbitration' to stress its initially limited competences). By then, the Supreme Court

[1] Gilissen 1968, pp. 897–910.

[2] Popelier and Lemmens 2015.

[3] Gilissen 1968, p. 132; Alen 1984, pp. 897–910.

had already broken the inviolability of Acts of Parliament by empowering courts to review such acts in the light of directly applicable international law.[4]

The Constitutional Court has gradually grown into a fully fledged human rights court that has constitutionalised the European Convention on Human Rights (ECHR) and relies heavily on the case law of the European Court of Human Rights (ECtHR). The Constitutional Court's power was initially limited to the competence to allocate rules between the federal state and the regional entities, but was widened in 1988 to include ensuring the equality clause and the clause protecting the rights and freedoms concerning education. While this situation lasted up to 2003 before Parliament conferred on the Court the right to directly review legislation for compatibility with fundamental rights and freedoms set out in the Constitution, this intervention only confirmed the powers that the Court had already assumed by linking the equality and non-discrimination clause with fundamental rights as protected by the Constitution or international treaties. The Court has now become an important actor in the constitutional field, providing individuals with an instrument to challenge Acts of Parliament which they consider as ignoring their interests.[5] Although the Constitutional Court has in 21% of the cases found an Act of Parliament to violate the Constitution,[6] Parliament has maintained confidence in the Constitutional Court.[7]

According to Art. 33 of the Constitution, all powers are derived from the 'Nation' as opposed to the 'People'.[8] The idea of national sovereignty was inspired by French constitutional theory, and implied a functional concept of the right to vote. Only in 1893 did the Constitution introduce universal (plural) voting. This was gradually widened, with equal suffrage for men introduced in 1918 and extended to women in 1948. Moreover, whereas the idea of a 'Nation' presupposes the notion of a single and undivided country, the Constitution now recognises that Belgium is a multinational federation. It enumerates four linguistic regions, divides the federal Parliament into two language groups and requires linguistic parity in the federal Government. While these two evolutions seem to have emptied the concept of national sovereignty, Art. 33 is still referred to as a constitutional obstacle for the organisation of nation-wide referendums. Meanwhile, the Constitution does allow for local advisory referendums and, since 2014, for advisory referendums organised by the subnational Regions.

[4] Cass. 27 May 1971, (1971) *Pas.* I, 886.

[5] Empirial research shows that participation in both anulment cases and preliminary references is largely dominated by private parties, especially individuals, followed by interest groups and firms. See De Jaegere 2017, pp. 100–111.

[6] De Jaegere 2017, p. 135.

[7] It should be taken into account that violations mostly concern minor points, referring to small parts of the Act, whereas more fundamental pleas are rejected.

[8] All translations of the Belgian Constitution are from the translation by the Legal Department of the Belgian House of Representatives, available at the website of the Constitutional Court, http://www.const-court.be/en/basic_text/belgian_constitution.pdf.

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1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1–1.2.3 The Belgian Constitution prescribes a rigid amendment procedure, which involves the enumeration of articles to be amended, the subsequent dissolution of Parliament and the revision of the enumerated articles by a two-thirds majority in both chambers of the newly elected Parliament.

This procedure has been used four times for reasons of EU membership. Three categories of amendments can be distinguished in this respect: (1) articles providing a constitutional basis for, or reinforcing the legitimacy of, the transfer of rights;[9] (2) articles inserted in order to bring the Belgian legal system into conformity with EU obligations[10] and (3) articles regulating domestic issues with regard to or by linking them to European elections.[11] In what follows, they are listed in chronological order.

Article 34 was inserted in 1970 so as to retroactively provide for a legal basis for the accession of Belgium to supranational organisations in general.[12] The Belgian Constitution does not include a specific 'Europe clause'. Article 34 of the Belgian Constitution stipulates in a general way that 'the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law'.

Secondly, in 1993, on the occasion of the fourth state reform that turned Belgium into a federal state, three amendments were linked to the European integration project. In this process, for the first time, the term 'supranational' appeared in the Constitution.

According to Art. 196 of the Constitution, the federal legislative and executive powers can legislate in place of the federated entities (Regions and Communities) 'in order to ensure the observance of international or supranational obligations'. The constituent power specifically had the infringement proceedings laid down in the EU treaties in mind.[13] However, the provision does not give any indication as to how to distinguish 'international' from 'supranational' obligations. Also, the special majority law that implements Art. 169 does not provide for a different procedure for 'supranational' compared to 'international' obligations: in both cases, the federal authorities can only act as substitutes for a federated entity to comply with the judgment of an international or supranational court that has condemned the Belgian state for the non-observance of an international or supranational obligation committed by a Community or Region, on the condition that the federated entity was

[9] Articles 34 and 168 Constitution.

[10] Articles 8 and 196 Constitution.

[11] Articles 46, 117 and 168*bis* Constitution.

[12] By then, the Treaties establishing the European Steel and Coal Community, the European Economic Community and the European Atomic Energy Community had already been ratified. About the chronology of events, see Louis 1970, pp. 410-411 and Valticos 1984, pp. 13–15.

[13] Now Arts. 258 and 260 TFEU. See Parl. Doc., Senate, Extraordinary Session 1991–92, No. 457/1, 2–3.

given a declaration of infringement and was involved in the entire procedure for the settlement of the dispute, including the procedure before the Court. In 2014, the special law was amended in order to simplify the substitution mechanisms in matters concerning the reduction of greenhouse gases in execution of the UN Framework Convention on Climate Change. In these matters, the federal authority can already act as a substitute if, for example, the European Commission declares an infringement in conformity with Art. 258 TFEU.

In 1993 as well, Art. 168 was inserted in the Belgian Constitution, granting the Houses the right to be informed of negotiations concerning any revision of the EU treaties.[14] Article 168 gives evidence that the Constitution regards the EU treaties as special, as it leads to specific information obligations, whereas in the case of other treaties Parliament can only agree or disagree with the treaty after the negotiations have taken place. The constituent power aimed at giving greater legitimacy to the increasing transfer of powers to the European level.[15] The Government promised to inform Parliament in a similar way regarding 'treaties of the same nature', which for example imply transfers of powers to similar supranational organisations,[16] but this was never explicitly inserted in the Constitution. This promise has not gained much importance in practice. As an example of 'treaties of the same nature', the Government has referred to the Western European Union.[17] This organisation, however, never carried much weight and was dissolved in 2011, with the EU having taken over its tasks.

Article 117, inserted in the course of the same fourth state reform, mentions the European Parliament, but only to secure a fixed legislative term for the parliaments of the federated entities, which, for the first time, were directly elected. According to this provision, community and regional parliamentary elections, as a rule, take place on the same day and coincide with European parliamentary elections.

A third phase occurred in 1998 when a provision was inserted in the Constitution in order to comply with the EU requirement, laid down in the Maastricht Treaty and EU directives, to give EU citizens the right to vote for municipality councils. As Art. 8 of the Constitution requires that a person have Belgian nationality for the exercise of core political rights such as the right to vote, the constitutionality of the ratification of the Maastricht Treaty was contested.[18] In July 1998, the European Court of Justice (ECJ) established the failure to timely implement the EU directives regarding the right to vote and rejected the necessity to follow a rigid constitutional

[14] A similar obligation is inserted in Art. 16 § 2 Special Majority Law on the Reform of the Institutions, this time in favour of the federated parliaments, if the treaty touches upon their competences.

[15] Craenen 1993, p. 89 and Ingelaere 1994, p. 81.

[16] *Parl. Doc.* Senate 1991–1992, 100-16/2, 16; *Parl. Doc.* House 1992–1993, 797/3, 9.

[17] *Parl. Doc.* Senate 1991–1992, 100-16/2, 16.

[18] This was already a point of critique in the advisory report of 6 May 1992 of the Council of State, Legislation Division, on the law regarding the approval of the Maastricht Treaty, *Parl. Doc.* House of Representatives, Extraordinary Session 1991–1992, 48-482/1, 70–71.

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amendment procedure as a justification for non-compliance.[19] The Constitution was revised in 1998 and implemented in 1999.[20] The third paragraph added to Art. 8 of the Constitution now allows Parliament to establish the right to vote for EU citizens 'in accordance with Belgium's international and supranational obligations'. According to a fourth paragraph, this right can be extended to Belgian residents who are not citizens of an EU Member State. Hence, the Constitution allows Parliament to give a right to vote to non-Belgian citizens, whether EU citizens or not, but the extent of this right to vote depends upon EU law. In other words, the Constitution restricts the powers of Parliament, but refers to the EU to decide upon the substantive limits: the right to vote can only be given to residents in Belgium who are not Belgian citizens, in so far as EU law obliges Belgium to confer this right to EU citizens.

Finally, Art. 168*bis* was inserted in the Constitution in 2012, stating that a special majority law is to determine special rules regarding the election of the European Parliament, with a view to protecting the 'legitimate interests' of French- and Dutch-speaking people in the former province of Brabant. This article should be read against the background of Belgian multinational conflict management. When Brussels-Halle-Vilvoorde, Belgian's only electoral district across language borders, was split after decades of Flemish struggle, this provision ensured that francophone people in certain Flemish municipalities around the borders of Brussels could still vote for candidates on francophone electoral lists. The political parties wanted to insert this in the Constitution to secure it against actions before the Constitutional Court.[21] As this article, along with other provisions required for the sixth Belgian state reform, was not mentioned in the list of constitutional articles that can be amended, a temporary provision was added to Art. 195 that lays down the amendment procedure. This provision allowed for constitutional amendment without prior dissolution of Parliament, but only to insert these articles and only during the one legislative session following the elections in 2010.

The same temporary provision enabled the amendment of Arts. 46 and 117, to provide that parliamentary elections at the federal level will also take place on the same day as the elections of the European Parliament, and that if the federal Parliament is dissolved before its term expires, the next term may not extend beyond the day when the election of the European Parliament following this dissolution is held. Article 46 of the Constitution, however, requires the adoption of a special majority law – and hence a new two-thirds majority and agreement in both language groups – for bringing the latter rule into force. At the same time, the regional parliaments may decide to choose another date for regional elections. Hence, the fixed five-year-term for the election of the European Parliament is now used to stabilise federal rather than regional legislatures.

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[19] Case C-323/97 *Commission v. Belgium* [1998] ECR I-04281.

[20] Law of 27 January 1999, *Official Gazette* 30 January 1999.

[21] *Parl. Doc.* Senate 2011–2012, No. 5-1562/1, 2.

1.3 Conceptualising Sovereignty and the Limits to the Transfers of Powers

1.3.1 Although Art. 33 of the Constitution states that 'all powers emanate from the Nation' and that these powers 'are exercised in the manner laid down by the Constitution', the sovereignty principle has never stood in the way of European integration. This was a project embraced by both the political and legal elites.

As mentioned in the previous section, Art. 34 of the Constitution provides for a constitutional basis for the transfer of powers to the European Union or other international or supranational organisations. A law adopted by an ordinary majority suffices to this effect. Until May 2014, the approval of both the House of Representatives and the Senate was required; since then, only the House of Representatives has this competence. No special procedural or substantive requirements apply apart from the obligation to inform Parliament. However, as EU treaties, as a rule, affect the federal and the federated entities, the approval of both the federal and the federated parliaments is required.[22]

1.3.2–1.3.3 Where the Constitution remains silent on the subject of the relations between domestic and international legal norms, the Belgian courts have filled this void. Already in 1971, the *Cour de Cassation* (hereinafter Supreme Court) pronounced its milestone *Franco Suisse Le Ski* judgment, which established the primacy of self-executing international law over national law.[23] Although the case concerned EEC law and the judgment was a reply to the emerging ECJ case law pronouncing the primacy of EEC law, the Supreme Court gave primacy to all international law on the basis of a newly accepted monist theory. In the *Orfinger* case, the *Conseil d'Etat*, the Belgian Supreme Administrative Court (hereinafter Council of State) clarified that on the basis of Art. 34 of the Constitution, EU law also presides over the Constitution.[24] Through this article, EU law, including ECJ case law, becomes part of the domestic legal order. In turn, the Supreme Court invoked the ECJ's *Internationale Handelsgesellschaft* judgment to recall that constitutional rights cannot call the validity of primary or secondary EU law into question.[25]

The Constitutional Court also positions itself as a Europe-friendly court. It has no competence to directly review Acts of Parliament against the yardstick of international or supranational law, but does so indirectly, through the equality clause laid down in Arts. 10 and 11 of the Constitution, and by interpreting fundamental rights in conformity with similar treaty rights. It accepts the primacy of

[22] Article 167, § 4 of the Constitution and Cooperation Agreement.

[23] Cass. 27 May 1971, (1971) *Pas.* I, 886.

[24] Council of State 5 November 1996, 62.922. This was confirmed in three other decisions of the same date: *Goosse*, *Gerfa* and *De Baenst.*

[25] Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125; Cass. 2 June 2003, No. S020039N, www.juridat.be.

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international law over national legislation[26] and readily refers preliminary questions to the ECJ concerning both interpretation and validity issues.[27] In the period 2000–2014, the Constitutional Court referred to the ECHR in 32% of its judgments, to EU law in 10% and to other international law in 18% of cases.[28] Also, it quoted both ECJ and ECtHR case law in 9% and 14.3% of its judgments, respectively.[29]

On the other hand, the Constitutional Court has assumed the power to review parliamentary acts giving assent to treaties.[30] In this way, it indirectly reviews the content of treaties against the Constitution. In the case of a violation, the parliamentary act cannot be applied, and the treaty is deprived of legal power within the domestic legal order. Although the Court had shown reluctance to also consider petitions challenging Acts providing for assent to an EC/EU treaty,[31] Parliament has interfered to ensure the smooth implementation of EU law. As a result, the Constitutional Court no longer has jurisdiction to reply to preliminary references concerning an Act of assent to an EU Treaty or to the European Convention on Human Rights or its Protocols.[32] Consequently, EU treaties cannot be challenged before the Constitutional Court through the Act providing for assent, except by way of an annulment request. In such case, however, specific time limits lessen the effectiveness of this option, as the request has to be lodged before the Court within 60 days after publication of the Act. Legal concerns regarding EU treaties can still be raised by the legislation division of the Council of State. The Government is obliged to ask the Council's independent expert advice, but is not bound by it.

Until now, the Constitutional Court has seemed to accept the supremacy of EU law over the Constitution without limitations. Although in doctrine its stance regarding secondary norms of EU law has been called ambiguous,[33] the Court has refused to consider the validity of an EU directive or regulation, or the law implementing such act, if Parliament does not dispose of discretionary leeway. It has considered the unity of the European Union and has referred to the ECJ if the validity of an EU act has been at stake.[34]

What is noteworthy is the *Care Insurance* case, where the Constitutional Court invalidated a Flemish statute following a preliminary ruling of the ECJ even though this cut across the constitutional criteria for the distribution of powers between the

[26] It even regards itself explicitly as 'a guardian of EU law', see Const. Court No. 151/2003, 26 November 2003.

[27] It referred 24 preliminary questions to the ECJ in a period of 18 years (1997–2014). The frequency gradually increased, with four preliminary references in 2012 and in 2013.

[28] De Jaegere 2017, p. 186–190.

[29] Ibid.

[30] For the first time in Const. Court. No. 26/91, 16 October 1991.

[31] Const. Court No. 76/94, 18 October 1994 (annulment request).

[32] Article 26, § 1*bis* Special Majority Law on the Constitutional Court. The Constitutional Court applied this rule even before the provision came into force, Const. Court No. 3/2004, 14 January 2004.

[33] Cloots 2008, pp. 50–52.

[34] Const. Court No. 128/2009, 24 July 2009.

Belgian federal level and the federated communities.[35] However, the Constitutional Court, while claiming to fully abide by ECJ rulings, sometimes deviates in a silent or hidden way. In one case, the Constitutional Court ignored an ECJ ruling that restrictions of intra-Community trade require a specific analysis on the basis of scientific studies.[36] In the *Money Laundering* case, the Constitutional Court explicitly stated that it followed the ECJ ruling, according to which the Directive did not violate Art. 6 ECHR, but it accepted the implementing law only in so far as it was given a broader interpretation than the one provided by the ECJ.[37] A more explicit example is the *Bressol* case, in which the Constitutional Court openly disagreed with the ECJ on whether the financial implications of students from other Member States could justify measures restricting access to higher education on the basis of nationality.[38]

1.4 Democratic Control

1.4.1 Article 34 of the Constitution is a general enabling clause, which does not impose specific procedural requirements or substantive restrictions to a transfer of powers. A simple majority in Parliament suffices. If a treaty contains a provision that is contrary to the Constitution, ratification should be preceded by an amendment of the Constitution, which implies a renewal of Parliament and a two-thirds majority. In reality, however, this procedure is not followed and, as mentioned, Parliament has barred the possibility to refer a preliminary question to the Constitutional Court regarding the constitutionality of a parliamentary act giving assent to an EU Treaty or the ECHR.

Dual federalism, however, complicates the procedure. In Belgium, the federated entities ('Communities' and 'Regions') are treated as being at an equal level with the federal Government, and external relations are governed by the principle '*in foro interno, in foro externo*'. As EU treaties are usually 'mixed treaties', comprising matters that in the national legal order belong to the field of competences of both the federal level and the federated entities, the approval of all federated parliaments is required. At the federal level, until May 2014, an ordinary majority in both the House of Representatives and the Senate was required. The Belgian constituent power did not seize the opportunity to transform the Senate into a more genuine chamber of the federated entities, to simplify the procedure and give federated parliaments the right

[35] Const. Court Nos. 33/2001, 13 March 2001 and 11/2009, 21 January 2009; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-01683. For a critical view regarding the ECJ's refusal to respect the institutional autonomy of federal Member States, see Verschueren 2011, pp. 211–223.

[36] Compare Case C-480/03 *Clerens & bvba Valkeniersgilde v. Walloon Government* Order of 1 October 2004 (unpublished), with Const. Court No. 28/2005, 9 February 2005.

[37] Const. Court No. 10/2008, 23 January 2008. More on this case in Popelier 2012, p. 84.

[38] Const. Court No. 89/2011, 31 May 2011, B.4.4.–4.5.

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of approval only through the Senate. Instead, the constituent power unequivocally opted for a veto right for each subnational parliament, even the smallest amongst them, and denied the Senate the power to give approval to treaties. Theoretically, the Parliament of the German-Speaking Community could obstruct the coming into force of a European Treaty, even though, with 75,000 inhabitants, it represents less than 1% of the Belgian population.[39]

Despite the functioning of an advisory committee on European Affairs composed of members of the House of Representatives as well as Belgian members of the European Parliament,[40] the involvement of Parliament in EU decision making is relatively weak. This was demonstrated in a study comparing parliamentary control capacity, based upon the strength of special parliamentary committees on European affairs, access to information and voting instructions.[41]

As mentioned, Art. 168 of the Constitution contains specific information obligations in the case of negotiations on a revision of the EU treaties. The subsidiarity mechanism following from the subsidiarity protocol[42] is not enshrined in the Constitution. However, prior to this protocol, a special majority law inserted the obligation to inform regarding all normative acts of the European Commission and gave the federal and federated parliaments a right to give advice.[43]

The federated parliaments are also involved in the subsidiarity procedure. The Belgian Declaration No. 51 holds that the term 'national parliaments' in the EU Treaties encompasses subnational parliaments in the Belgian legal order.[44] A co-operation agreement was signed by the eight chairs of the legislative assemblies in 2005, which was revised in 2008, and then again in 2017 in light of the latest state reform and the transformation of the Senate. A conflict may arise, as the reformed Senate no longer has powers in international and EU affairs,[45] whereas Art. 7 of the Protocol states that 'in the case of a bicameral Parliamentary system, each of the two chambers shall have one vote'. According to the co-operation agreement, each federated parliament can submit a reasoned statement, and votes are cast in such a way that federal and subnational opinions are positioned next to one another, without fostering institutional dialogue.[46] The revised co-operation agreement does not differ in this respect.

1.4.2 The Belgian constitutional system does not allow for the organisation of nation-wide referendums. While the Constitution does not explicitly ban

[39] See Rimanque 2002, p. 76.

[40] Article 68 Rules of Regulation of the House of Representatives.

[41] Raunio 2005, p. 324.

[42] Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

[43] Article 92*quater* Special Majority Law on the Reform of the Institutions.

[44] Declaration No. 51 of the Kingdom of Belgium on the national parliaments, 17.12.2008, *PB C* 306, 287.

[45] One exception concerns Acts of Parliament that implement supranational or international obligations if the federated entities have failed to do so, based on Art. 169 Constitution.

[46] Popelier and Vandenbruwaene 2011, p. 223.

referendums, it is inferred from Art. 33, which refers to the 'Nation' as the source of all powers instead of the 'People', and which states that all powers are exercised in the manner laid down in the Constitution. Hence, referendums can only be held in so far as the Constitution allows for it. One nation-wide (advisory) referendum was held nevertheless, in 1950, concerning the position of King Leopold III after World War II. As this referendum aggravated the political crisis it was intended to resolve, nation-wide referendums are not only considered unconstitutional, but they are also regarded as a threat to the delicate balance between the two major language groups which constitute the divided Belgian state. The reason is that the outcome of a referendum may clearly demonstrate the cleavage between the Flemings and francophone people, while lacking the instruments to mitigate the differences.[47]

The Constitution does explicitly allow for local advisory referendums and, since the recent sixth state reform, gives the right to organise advisory referendums to the federated Regions within their exclusive spheres of competence.[48] As EU treaties are mixed treaties, regional referendums regarding the approval of these treaties are excluded. Regularly, proposals are submitted in the federal Parliament aimed at enabling or requiring the organisation of referendums regarding the approval of (EU) treaties in general,[49] a particular EU treaty[50] or the accession of a (possible) new Member State.[51] These proposals are initiated by members of various Flemish as well as francophone political parties, from left-wing to right-wing. Nevertheless, they are hardly ever discussed.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 Reasons for EU amendments Article 34, enabling the transfer of powers to international organisations, was inserted into the Constitution in 1970, in order to end ongoing debate on whether access to the European Communities was

[47] Popelier 2005, pp. 115–116.

[48] Article 39*bis* Constitution.

[49] *Parl. Doc.* House of Representatives 2010–2011, 53-999/1; 2007–2008, 52-794/1; 2007–2008, 52-332/1; 2004–2005, 51-1818/1; Senate 1995–1996, 1-295/1; 1995–1996, 1-293/1; 1995–1996, 1-161/1.

[50] Treaty on Stability, Coordination and Governance: *Parl. Doc.* House of Representatives 2011–2012, 2105/1; *Parl. Doc.* Senate 2011–2012, 5-1613/1; Treaty of Lisbon: *Parl. Doc.* House of Representatives 2007–2008, 52-591/1; 2007–2008, 52-584/1; Treaty establishing a Constitution for Europe: *Parl. Doc.* House of Representatives 2003–2004, 51-317/1; 2003–2004, 51-297/1; 2003–2004, 51-281/1; 2003–2004, 51-1531/1; 1988–1989, 47-757/1; Senate 2003–2004, 3-950/1; 2003–2004, 3-282/1; 2003–2004, 3-250/1; Senate, 1988–1989, 595/1; Treaty of Amsterdam: *Parl. Doc.* House of Representatives 1997–1998, 1429/1; *Parl. Doc.* Senate 1997–1998, 2-889/1; Treaty of Maastricht: *Parl. Doc.* House of Representatives 1991–1992, 48-576/1; *Parl. Doc.* Senate 1991–1992, 1-440/1.

[51] Turkey: *Parl. Doc.* Senate 2003–2004, 3-919/1; List of 12 countries: *Parl. Doc.* House of Representatives, 2000–2001, 50-1094/1; 1999–2000, 509/1.

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in conformity with the Constitution. Several constitutional experts were of the opinion that joining a supranational Europe violated Art. 33 of the Constitution, which states that all powers emanate from the Nation and are exercised in the manner laid down by the Constitution.[52] Other experts, along with the legislative chambers, argued that Art. 33 only referred to domestic issues and did not prevent the transfer of powers to international organisations.[53] The legislation division of the Council of State took a middle position, stating that the Constitution did not allow for the transfer of 'essential prerogatives' assigned to the national authorities.[54] The legislative assemblies, however, opted for a firm constitutional basis, considering the changing nature of modern international organisations.[55]

Legality concerns also explain the insertion of a provision in Art. 8 of the Constitution, enabling the right to vote for non-Belgian citizens of the European Union. The Council of State had, on several occasions since 1980, pointed out that a constitutional amendment was required if non-Belgian residents were to be granted the right to vote for municipality councils.[56] Hence, unsurprisingly, the Council of State considered the law giving approval to the Treaty of Maastricht unconstitutional, as this Treaty introduced the right of every citizen of the Union residing in a Member State of which he is not a national, to vote and to stand as a candidate in municipal elections.[57] Parliament approved the treaty nevertheless, relying on the Government's argument that implementation of the treaty required the issuing of a directive.[58] The Constitution was finally amended in December 1998, four years after the issuing of the directive.[59] The rigid procedure for constitutional amendments, requiring the renewal of Parliament, as well as disagreement regarding the extension of the right to vote to non-EU citizens residing in Belgium, explain this belated action.

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[52] See in particular the opinion by Dor G., Ganshof van der Meersch W.J., De Visscher P. and Mast A., *Parl. St.* House of Representatives 1952–1953, 696.

[53] See also Rimanque and Wouters 1998, p. 10. Both positions were reflected in the Council of State's advice of 12 January 1953, *Parl. Doc.* House of Representatives 1952–1953, 163.

[54] Council of State, advice of 12 January 1953, *Parl. Doc.* House of Representatives 1952–1953, 163. For this reason, it considered that approval of the European Defence Community Treaty violated the Constitution, unless justified by an inescapable and urgent necessity. The same position was held in subsequent advice, but ignored by the political actors. For an overview, see Velaers 1999, p. 236.

[55] Commission Report, *Parl. Doc.* Senate 1969–1970, No. 275.

[56] Council of State, Advice of 22 October 1980, *Parl. Doc.* House of Representatives 1985–1986, 262/2, 3–10. For an overview, see Velaers 1999, p. 59.

[57] Advice of 6 May 1992, *Parl. Doc.* 1991–1992, 48-482/1.

[58] *Parl. Doc.* House of Representatives, Special Session 1991–1992, 48-482/1, 90. The Council of State refuted these arguments: Advice of 6 May 1992, *Parl. Doc.* 1991–1992, 48-482/1, 71.

[59] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368/38.

1.5.3 The role of the Belgian Constitution in a multilevel environment Legal systems within the EU that are obliged to implement EU law in the domestic legal order are faced with the question of the extent to which limitations of power that follow from external sources can be accepted, while maintaining legitimacy within the legal order. Two main approaches can be discerned: an 'efficacy approach', which is predominantly occupied by the concern for efficient through-put of EU law, and a 'legitimacy approach', which is specifically concerned with providing legitimacy to inflowing EU law.[60] If a legitimacy approach is adopted, ideally, (a) the transfer of powers is submitted to special procedural and/or substantive conditions, (b) the precedence of EU law over the constitution is contested and (c) constitutional or supreme courts play the role of watchdogs over the constitution, assuming the power to ultimately delineate competences. If an efficacy approach is adopted, (a) the transfer of powers to the EU is allowed without special formal conditions, (b) the precedence of EU law over national law, including the constitution, is uncontested and (c) the judicial review of EU laws and treaties is constrained.

In Belgium, an efficacy approach clearly dominates. First of all, Art. 34 of the Constitution that allows for the transfer of powers does not impose specific conditions other than a law adopted by a simple majority (a). The precedence of EU law over the Constitution is uncontested (b) and the courts, including the Constitutional Court, are Europe-friendly (c). This is in line with the general approach towards European integration that Belgium has taken from the outset, along with other small countries such as the Netherlands and Luxembourg, because national interests in terms of both the economy and international relations have coincided with EU interests.[61] Of course, public sentiment towards the European Union evolves, in which case an efficacy approach may harm the perceived legitimacy of the European project. Until now, Belgian citizens have still been positive about the EU and its democratic functioning, when compared to other citizens of the EU.[62] A recent survey nonetheless reveals that support for the European integration project is decreasing amongst young adults.[63]

The efficacy approach is somewhat undermined by the consequences of dual federalism, as every federated entity has to give assent to an EU treaty. The sixth state reform gave the opportunity for a more efficient procedure. As the Belgian Senate was transformed into a genuine chamber of the federated entities, it would have been sensible to simplify the procedure and give the federated entities the right of approval only through the Senate. In that case, the federated entities would have been denied a veto right, but they would still have been able to discuss a treaty

[60] Popelier 2014a, pp. 300–319.

[61] Bribosia 1998, p. 32.

[62] See the Belgian report for the Standard Eurobarometer 80, *L'opinion publique dans l'Union européenne – Rapport National Belgique*, fall 2013, http://ec.europa.eu/public_opinion/archives/eb/eb80/eb80_be_fr_nat.pdf.

[63] Elchardus and Te Braak 2014.

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jointly, and veto the treaty under ordinary or specific majority requirements. By contrast, the Belgian constituent power opted for a more confederal approach and maintained the federated entities' veto rights, while depriving the Senate of its right of approval.[64]

2 Constitutional Rights, the Rule of Law and EU Law

2.1 Fundamental Rights and General Principles of Law in the Belgian Constitution

2.1.1 The Belgian Constitution clusters the constitutional rights and freedoms in Title II Constitution titled 'on Belgians and their rights'.[65] This chapter is quite extensive as to the number and nature of constitutional rights entrenched therein, including the rights of the child and several social and economic rights (the right to education, work, housing). Certain classic fundamental rights included in the Constitution provide broader protection than analogous rights entrenched in international or regional treaties, e.g. prohibition of the imposition of pre-emptive measures which may hinder the enjoyment of specific rights and freedoms such as the right to enter into associations.[66]

The Constitution provides for a number of general principles of law without, however, formally distinguishing between principles and rights. For example, the Constitution provides for the prohibition of retroactive legislation or punishment, or the legality principle (*nulla poena sine lege*) (Arts. 12 and 14 Constitution). Other general principles, such as the proportionality principle, legal certainty and legitimate expectations have not been entrenched in the Constitution.

Constitutional rights are enforceable in courts. First, the Constitutional Court provides centralised constitutionality review, by examining the compatibility of legislation with the constitutional rights entrenched in Chapter II of the Constitution and a given number of other constitutional rights. If the Court finds legislation to be incompatible, it annuls the legislation. Secondly, ordinary courts and administrative courts provide decentralised review. If they find secondary legislation to violate the Constitution or statutes to violate international treaties, they can disapply (not annul) the provisions in question or provide a constitutionally conforming interpretation of the legislation. The Act on the Constitutional Court regulates the interaction between the ordinary or administrative courts and the Constitutional

[64] On the Belgian confederal approach, compared to the UK centralist and the German federal approach, see Popelier 2014b, p. 17.

[65] A limited number of fundamental rights have been entrenched in other chapters, including rights concerning fairness in taxation (Arts. 170–171).

[66] Article 27 Constitution.

Court.[67] This Act provides for the rules applicable when these courts are obliged to make a reference to the Constitutional Court by means of a preliminary reference procedure.

2.1.2 There is no general limitation clause in the Belgian Constitution. Some specific provisions establishing constitutional rights provide for limitation clauses. The general approach to these limitations is that, in line with the rule of law, limitations to constitutional rights can only be provided by law.[68] For example, the Belgian Constitution provides for a limitation to the right of peaceful assembly, namely that it must be in accordance with the law.[69] As such, Parliament is given a wide discretion to regulate the conditions and criteria for peaceful assembly.

However, such limitations are not without restriction. First, in principle, preventive measures to the exercise of constitutional rights and freedoms are prohibited,[70] in order to ensure the broadest protection of personal freedom.[71]

For example, while Parliament may limit the right of peaceful assembly, it may not submit peaceful assembly to prior authorisation.[72] In addition, certain material limitations have been entrenched in specific provisions. For example, the Belgian Constitution provides that no one can be deprived of his or her property except in the case of expropriation for a public purpose, in the cases established by law and in return for fair compensation remunerated beforehand.[73]

2.1.3 The Belgian concept of the rule of law, influenced by the classic French notion as developed during the Enlightenment, focuses on protection against arbitrary power. This notion is articulated in formal as well as in material requirements to the exercise of power by government. The Belgian conception of the rule of law (*état de droit*) is currently understood as protection against the arbitrary use of power by public authorities by requiring that public power be exercised in line with the existing and applicable legal norms.[74]

There is no separate category in the Constitution regarding the rule of law, nor a specific title. However, it is without any doubt that the Belgian polity and Constitution are based on this notion. First, the main principles of the formal concept of the rule of law are explicitly entrenched in the Constitution, in particular the separation of powers (Title III, Title IV, Title V). Secondly, the underpinning

[67] Special Act of 6 January 1989 on the Constitutional Court, *Official Gazette* 7 January 1989.

[68] Van Delanotte considers this an example of the immense trust the 19th century constitutionalists put in Parliament. Vande Lanotte and Goedertier 2010, p. 281.

[69] Article 26 Belgian Constitution.

[70] This notion is mentioned explicitly in Arts. 19, 24, 25, 26 and 27 of the Constitution. However, jurisprudence accepts that this prohibition is of general nature and applies in principle to all constitutional rights and freedoms. Wigny 1952, pp. 267–269 and Alen 1995, p. 499.

[71] Wigny 1952, p. 269.

[72] The only exception provided are gatherings in public space.

[73] Article 16 Belgian Constitution.

[74] Popelier 1997, p. 97; Dujardin et al. 2014, p. 367; Mast and Dujardin 1985, p. 23; Allen 1995, p. 12.

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material criteria of this principle are also entrenched as specific rights in the Constitution, such as the equality of all persons before the law (Art. 10), the application of the law without discrimination (Art. 11) and the legality principle with regard to punishments (Art. 14).

Protection of the rule of law has been invoked before the Constitutional Court as a general principle of law of constitutional nature and, thus, the Constitutional Court has been asked to protect given rights read in the light of this general principle.[75]

In several cases the Constitutional Court has reiterated that Belgium is governed by the rule of law and that such conclusion follows from the Constitution itself. The Constitutional Court has held that the Belgian polity is conceived as a state under the rule of law.[76] Consequently, the Constitutional Court has protected several legal principles and rights on the basis of protection of this notion, such as the legality principle and equality principle. In particular, the Constitutional Court has stated explicitly in several judgments that protection of the rule of law implies that public authorities are subjected to the law and, thus, government is to exercise power in line with the applicable legal norms.[77] The Constitutional Court additionally protects the material requirements of the rule of law, in particular the protection of constitutional rights and freedoms. The Court has held that protection of the rights of defence and the right to a fair trial ensue from protection of the rule of law by the Belgian legal order.[78]

2.2 *The Balancing of Fundamental Rights with Economic Free Movement Rights*

2.2.1 Historic reasons explain the absence of systemic conflicts between the protection of fundamental rights and economic free movement rights in Belgium. For over 150 years, the Belgian Constitution played only a marginal role in Belgian case law, given that courts were not allowed to review legislation for compatibility with the Constitution.[79] While courts could provide for a constitutionally conforming interpretation,[80] the absence of constitutional review restricted the development of a true constitutional jurisprudential culture.

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[75] E.g. Const. Court No. 41/201115, March 2011.

[76] Const. Court No. 151/200215, October 2002, para. B.3.2.

[77] Const. Court No. 151/2002, 15 October 2002, para. B.3.2.

[78] Const. Court No. 98/2008, 3 July 2008, para. B.7; Const. Court No. 77/2012, 14 June 2012, B.3.1.

[79] The inviolability of legislation was not explicitly provided in the Belgian Constitution or other legislation. However, in a judgment of 1849 the Supreme Court held that courts were not competent to review the constitutionality of legislation. Cass. 23 July 1849, *Pas*. 1849.

[80] The Supreme Court held that if several interpretations of legislation were possible, courts were to select the interpretation that conformed to the Constitution. Cass. 20 April 1950, *Arr. Verbr*. 1950.

Belgian courts were in contrast exposed to the law of the European Community and later of the European Union early on. Belgium was a founding father of the EC and, therefore, the economic free movement rights as developed by the European Community were adopted in the Belgian legal sphere well before the development of constitutional review. In consequence, courts have in general been lenient towards accommodating economic free movement rights, in particular the free movement of goods. Already in 1971, the Court of Cassation proclaimed that domestic law should be set aside when incompatible with directly applicable international law provisions, including European Economic Community rules.[81] As a result, Belgian courts have interpreted domestic norms in line with EU law and, if such coherent interpretation has not been possible, have set aside these norms.

A jurisprudential discussion on the constitutional limits of the precedence of these economic free movement rights of EU pedigree is thus recent. Two evolutions in Belgian constitutional history have put the automatic acceptance of the primacy of EU law over domestic norms into question. First, the development of constitutional review by the establishment of the Constitutional Court awakened a constitutional consciousness within Belgian academic, judicial and political circles.[82]

Secondly, during the last three decennia Belgium has swiftly transformed from a unitary state to a federal state whereby competences are divided between the federal state and the federated Communities and Regions.[83] The equilibriums between the federal state and the Regions and Communities are key to the functioning of the Belgian state and have been entrenched in the Constitution or in legislation of constitutional nature. Consequently, certain EU rules and ECJ jurisprudence touching upon these balances have sparked debate on the limits of the unconditional acceptance of the primacy of EU law.[84]

Nevertheless, the interaction between the protection of constitutional rights and economic free movement rights is in general not considered as problematic. The Constitutional Court has adopted a pragmatic approach: if a conflict occurs between constitutional rights and economic free movement rights, the Court will engage in the discussion by sending preliminary questions to the ECJ requesting a decision on

[81] Cass. 27 may 1971, *Arr. Cass*. 1971, 959.

[82] As was explained in Sect. 1.1, the Belgian Constitutional Court was established in 1980 in order to guard the division of competences between the federal state and the regional entities. The competences of the Court were extended over the course of two decennia providing the Court with the competence to review legislation on its compatibility with the constitutional rights and freedoms entrenched in Title II of the Constitution. Finally, the original name of the Court, 'the Arbitrage Court', was replaced by 'Belgian Constitutional Court', in recognition of the evolution of the court from an arbiter between the federal state and regional entities to a fully fledged modern constitutional court.

[83] Supra Sects. 1.1 and 1.4.

[84] Such federal equilibrium was at stake in the only case where the Constitutional Court explicitly voiced critique on an ECJ judgment. See Const. Court No. 89/2011, 31 May 2011. At the same time EU law has been relied upon to mediate conflicts at the national level, in particular in regard to questions concerning federal conflicts. See Popelier and Voermans 2015, p. 106. More on this issue, see infra Sect. 2.8.1.

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the compatibility between the free movement rights and EU fundamental rights. Thus, the potential conflict between a given right and an economic free movement right is not framed as a conflict between a constitutional right and a free movement right, but as a conflict between a (EU) fundamental right and a free movement right. As a result, the Constitutional Court avoids open conflicts between EU law and constitutional law. However, in the literature, certain scholars state that there are constitutional limits to the application of EU law in the Belgian legal order,[85] for example as regards the balancing of market freedoms and the right to strike or protest (see Sect. 2.6).

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

2.3.1–2.3.5 The reception and enforcement of the European Arrest Warrant

The implementation of the EAW in Belgian law and its application The European Arrest Warrant (EAW) was implemented in Belgium in 2003.[86] The Belgian Parliament copied the European Arrest Warrant Framework Decision (EAW Framework Decision) almost literally in the implementing act.[87] The EAW implied essential changes to the Belgian legislation concerning extradition that was applicable before the introduction of the EAW.[88] First, the Belgian law entrenched the principle of double criminality. A person could only be extradited if the offence for which extradition was requested was also accepted as an offence under Belgian law and was punishable in Belgium and in the requesting state by a prison sentence exceeding one year. The EAW meant that certain exceptions to this principle of double criminality had to be accepted. Secondly, the Belgian law provided that Belgian judges could refuse extradition if the person to be extradited held Belgian nationality. The EAW does not allow for such exception.

Some specifications were, however, introduced, in particular with regard to crimes for which the requirement of double criminality will continue to apply.[89] The Belgian law stipulates explicitly that abortion and euthanasia will not be considered manslaughter under the list of crimes for which the criterion of double criminality of the offence in the requesting state and Belgium are no longer required.

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[85] Maintaining that the Constitutional Court considers the Constitution supreme Craig 2004, p. 37; Bribosia 1998, pp. 21–22; Bombois 2004, pp. 143–150. Highlighting that the Constitutional Court has not embraced such vision explicitly Popelier 2008, p. 48 and Beirlaen 1992, p. 150.

[86] Act of 19 December 2003 concerning the European Arrest Warrant, *Official Gazette* 22 December 2003 (EAW implementing act).

[87] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[88] Act of 15 March 1874, *Official Gazette* 17 March 1874.

[89] Article 5 EAW implementing act, supra n. 86.

The EAW and constitutional challenges Given the essential changes imposed by the EAW on the Belgian system of extradition, it came as no surprise that the EAW, through implementation in Belgium, was tested before the Constitutional Court.

The first decision of the Constitutional Court on the EAW resulted from a procedure initiated by the NGO *Advocaten voor de Wereld*.[90] The NGO advocated that the absence of the double criminality (legality principle) requirement for extradition on the basis of an EAW violated the prohibition on discrimination and the right to equal treatment as stipulated in Arts. 10 and 11 of the Constitution. The Constitutional Court referred the question to the ECJ for a preliminary ruling, arguing that the absence of the double criminality principle in the implementing act followed directly from the EAW Framework Decision and, consequently, the question before the Constitutional Court raised an important point on the compatibility between the EAW Framework Decision and fundamental rights.[91]

In its 2007 judgment *Advocaten voor de Wereld* the ECJ decided on the preliminary questions referred by the Belgian Constitutional Court regarding the compatibility of the EAW Framework Decision and the legality and equality principles.[92] The ECJ accepted that the Framework Decision was to respect fundamental rights, in particular those guaranteed in the ECHR and as they result from the constitutional provisions common to the Member States. For this reason, the Framework Decision should indeed respect the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination.[93] However, the ECJ decided that the Framework Decision complied with those principles.

As regards the legality principle, the ECJ held that this principle does not require the double criminality of offences, but only that legislation must clearly define offences and the penalties they attract.[94] The ECJ repeatedly emphasised that the Framework Decision by no means intended to harmonise the definition of offences among the Member States, but only to improve mutual co-operation in the field of extradition for the most serious crimes. It was not the intention of the Framework Decision to provide for the definition of offences and penalties, but merely to set the minimum criteria for those offences with regard to which the EAW applies. The Court found the Framework Decision to comply with this principle given that it only provides for extradition for those offences which are punishable in the issuing Member State 'as they are defined by the law of the issuing Member State'.[95]

[90] Const. Court No. 124/2005, 13 July 2005.

[91] Both at the level of the Constitutional Court and the ECJ more technical judicial questions were raised concerning the competence to enact the Framework Decision and implementing act. However, for the purpose of this contribution, the focus has been put on the fundamental rights issues concerned.

[92] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-03633.

[93] Ibid., paras. 45–46.

[94] Ibid., para. 50.

[95] Framework Decision, supra n. 87, Art. 2(2).

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The ECJ argued that the Framework Decision therefore only provides for extradition if the issuing state complies with the legality principle.[96]

As for the equality principle, the ECJ held that the choice of the 32 categories of offences for which the double criminality principle does not apply was objectively justified on the basis of several features, including the seriousness of the offences in adversely affecting public order and safety.[97]

Upon the return of the preliminary judgment of the ECJ, the Constitutional Court reverted extensively to the ECJ judgment, blending the reasoning of the ECJ with other arguments based on the preparatory works of the implementing act.[98] The Constitutional Court emphasised that the absence of the double criminality principle for certain categories of offences did not imply that there is no judicial control by the judicial authorities. The Court stated that the double criminality principle was replaced by other criteria.[99] The Court in particular referred to the criteria in the implementing act which define the cases in which the domestic authorities are even obliged to refuse extradition, such as compliance with the *non bis in idem* principle or age restrictions.[100] It held that in view of the above, there was no violation of the legality and equality principles.[101] This judgment is a typical example of the approach of the Constitutional Court vis-à-vis ECJ judgments: the Court will extensively refer to the ECJ judgment, but will add its own reasoning based on its previous case law and parliamentary works, blending the EU *contentieux* with the domestic constitutional *contentieux*.

The implementing act was tested for a second time before the Constitutional Court in 2009.[102] This case originated from a preliminary reference by an investigation court. The referring court questioned whether Art. 8 of the implementing

[96] Case C-303/05 *Advocaten voor de Wereld*, n. 92, paras. 52–53.

[97] Ibid., paras. 57–58.

[98] Const. Court No. 128/2007, 10 October 2007.

[99] Ibid., paras. B.17.1–B.17.2.

[100] Ibid., para. B.19.

[101] In its reasoning the Constitutional Court considered the compatibility of the implementing act with the constitutional rights from the perspective of Art. 6 ECHR. However, in its original request, the NGO questioned the compatibility of the prohibition of the constitutional equality principles in the light of Art. 6 ECHR, but also the constitutional right to have access to the legally provided tribunal (Art. 13 Constitution) and the right to liberty (Art. 12 Constitution). In the reasoning of the Constitutional Court, these articles play no role and no distinct reasoning is provided on the basis of these provisions. More in general, the case law of the Constitutional Court on procedural rights is almost entirely developed on the basis of Art. 6 ECHR and not on the basis of Art. 13 of the Constitution. The same is true with regard to Art. 5 ECHR and Art. 12 of the Constitution.

[102] Const. Court No. 128/2009, 24 July 2009. In contrast to the *Advocaten* case, this judgment did not follow an application for annulment by an NGO, but originated from a preliminary reference from an investigation court, i.e. a court that decides at the end of a criminal investigation whether the case will be referred to a court which can decide on the merits of the case. In this case, the referring court limited the preliminary reference to a question on the compatibility of the implementing act with the right to equality (Arts. 10 and 11 Constitution).

act violated the prohibition on discrimination and the right to equal treatment as stipulated in Arts. 10 and 11 of the Constitution. Article 8 of the implementing act provides that a judge cannot refuse the extradition of a person because the foreign judgment on the basis of which the European arrest warrant was delivered resulted from a trial *in absentia*.[103] The Constitutional Court decided again that the provisions of the implementing act followed directly from the European Framework Decision and for that reason referred the question to the ECJ.

In contrast to the *Melloni* case, the preliminary question by the Constitutional Court did not question the compatibility of extradition in the case of an *in absentia* trial as such.[104] The Belgian Constitutional Court merely asked whether extradition, in the case of an *in absentia* trial where the person concerned would have the opportunity in the requesting state to apply for a retrial, could be rendered conditional upon the return of the extradited person for the execution of the sentence. The ECJ in its judgment did not consider the case from a fundamental rights perspective.[105] The ECJ decided that the Framework Decision was to be interpreted in such manner as to allow for judicial authorities to render the extradition of a person conditional upon his or her return to the executing state to serve the sentence, if the sentence was imposed *in absentia*.[106]

The Constitutional Court relied on the ECJ judgment when deciding the case, holding that the implementing act was to be interpreted so that judicial authorities could render the extradition conditional upon the return of the person extradited to serve the sentence if this person was convicted *in absentia*.[107] The Constitutional Court did, however, refer to applicable fundamental rights criteria, in particular the right to a fair trial and ECtHR case law, in deciding that the provision would not be compatible with the right to equal treatment unless it were interpreted as rendering the extradition conditional upon the return of the person to Belgium to serve the sentence in the case of an *in absentia* trial.[108] Again, the Constitutional Court closely followed the ECJ judgment but added its own reasoning.

2.3.1 Other Relevant Issues in Fundamental Rights and Criminal Law

The Belgian constitutional case law regarding criminal procedure clearly shows the dual impact EU law can have on fundamental rights protection: under certain circumstances EU law might limit the guarantees in domestic constitutional law while

[103] Const. Court No. 28/2011, 24 February 2011.

[104] Case C-306/09 *I.B.* [2010] ECR I-10341. For a discussion on *in absentia* trials, see the preliminary reference question from the Spanish Constitutional Court in Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[105] There was no reference in the judgment to fundamental rights nor a wider discussion on the compatibility of extradition in cases involving *in absentia* trial and fundamental rights.

[106] Case C-306/09 *I.B.*, supra n. 104, para. 61.

[107] Const. Court No. 28/2011, 24 February 2011, para. B.2.7.

[108] Ibid., para. B.5.

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on other occasions EU law might actually improve the standards of protection. The Money Laundering Directive is an example of such limitation, while the so-called Salduz-Directive exemplifies the potential for upgrading standards of protection.

The implementation of the Money Laundering Directive[109] in Belgian law was highly contested due to the obligation for independent legal professionals, including lawyers, to report information in a listed number of circumstances. This clearly implied a limitation of the professional secrecy of lawyers. The protection of professional secrecy of lawyers is not explicitly set out in the Belgian Constitution. However, it is considered in Belgium as an elementary condition for ensuring the right to an equal and fair trial as protected under Art. 6 ECHR as well as the lawyer-client privilege as protected under Art. 8 ECHR. Therefore, the Belgian Bars asked the Constitutional Court to annul the domestic act implementing the Directive.[110] The Constitutional Court referred a preliminary question to the ECJ asking whether the obligation for professionals in the financial sector to report potential money laundering by clients to official authorities, as introduced by the Directive, violated the constitutional prohibition of discrimination read in the light of Art. 6 ECHR.[111] Given that the Belgian implementing act almost entirely copied the text of the Directive, a finding by the Constitutional Court that the implementing act violates fundamental rights would imply that the Money Laundering Directive suffered the same flaws.

In its judgment *Ordre des barreaux francophones et germanophone*, the ECJ answered that the Directive establishing this obligation did not violate the constitutional right to non-discrimination read in the light of Art. 6 ECHR.[112] The ECJ indicated that sufficient guarantees had been provided in the Directive, given that the obligation to report is limited to the execution of certain transactions, essentially those of a financial nature or concerning real estate, and no obligation to report was provided where a lawyer is called upon to assist or represent a client before the courts.[113]

When the Constitutional Court was to decide the case after the ECJ judgment, it referred to the ECJ judgment, stating that the judgment had found that there was no violation of Art. 6 ECHR.[114] However, the Constitutional Court proceeded to

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[109] Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, [1991] OJ L 166/77 as amended by Directive 2001/97/EC of 4 December 2001, [2001] OJ L 344/76. The directive was implemented by the Act of 12 January 2004 amending the Act of 11 January 1993 relating to the prevention of the use of the financial system for the purpose of money laundering, *Official Gazette* 23 January 2004.

[110] Given the federal structure of Belgium, the Bar of Lawyers is divided into a Dutch-speaking section, a French- and German-speaking section, and a Dutch-speaking section and French-speaking section in Brussels.

[111] Const. Court No. 126/2005, 13 July 2005.

[112] Case C-305/05 *Ordre des barreaux francophones et germanophone and others* [2007] ECR I-05305.

[113] Ibid., paras. 33–35.

[114] Const. Court No. 10/2008, 23 January 2008, para. B.5.2.

review whether the implementing act was compatible with Arts. 6 and 8 ECHR. The Constitutional Court had limited its preliminary question to the ECJ to the aspect of procedural rights, i.e. the compatibility with Art. 6 ECHR. It could therefore not rely on the ECJ judgment upon reviewing the compatibility with Art. 8 ECHR. The Court held that the implementing act did not violate the Constitution read in the light of Arts. 6 and 8 ECHR in so far as the act was interpreted as exempting lawyers from reporting information in the exercise of the essential activities of their profession.[115] It maintained that this also applies to transactions listed in the Directive for which the reporting obligation is provided. It is unclear whether the refusal of the Constitutional Court to send another preliminary reference on compatibility with Art. 8 ECHR implied that the Court meant to emphasise its own authority to deal with such issues or, alternatively, whether the refusal was just a matter of pragmatics to ensure that the case would be decided within due time.[116]

The introduction of the so-called Salduz-Directive,[117] in contrast, will result in a better standard of protection of fundamental rights in comparison to the current standard held by the Constitutional Court. This Directive provides for the right to the assistance of a lawyer during an interrogation by police and judicial authorities. The Belgian provisions regulating consultation and assistance rights prior and during interrogations limit the assistance of a lawyer during an interrogation to persons deprived of liberty.[118] The Belgian Constitutional Court based its reasoning on the ECtHR jurisprudence to find that the limitation to persons in custody did not violate Art. 6 ECHR.[119] The implementation of the Directive implied the extension of this right to all persons who are interrogated and thus improve the standard of protection of procedural rights currently held by the Constitutional Court to be compatible with Art. 6 ECHR.

The *Total Belgium* case of the Constitutional Court is a second example where a reference to EU law has had a positive effect on the protection of fundamental rights in criminal proceedings.[120] This case concerned the compatibility of the sanctions provided in Belgian law for evasion of taxes on mineral oils with the prohibition of disproportionate sanctions. The Act in question seriously limited the discretion of

[115] Ibid., para. B.9.6.

[116] However, in subsequent cases no similar approach was taken, suggesting that this judgment should not be regarded as a principled stance of defiance towards the ECJ case law.

[117] Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.

[118] Act of 13 August 2011 amending the Code of Criminal Procedure and the Act of 20 July 1990 on temporary custody, *Official Gazette* 5 September 2011, 56347. These provisions were introduced following the ECtHR Salduz jurisprudence *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

[119] Const. Court No. 07/2013, 14 February 2013, paras. B.9.1.–B.9.2.

[120] Const. Court No. 81/2007, 7 June 2007.

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judges to amend the fines provided in the Act, e.g. the judge could not adapt the fines mentioned to the circumstances of the case and take mitigating circumstances into account.[121] Given that this Act implemented EU measures, the Constitutional Court relied on ECJ case law and found that the sanctions were to be effective but not disproportionate. The Constitutional Court in particular referred to the applicable article in the EU Charter of Fundamental Rights, even though the Charter was not yet in force at the time of the judgment.[122]

2.4 *The Data Retention Directive and the Belgian Constitutional Order*

2.4.1 The annulment procedure regarding the implementation of the Data Retention Directive 2006/24/CE[123] was still pending before the Constitutional Court at the time of the ECJ's judgment in the *Digital Rights Ireland* case.[124] The Directive had only been implemented on 30 July 2013[125] and, hence, the annulment procedure had been initiated only shortly before the ECJ's judgment.[126]

The reason for this delay in implementation is of a less principled nature than was the case in Sweden. Belgium is in general slow in implementing directives and has already been penalised on numerous accounts by the European Commission for a lack of efficient and timely implementation. In reaction to threats by the European Commission to penalise Belgium for non-implementation of the Data Retention Directive, the Government speeded up the implementation of the Directive in the summer of July 2013. For this reason, the Government left only little time for debate or interventions by experts during the implementation by Parliament.

The former Belgian Deputy Prime Minister and public law professor Vande Lanotte had suggested that the judgment of the ECJ must not have consequences for the Belgian act, given that more guarantees for fundamental rights were entrenched in the implementing act.[127] This position was not followed by the Constitutional

[121] Act of 22 October 1997 concerning the structure and the tariffs of taxes concerning mineral oil, *Official Gazette* 20 November 1997.

[122] Const. Court No. 81/2007, 7 June 2007, para. B.9.2.

[123] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[124] Joined cases C-293/12 and C-595/12 *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238.

[125] Act of 30 July 2013 concerning the amendment of Articles 2, 126 and 145 of the Act of 13 June 2005 on the Electronic Communication and Article 90decies of the Code of Criminal Procedure, *Official Gazette* 28 August 2013, 56109.

[126] The procedure had been initiated by the Belgian League of Human Rights and the Francophone and German Order of Lawyers on 24 February 2014.

[127] *De Tijd* 9 April 2014, available at www.detijd.be.

Court. Given that the Belgian act is almost a literal copy of the European Directive, in particular with regard to the provisions criticised by the ECJ, the Constitutional Court found the implementing act to be in violation of the right of privacy as protected by the Constitution, read in the light of EU fundamental rights and the ECHR. It explicitly mentioned that the implementing act violated EU fundamental rights for the same reason as stated by the ECJ.[128] Upon the annulment by the Constitutional Court, the Belgian legislator did not await a new European initiative but rather introduced a new Act in 2016. This Act still allowed for bulk retention of communication data but limited the access to such data for law enforcement. After the new ECJ judgment *Tele2/Watson* in which the ECJ found bulk retention of communication data to be in violation of the protection of personal data and privacy, it was expected that the Constitutional Court would once again strike down the Belgian Act. Instead, the Constitutional Court sent new preliminary questions to the ECJ implicitly criticising the Luxembourg case law by highlighting the importance of bulk retention for criminal investigations. The preliminary questions are a clear invitation for the ECJ to reconsider its position or at least provide some margin to the national courts.[129]

2.5 Unpublished or Secret Legislation

2.5.1 The question of secret legislation by EU institutions has not risen in Belgium. Most probably, it would not be considered as binding upon individuals. According to Art. 190 of the Constitution, laws are not binding upon third parties until publication 'in the manner described by the law'. This article is considered to articulate a more general principle of law according to which citizens can only be bound by laws if they have been properly published.[130] The Belgian Constitutional Court interprets this article in the light of the rule of law, to require that authorities make substantial efforts to ensure equal access to the law for each person.[131] The duty to publish includes annexes with normative content.[132] Also, legislative acts that simply refer to provisions in an EU directive do not comply with Art. 190 of the Constitution, if the directive has not been published in the Belgian Official Gazette.[133] While unpublished law cannot have any effect on third parties, it

[128] Const. Court No. 84/2015, 11 June 2015.

[129] Const. Court. No. 96/2018, 19 July 2018. Compare to Joined cases C-203/15 and C-698/15 *Tele2 Sverige* [2016] ECLI:EU:C:2016:970.

[130] See Velaers 2003, pp. 33–34.

[131] Const. Court No. 106/2004, 16 June 2004. Confirmed in Const. Court No. 10/2007, 17 January 2007, however, without explicitly mentioning the '*Rechtsstaat*' principle.

[132] Council of State 22 October 1986, No. 27.050 (*Fecosalab*).

[133] Cass. 26 April 1990, *Arr. Cass.* 1989–90, 1115.

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remains valid and can have consequences: an individual may claim rights conferred by an unpublished law, if he or she meets the conditions laid down in the act.[134]

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 These issues have not been discussed at length in Belgian jurisprudence. This is not to say that market regulation has not impacted Belgian jurisprudence. However, in general a Euro-friendly stance has been taken towards EU measures concerning market regulation without fundamental constitutional issues concerning property rights or legal principles such as legal certainty being raised.

If such measures have been considered problematic from a constitutional stance, the issues raised have concerned the compatibility of market regulation with the constitutional provisions regarding the federal structure of Belgium and the checks and balances between the state, region and communities, or with social rights. For example, the balancing of the market freedoms and the right to strike or protest have been considered by certain scholars to fall below the domestic protection of the protection of these rights.[135]

2.7 *The ESM Treaty and the Belgian Constitutional Order*

2.7.1–2.7.3 There has been limited discussion on the constitutionality of the Treaty establishing the European Stability Mechanism (ESM Treaty) or other EU financial regulations following the economic and financial crisis.[136] In general, the ESM Treaty and other regulations have had only a limited impact on Belgian fundamental rights. During the implementation of the ESM Treaty constitutional arguments were absent from the discussions in Parliament. In general, these new norms did not result in public contestations due to the general Euro-friendly sentiments in Belgian society as well as the limited impact of the EU financial measures on Belgian law.

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[134] Council of State 24 February 1987, No. 27.569 (*vzw Centrale voor Socialistisch Cultuurbeleid*); Council of State 20 November 1956, No. 5.374 (*Depaepe*).

[135] See Dorssemont and Jaspers 2007, pp. 2–14.

[136] A procedure launched against the act consenting to the ESM Treaty was dismissed by the Constitutional Court as inadmissible for procedural reasons. Const. Court. No. 156/2012, 20 December 2012.

2.8 Indirect Judicial Review and the Belgian Judiciary

2.8.1 The co-operation of Belgian courts with the ECJ in numbers As mentioned, Belgian courts generally adopt a Euro-friendly approach and, thus, Belgian courts regularly refer preliminary questions to the ECJ. For this reason, lawyers and other legal practitioners are well aware of the preliminary reference procedure and will frequently suggest preliminary questions in their legal briefs. In view of this practice, it should not be surprising that several workshops have been organised and publications written to instruct lawyers how to write preliminary questions and convince courts to send these preliminary questions to the ECJ.

As to quantity, the most remarkable feature of the approach by the Belgian judiciary is the number of preliminary references from the Belgian Constitutional Court. The Belgian Constitutional Court is one of the few constitutional courts that sends preliminary questions, and has sent the most preliminary questions of any constitutional court of an EU Member State.[137] At first, the Constitutional Court was hesitant to refer preliminary questions.[138] The Court sent its first preliminary question in 1997, hence more than a decade after its establishment. In this case the dispute originated from the different implementation of an EU directive[139] on the vocational training of general practitioners in the Flemish region and the other regions.[140] The underlying issue of this dispute was the different treatment between the federalised entities, which was politically highly sensitive. By sending a preliminary reference to the ECJ, the Constitutional Court to a certain extent 'outsourced' the politically sensitive issue.[141]

This first preliminary reference already gives an indication for a hypothesis why the Belgian Constitutional Court frequently refers preliminary questions to the ECJ. The composition of the Constitutional Court is based on a federalist logic whereby judges are picked from the different language groups on the basis of a

[137] On the remarkable position of the Belgian Constitutional Court, see Vandamme 2008, pp. 127–148.

[138] See Van Nuffel 2005, pp. 46–47.

[139] Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, [1993] OJ L 165/1.

[140] Const. Court No. 6/97, 19 February 1997. The ECJ decided the case in Case C-93/97 *Fédération Belge des médecins* [1998] ECR I-04855. Final decision of the Constitutional Court in Const. Court No. 120/98, 3 December 1998.

[141] The attraction to outsource such questions became very clear in the tobacco judgment of the Constitutional Court. The Belgian legislation on tobacco advertisement implementing European Directive 98/34/EC highly impacted on the Walloon sports industry, in particular Francorchamps Formula I races. The Constitutional Court in this case did not refer a preliminary question but decided the case itself relying on the applicable EU norms (See Judgment Constitutional Court 30 September 1999, No. 102/1999). However, the Constitutional Court was still reproached for rendering a 'political judgment'. Popelier and Voermans refer to this judgment as a failed attempt to depoliticise the case by relying on EU law. Popelier and Voermans 2015, p. 106.

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fixed division of the number of judges.[142] In consequence, to avoid a deadlock vote between the judges or to find 'external support' for a decision on sensitive issues relating to federalism, it might appear appealing to the Constitutional Court to send a preliminary question to the ECJ.

Since 2003 the Constitutional Court has more frequently referred preliminary questions.[143] At the time of submission of this report, the Constitutional Court has referred 26 preliminary questions to the ECJ. The website of the Constitutional Court provides a separate section with all the preliminary questions, including references to ECJ judgments as well as the Constitutional Court's referral judgment and final judgment.[144]

The other courts also frequently refer preliminary questions. In total, Belgian courts have sent 739 preliminary references.[145] The Supreme Court has sent 90 preliminary references, the Council of State has sent 68 preliminary references and the other courts and tribunals have sent 553 preliminary references. Taking into account the relatively small population of Belgium, it is clear that Belgian courts refer preliminary questions more frequently in comparison to other EU Member States. The relatively small number of references by the highest courts in comparison to the lower courts cannot be attributed to a deferential approach of the highest courts. Rather, preliminary questions are in general already sent by the lower courts and thus these issues have in general already been resolved by the time the issues are presented before the highest courts.[146]

2.8.2 The approach towards indirect judicial review The Belgian judiciary has been very open to indirect judicial review by the ECJ. With regard to the relationship between the Belgian highest courts and the ECJ, Belgian authors and judges have frequently labelled this relationship as harmonious or as a judicial dialogue.[147] When lower courts refer a preliminary question, they will in general simply apply the judgment of the ECJ regarding the preliminary question.

The Constitutional Court, however, will in general not limit itself to a referral to the ECJ judgment. Instead, the Constitutional Court will highlight the reasoning of the ECJ in the preliminary judgment, while adding its own reasoning to come to the

[142] For another clear example of outsourcing and Belgian federalism, see the case concerning the social care insurance scheme. See Const. Court Nos. 33/2001, 13 March 2001 and 11/2009, 21 January 2009.

[143] This increase in cases is most probably due to the expansion of the Constitutional Court's scope of review by Parliament in 2003 to the full Title II of the Constitution which includes the vast majority of constitutional rights and freedoms and the Constitutional Court's new approach to interpreting constitutional rights in the light of international fundamental norms, in particular the ECHR (since the Const. Court No. 136/2004, 22 July 2004).

[144] See www.const-court.be.

[145] Court of Justice of the European Union, Annual report 2013, Luxembourg 2014, pp. 106–107. Available at www.curia.europa.eu.

[146] See extended analysis Van Nuffel 2010, pp. 1162–1169.

[147] Verrijdt 2012, pp. 89–100; Popelier 2012, pp. 73–98; Van de Heyning 2012, pp. 395–419.

same conclusion based on the parliamentary preparatory works and its own jurisprudence as well as the general jurisprudence of the ECtHR and the ECJ.[148]

2.8.3 For constitutional review by, and statistical data of, the Belgian Constitutional Court, see Sect. 1.1. In particular, in the period 2000–2014, 73% of the cases were lodged by private parties: 45% by individuals and 28% by business entities. A breach of the Constitution was found in 31% of the judgments in the period 2009–2013 (279 out of 890 judgments): 26.5% in annulment procedures (65 out of 245 judgments) and 33% in preliminary decisions (214 out of 645 judgments).

2.9 Other Constitutional Rights and Principles

2.9.1 EU law does not only pose challenges to the material protection of fundamental rights, but also to the procedural protection of fundamental rights, in particular protection by the Constitutional Courts. The Belgian system of constitutional rights protection has been challenged by the ECJ case law on the limits to the procedural autonomy of the Member States, sparking a constitutional crisis.

In 2008 the Belgian Parliament introduced a new procedural rule that determined whether ordinary courts were first to submit a preliminary question to the ECJ or the Constitutional Court if concerns arise regarding the compatibility of domestic legislation with a given fundamental right that is partially or fully protected in the Belgian Constitution and in an international treaty, in particular in EU law or the ECHR, in an analogous manner.[149] The introduction of this rule resulted from a Supreme Court case in which the Court held that it was under no obligation to pose a constitutional question where the constitutional issue concurred with a potential infringement of an equivalent international norm.[150] It was feared that in every case where a legal norm might conflict with a fundamental right protected analogously by the Constitution and international law, ordinary courts would directly review the compatibility between this provision and international law, circumventing their obligation to send a preliminary question to the Constitutional Court in case of conflict between legislation and the Constitution. Moreover, if the norm under scrutiny fell within the scope of EU law, ordinary courts could prefer to send a preliminary question to the ECJ rather than to the Constitutional Court, reducing the

[148] Examples have already been mentioned supra e.g. with regard to the EAW Framework Decision and the Money Laundering Directive. See Sects. 2.3.1–2.3.5 and 2.3.6, respectively. Whether or not this implies the acceptance of primacy of EU law or the Constitution is discussed supra Sects.1.3 and 2.2 as well as infra Sect. 3.2.

[149] Special Act to Amend Art. 26 of the Special Act of 6 January 1989 on the Const. Court, session 2007–2008, No. 4-12/4, 12 June 2008. Available at: www.dekamer.be. On this act and the Belgian war of judges see Velaers 2012, pp. 323–342.

[150] Cass. 9 November 2004, No. 04.08949.N; Cass. 16 November 2004, No. 04.0644.N; Cass. 16 November 2004, No. 04.1127.N. Available at: www.juridat.be. On the 9 November 2004 case (*Vlaams Blok judgment*), see Gors 2005, pp. 509–519.

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importance of the Constitutional Court. Therefore, the new procedural rule imposed the chronological priority of the constitutional preliminary question over the preliminary procedure before the ECJ: the ordinary courts were first to send a preliminary question to the Constitutional Court, but remained free to send the question to the ECJ afterwards.

It was questioned whether this priority rule was compatible with EU law. In principle the Member States have extensive discretion with regard to procedural rules. However, when asked to review the compatibility of the French constitutional priority rule in the *Melki* case, the ECJ developed strict criteria for such priority rules.[151] The ECJ held that such a priority rule violated EU law if it implied that judges would lose their discretion to refer preliminary questions when they doubted the compatibility of domestic legislation with EU law.[152] This judgment meant a serious limitation of the procedural autonomy of domestic procedural law in the field of constitutional adjudication. It was questioned whether the Belgian priority rule would survive ECJ scrutiny in the light of the *Melki* judgment.[153] The ECJ was asked to review the compatibility of the Belgian priority rule with EU law. Given that the Belgian priority rule was the outcome of lengthy and highly sensitive discussions on the correct balance between the Supreme Court, the Council of State and the Constitutional Court, rejecting the rule as a violation of EU law would seriously undermine relations between the top Belgian courts. However, in *Chartry,* the ECJ refrained from deciding on the compatibility of the Belgian priority ruling since the underlying subject-matter of the dispute, i.e. taxation of activities carried out within the territory of Belgium, did not fall within the scope of EU law.[154] In the meantime, the Belgian Parliament amended the priority rule fully in view of the *Melki* case law.

This episode shows at least the potential for a conflict: whereas the domestic legislator intends to protect the prerogatives of the Constitutional Court, in particular the centralised review of legislation for compatibility with constitutional rights, the ECJ promotes the decentralised review of legislation in order to strengthen the effectiveness of EU law.

2.10 Common and Individual Constitutional Traditions

2.10.1–2.10.2 Several of the preliminary references sent by the Belgian Constitutional Court highlight the commonality of the constitutional concerns

[151] Joined cases C-188/10 and C-189 *Melki and Abdeli* [2010] ECR I-05667. On this judgment see Dyevre 2012, pp. 318–322.

[152] In this judgment the ECJ developed several requirements to guarantee the discretion of judges. See Velaers 2012, p. 332.

[153] It was argued that the Belgian priority rule fully complied with these criteria. Velaers 2012, p. 338.

[154] Case C-457/09 *Chartry v. Belgium* [2011] ECR I-00819.

among the constitutional and supreme courts of the Member States. For example, with regard to the preliminary references regarding the EAW, it was clear that several supreme and constitutional courts doubted the compatibility of this Framework Decision and the implementing acts with constitutional rights. While the framing of the constitutional rights might diverge from one country to another, many constitutional and supreme courts were confronted with questions on the compatibility of the EAW implementing acts and constitutional rights. As such, it comes as no surprise that a second constitutional court referred a preliminary question on the constitutionality of fundamental rights and the EAW Framework Decision.[155]

The same is true for the Money Laundering Directive. In almost all European Member States the professional secrecy of lawyers is protected as an essential guarantee for the rule of law.[156] While this privilege might be interpreted in the different Member States in various manners, under different provisions – the right to a fair procedure and equality of arms, or the protection of privacy, or with different legal bases – constitutional law, ordinary law, jurisprudence or general principles of law, the concern has been shared by many of the highest courts in the European Union.[157]

However, it is unclear whether addressing such issues from the perspective of common constitutional traditions would improve the reception of fundamental rights issues at the level of the ECJ. The examples mentioned not only show the commonality of certain fundamental rights concerns, but also the impact of the ECHR and the ECtHR case law. In both cases, the Belgian Constitutional Court did not so much rely on Belgian constitutional rights, but rather on the Constitution interpreted in the light of the Convention and ECtHR case law. In particular, ECtHR case law has ensured a common understanding of fundamental rights. As a consequence, a clash of EU law and common constitutional traditions often follows from a conflict between EU law and the ECHR. The Belgian Constitutional Court also frames its preliminary questions to the ECJ not as conflicts between EU law and constitutional rights, but as conflicts between EU law and the ECHR.

On the other hand, examples can be provided where a constitutional issue is particular to one or a limited number of Member States. In general, this particularity follows from the specific domestic state structure or historical and societal specificities. With regard to the Belgian context, it is without doubt that the language rights and language regulations following the federalisation of Belgium would be

[155] Case C-399/11 *Melloni*, supra n. 104.

[156] See The Bar of Brussels 2013. Discussion continues regarding to what extent this privilege is also applicable to in-house lawyers. See e.g. in favour Dutch Supreme Court 15 March 2013, LJN: BY6101, while against such extension UK Supreme Court *R (Prudential plc & Anor) v. Special Commissioner of Income Tax & Anor* [2013] UKSC 1.

[157] The implementation of the Money Laundering Directive did not result in additional preliminary references, but in the question appearing before the ECtHR in the *Michaud* case. This case originated from the French implementation of the Directive. *Michaud v. France*, no. 12323/11, ECHR 2012.

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considered a constitutional issue that might trigger the Constitutional Court to revolt against EU law.[158] As such, the Belgian language rights as protected in the Constitution might be considered as the core of the Belgian constitutional identity.[159] Such conflict has not yet appeared.

2.11 *Article 53 of the Charter and the Issue of Stricter Constitutional Standards*

2.11.1 There are two possible interpretations of Art. 53 of the Charter. According to the first interpretation, constitutional provisions providing for better protection of fundamental rights than provided by EU fundamental rights case law can limit the application of EU law in the domestic legal sphere.[160] This interpretation implies a limitation to the primacy of EU law.[161] A second interpretation provides that national courts cannot be compelled to rely on the Charter in cases before them if domestic constitutional provisions or international agreements provide for better protection. As Advocate General Bot has stated: 'Article 53 of the Charter also expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law'.[162]

The latter interpretation implies no limitation to the primacy of EU law. For this reason, it is without doubt that the latter interpretation will be preferred by the ECJ in view of the primacy doctrine as developed by the ECJ.

However, even in this more restricted interpretation of Art. 53 Charter, it can be expected that this provision will only scarcely be relied upon to resolve conflicts of different fundamental rights standards. Other provisions or interpretational tools appear more successful for providing a margin for the Member States to safeguard a higher level of protection, in particular the margin of discretion as well as the constitutional identity provision.[163] The underlying reason why such concepts are more attractive than the maximisation clause is that they do not require an assessment of which standard of fundamental rights protection is the highest, suggesting that the other standard is a lower standard of fundamental rights

[158] The importance of this issue is for example the reason why Belgium has not ratified the Framework Convention for the Protection of National Minorities by the Council of Europe.

[159] On the constitutional identity, see Van de Heyning 2012, at pp. 198–202.

[160] Such interpretation was implied in the preliminary question of the Spanish Constitutional Court regarding the limitation to the EAW framework decision on the basis of a better protection of suspects in cases involving trials *in absentia*. Spanish Constitutional Court Auto 86/2011, 9 June 2011 (*Melloni* judgment).

[161] It has been argued that this was by no means the intention of the drafters. See for an overview Ladenburger 2012, pp. 174–175.

[162] Opinion of AG Bot, in Case C-399/11 *Melloni* [2011] ECLI:EU:C:2012:600, para. 133.

[163] Article 4 para. 2 TEU.

protection. Rather, these concepts imply the particularity of a given system for which in a given circumstance and to a limited extent an exception to EU law can be provided.

It is probably due to this reason that its equivalent in the Convention, namely Art. 53 ECHR, has only been referred to by the ECtHR in a limited number of cases.[164] The ECtHR developed the doctrine of the margin of appreciation to provide for some flexibility and room for manoeuvre for the Member States and courts to uphold a domestic standard of fundamental rights protection.

The maximisation provision has not been relied upon frequently in domestic case law either. In the Belgian case law, the Supreme Court has only on one occasion explicitly referred to Art. 53 ECHR to refute an objection against the application of the domestic interpretation of the right to a trial before an independent judge. It was held that the Belgian interpretation was stricter than the interpretation provided by the ECtHR. The Supreme Court relied upon Art. 53 ECHR to find that a national court could provide for stricter criteria than the ECtHR when reviewing the independence of a judge as protected under Art. 6 ECHR.[165]

The Constitutional Court has made several references to Art. 53 ECHR with rather diverse outcomes.[166] In most cases the reference to this article has not had any impact on the actual judgment.[167] In one case the Constitutional Court relied on Art. 53 ECHR to decide that the provisions in the ECHR and international law on the right to marriage could not be interpreted so as to restrict the domestic legislator from extending the right to marriage to homosexual couples.[168] In another judgment the Constitutional Court held that a reference to Art. 53 ECHR could not be relied upon to extend the interpretation of an ECHR provision.[169] Finally, in a number of judgments the Constitutional Court held that Art. 53 ECHR implied that the domestic legislator was both to uphold the material interpretation of the legality principle as entrenched in the ECHR (legislative norms must be accessible and foreseeable) as well as the formal interpretation entrenched in the Belgian Constitution (interference of rights must be based upon a statute).[170] In these cases, the Court effectively relied on Art. 53 ECHR to combine constitutional and conventional protection in order to strengthen fundamental rights protection.[171]

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[164] See on this issue Liisberg 2001.

[165] Cass. (2e k.) 11 December 1996, AR P.96.1460.F (Benaïssa/Dutroux).

[166] For an overview, see Popelier and Van de Heyning 2011, pp. 495–536.

[167] Const. Court No. 77/94, 18 October 1994; Const. Court No. 34/96, 15 May 1996; Const. Court No. 76/96, 18 December 1996; Const. Court No. 49/2001, 18 April 2001; Const. Court No. 33/94, 26 April 1994.

[168] Const. Court No. 159/2004, 20 October 2004.

[169] Const. Court No. 81/95, 14 December 1995. In this case the European Commission had explicitly stated that compulsory military service should not be regarded as forced labour under Art. 4 ECHR. The Constitutional Court stated that Art. 53 ECHR did not alter this finding.

[170] Const. Court No. 202/2004, 21 December 2004; Const. Court No. 131/2005, 19 July 2005; Const. Court No. 151/2006, 18 October 2006.

[171] Popelier 2011, p. 166.

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2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 The stance of the public as well as the political class vis-à-vis EU law and the European Union more in general has been labelled in the literature as a permissive consensus.[172] In general, political parties take a pro-European stance. Research shows that political parties vote in large majorities in favour of the ratification and implementation of EU norms.[173] Also, public debate regarding the limits of EU law in the Belgium domestic sphere is exceptional.[174] Consequently, the question whether EU law may restrict constitutional rights and values is only occasionally debated in view of a specific directive or new judgment of the ECJ, and in general, the debate is limited to human rights organisations or professional actors, such as the Belgian Bars of Lawyers in view of EU norms touching upon the protection of procedural rights. It appears that more political debate on the EU has emerged due to the financial and economic crisis and the budgetary measures taken by the EU.[175] In these discussions the central question is not so much whether more or less Europe is needed, but rather whether a more social or liberal approach should be taken. However, there is no conclusive research to date to support the claim that the renewed political interest in EU politics has also triggered public debate on EU issues and the limits of the EU. The 2014 barometer of the European Commission does not show an increased interest in European politics.[176] On the other hand, a high number of Belgian citizens replied that they agreed with the statement that economic reforms would be more effective if they were co-ordinated on the European level.[177] Thus, Belgian public opinion could be described as 'EU-friendly but uninterested'.

Specifically with regard to the drafting of the EAW, there was only limited public engagement. However, several public actors did raise constitutional issues during the drafting process, in particular human rights institutions such as the

[172] Whereas this position of permissive consensus changed in many Member States after the Maastricht Treaty, this position has not altered in Belgium. Bursens et al. 2010, pp. 16–22 and Beyers 1998.

[173] Bursens, et al. 2010, pp. 19–21.

[174] The permissive consensus in Belgium does not imply a great interest in EU issues in public debate. In general terms, research shows that public debate on EU issues or interest in EU politics is very limited, in contrast to domestic political issues. See Bursens 2002 and Eurobarometer of the European Commission 81, Tables of Results July 2014, p. 83. In this Eurobarometer the Belgian public scored very low on the question on whether one would discuss European politics with friends or relatives. Only 8% answered 'frequently' and 45% responded 'never'. Belgium is among the lowest scoring countries of the EU on this issue.

[175] This is particularly true for the so-called six-pack measures of the EU. See e.g. (2012, March 8) Belgian minister vows to resist 'ultra-liberal' Commission. Euractiv. http://www.euractiv.com/euro-finance/commission-reproached-tough-belgium-news-511398.

[176] Eurobarometer of the European Commission 81, Tables of Results July 2014, p. 83.

[177] Standard Eurobarometer of the European Commission 81, Report July 2014, p. 62.

Human Rights League as well as the Belgian Bars of Lawyers. In general, the Belgian Bars have been very active with regard to the implementation of EU law in Belgian law when relevant to criminal proceedings and procedural rights.[178]

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1–2.13.4 On the basis of the Belgian experience, no univocal answer can be given to the question of whether EU law increases or decreases the standard of human rights protection. In certain cases, ECJ case law might result in a decrease, while in other cases in an increase, of fundamental rights standards at the domestic level.

In particular in the area of criminal proceedings, concern has been voiced regarding the impact of EU law, including ECJ case law, on the domestic level of protection of the procedural rights of suspects. Examples that have been mentioned above include the impact on the legal privilege of lawyers following adoption of the Money Laundering Directive and the procedural safeguards for suspects and accused persons following the introduction of the EAW.[179]

In other areas of law, however, it has also been noted that EU law, including ECJ case law, has improved the level of protection. With regard to the Belgian legal order, this has particularly been the case with regard to age and gender discrimination. The *Test-Achats* case is a well-known example.[180] The EU Directive in question intended to end all discrimination on the basis of gender in the insurance sector.[181] The EU, however, succumbed to pressure from the Member States to include a derogation in the directive allowing Member States to use gender as an actuarial factor for insurance services. The Belgian Parliament relied on this exemption when implementing the directive into Belgian law, allowing for insurance companies to use gender as a factor in calculating insurance premiums and benefits.[182] The Constitutional Court was requested to decide on the compatibility

[178] The Belgian Bars have raised constitutional challenges regarding several domestic acts raising preliminary questions before the ECJ, most notably the Money Laundering Directive and more recently with regard to the introduction of VAT on legal fees. Const. Court No. 126/2005, 13 July 2005; Const. Court No. 165/2014, 13 November 2014.

[179] See Sects. 2.3.6 and 2.3.1–2.3.5, respectively.

[180] Other directives also had an important impact on the protection against discrimination on the basis of race or gender in Belgium, in particular Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation [2002] OJ L 303/16.

[181] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37.

[182] Act of 10 May 2007 combating discrimination between men and women, *Official Gazette* 31 December 2007.

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of this exemption with the prohibition on discrimination. The Court decided to refer a preliminary question to the ECJ.[183] The ECJ decided that Member States could not allow for derogations from the prohibition to use sex as an actuarial factor for insurance services, rendering the exemption in the directive invalid.[184] The Constitutional Court in consequence struck down the provision in the domestic act based on this exemption.[185]

An interesting aspect of the impact of the ECJ on the standard set for constitutional rights is its harmonising effect on the case law of the Belgian Constitutional Court and Supreme Court. In the past both courts have frequently disagreed on the interpretation of certain constitutional provisions, resulting in divergent case law. It has been noted in the past that in this respect, supranational law has played the role of pacifier between the highest courts. In general this has implied that the Supreme Court has amended its case law in line with Constitutional Court case law, given that the Constitutional Court already interprets constitutional rights in line with the case law of the ECtHR and the ECJ.

While in previous cases the Strasbourg case law has played this role of pacifier, it was ECJ fundamental rights case law that most probably ended a divergence between the Constitutional Court and the Supreme Court on the interpretation of the principle that no legal action can be instituted twice for the same cause of action (the *non bis in idem* principle) in criminal proceedings, if one of the two proceedings would be qualified under Belgian law as an administrative proceeding (e.g. fiscal or deontological matters). Whereas the Constitutional Court held – in line with the applicable ECtHR case law – that this principle applies whenever the underlying facts are identical or substantially the same,[186] the Supreme Court would only accept that this principle applies when the crimes for which the person was prosecuted were drafted in the same wording and mentioned the same constitutive elements.[187] The Supreme Court finally amended its case law in line with the Constitutional Court and ECtHR jurisprudence. The reason for this change is attributed to ECJ case law, in particular the *Åkerberg Fransson* case, in which the ECJ clearly stated that the *non bis in idem* principle applies in case of identical or substantially the same facts.[188] Following this line of case law of the ECJ, the Supreme Court finally altered its position.[189] This provides evidence of the persuasive power of ECJ case law as well as the harmonising effect this case law can have on domestic fundamental rights protection.

[183] Const. Court No. 103/2009, 18 June 2009.

[184] Case C-236/09 *Association Belge des Consommateurs Test-Achats and others* [2011] ECR I-00773.

[185] Const. Court No. 116/2011, 30 June 2011.

[186] Const. Court 29 July 2010, No. 91/2010 and Const. Court 19 December 2013, No. 181/2013.

[187] Supreme Court 24 January 2002, Supreme Court 11 January 2012 and Supreme Court 27 March 2013, available at www.cass.be.

[188] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

[189] Supreme court 17 June 2014, available at www.cass.be.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.2 The enabling clause of Art. 34 of the Constitution, discussed in Part 1, is a general clause. It regulates the transfer of powers to all international organisations, not merely the European Union. It will be recalled that a simple majority in Parliament suffices, unless the treaty contradicts the Belgian Constitution, in which case a prior amendment of the Constitution is necessary before ratification. Also, in the case of 'mixed treaties', containing provisions within the spheres of competence of both the federal and the federated entities, the approval of all competent parliaments is required.

3.1.3–3.1.4 See also Part 1 for (unsuccessful) proposals to introduce treaty referendums. In addition to those mentioned above, scholars have regularly made proposals to simplify the constitutional amendment procedure in order to facilitate the ratification of treaties which contradict the Constitution.[190] Occasionally, this has been translated into a legislative proposal.[191] The idea is to do away with the intermediate renewal of Parliament. This would reinforce the efficacy approach discussed above. These proposals, however, have never seriously been discussed in Parliament.

3.2 The Position of International Law in National Law

3.2.1–3.2.2 The Constitution is silent about the position of international law in the domestic legal order, despite several efforts that have been undertaken since the 1950s to determine the relation between Acts of Parliament and the Constitution.[192] As mentioned, a monist position, establishing the primacy of self-executing international law over national law, was opted for by the Supreme Court in its *Franco Suisse Le Ski* judgment.[193] By assuming the power to disregard Acts of Parliament,

[190] For an overview of advocates of this proposal, see Blero 2011, p. 43. Most recently: Van Assche 2012, p. 447.

[191] E.g. *Parl. Doc*., Senate, 2010–2011, No. 5-281/1. The Council of State, Legislation Division, also supports this idea: Advice of 21 December 2004 of the general assembly, *Parl. Doc.* Senate 2004–2005, No. 3-1091/1, 532 and Advice of 18 January 2008 of the general assembly, *Parl. Doc.* Senate 2007–2008, No. 4-568/1, 343.

[192] E.g. Parl. Doc. House, 1952–1953, No. 693, 54–55; Parl. Doc. House, 1959–1960, No. 374/1; Parl. Doc. Senate, 1978–1979, 476/2; Parl. Doc. House, 1978–1979, 519/4, 12; Parl. Doc. Senate, 1991–1992, 626/1.f.

[193] Cass. 27 May 1971, (1971) *Pas.* I, 886.

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it tacitly amended the Constitution.[194] We recall that the case in point concerned EEC law, but the primacy rule was established regarding all international law. According to the Court, this is a general principle of law,[195] inherent to the 'nature' of international law. The Constitutional Court embraced this stance, adding that in the case of abstract review, the provisions do not have to be self-executing for a treaty to have primacy over a national statute or regulation.[196]

More controversial is the question of whether international law also has precedence over the Constitution. As mentioned above, both the Supreme Court and the Council of State accept the precedence of EU law over the Constitution. The Supreme Court has also explicitly declared the primacy of the ECHR over the Constitution.[197] The Constitutional Court's stance, however, is less clear. As mentioned in Part 1, the Constitutional Court has assumed the power to review laws giving assent to treaties against the Constitution, not only pursuant to annulment requests (which have to be lodged 60 days after publication of the Act of assent) but also in preliminary judgments.[198] This has given rise to heated debate in doctrine, as it was considered to detract from the traditional monist position.[199] Although the Constitutional Court, formally, assesses the Act giving assent, in reality it reviews the content of the treaty, as implemented in the domestic legal order through the Act of assent, against the Constitution. In a monist approach and from an international law perspective, judicial review is excluded once Belgium has ratified a treaty, with one exception based on Art. 46 of the Vienna Convention on the Law of Treaties: if the State's consent to be bound by the treaty manifestly violated a fundamental internal rule regarding its competence to conclude treaties.[200] In doctrine, the Constitutional Court's approach was considered – and often applauded[201] – as giving precedence to the Constitution over international treaties. Other doctrine, while generally accepting the precedence of EU law, argues in favour of the precedence of constitutional law over other international law.[202] In reality, the Constitutional Court has never taken an explicit stance. When reviewing an Act giving assent to a treaty, it merely examines – from a constitutional, not an international point of view – whether Parliament's consent, at the time of entry, was in conformity with the Constitution, which it considers a requirement for the treaty to

[194] Bossuyt and Verrijdt 2011, p. 356.

[195] Cass., 5 Dec. 1994, *Arr. Cass.*, 1994, 1055.

[196] Const. Court No. 106/2003, 22 July 2003.

[197] Cass. 9 November 2004, (2005) *Rev.belge de Dr. Const.* 507; Cass. 16 November 2004 (2005) *Rechtskundig Weekblad* 387.

[198] For the first time in Const. Court. No. 26/91, 16 October 1991.

[199] Several scholars consider the Constitutional Court's stance to be a return to a dualist approach, e.g. Van Assche 2012, p. 440.

[200] Van Assche 2012, pp. 442–444; Velu 1992, p. 147.

[201] Bombois 2004, pp. 143–150; Bribosia 1996, p. 76; Brouwers and Simonart 1995, pp. 13–17; Lejeune and Brouwers 1992, p. 674; François 2005, pp. 261–266; Meersschaut 2003, p. 50; Naome 1994, p. 55.

[202] Alen 2007, pp. 105–113; Delpérée 2004, pp. 167–180; Jamart 1999, pp. 128–129.

take effect in the domestic legal order.[203] Bossuyt, the former president of the Constitutional Court, has even argued that the Constitution as well as all highest courts (Supreme Court, Council of State and Constitutional Court) should avoid taking an explicit stance on the primacy of either constitutional or international law, to prevent a *guerre des juges*.[204]

It is striking that this debate has often been held in terms of monism and dualism, whereas in reality legal systems employ a more nuanced approach in between these extremes.[205] Traditionally, proponents of a monist approach have adhered to a form of 'progressive internationalism', while dualism has been linked with the theory of state sovereignty.[206] Today, the growing sympathy for a more dualist approach in Belgian doctrine does not necessarily express a nostalgic yearning for a lost sense of sovereignty. Rather, it aligns with concerns for the respect of domestic values and principles in a globalising world.

Meanwhile, the idea that supranational law and national constitutional law are part of one multilevel constitutional system and European and domestic courts should find some equilibrium through judicial dialogue, is slowly gaining ground in Belgian doctrine.[207] In practice, however, judicial dialogue with the ECJ and the European Court of Human Rights is limited. On the one hand, the Belgian courts, including the Constitutional Court, readily implement and quote European case law and refer preliminary questions to the ECJ. The European Convention on Human Rights and the case law of the ECtHR have particular influence in the Belgian legal order. The Constitutional Court interprets constitutional rights in conformity with treaty rights, considering them an 'inextricable unity'.[208] While this concerns all international treaties and especially the UN fundamental rights treaties are often invoked, the ECHR is of special importance. The Constitutional Court regularly quotes Strasbourg case law, by which it feels bound,[209] and once even waited for the Grand Chamber's decision, in the *Hirst* case, before giving its own judgment.[210] On the other hand, the Belgian courts hardly ever criticise the European Courts' rulings,[211] even when they feel reluctant towards specific case law, such as the

[203] Beirlaen 1992; Bossuyt 2012, pp. 427–429; Popelier 2007, pp. 228–238; Velaers 2008, pp. 112–116.

[204] Bossuyt 2012, p. 427.

[205] Franckx and Smis 2006, p. 123; Feyen 2008, p. 177.

[206] Franckx and Smis 2006, p. 125.

[207] Alen, Muylle and Verrijdt 2012, pp. 6–11; Bossuyt and Verrijdt 2011, pp. 365–366; Popelier 2012, pp. 73–99; Van Meerbeeck and Mahieu 2007, pp. 79–88.

[208] For the first time in Const. Court No. 136/2004, 22 July 2004.

[209] Alen et al. 2012, p. 25; Lavrysen and Theunis 2013, p. 354.

[210] Martens 2010, p. 352.

[211] Alen et al. 2012, p. 16; Popelier 2012, p. 83. The *Bressol* case is a rare exception where the Constitutional Court openly disagreed with the ECJ on whether the financial implications of students from other Member States could justify measures restricting access to higher education on the basis of nationality, Const. Court No. 89/2011, 31 May 2011.

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Salduz case law[212] or the nationality requirement for enjoying social security allowances.[213] Most of the time, conversations with the European Courts are one-sided. As a result, the courts are not successful in bringing domestic arguments to the fore at the European level.[214]

3.3 Democratic Control

3.3.1 The Belgian Constitution does not provide for parliamentary participation in the conclusion of international agreements or the entry into international organisations, other than giving assent by a simple majority or, in the case of EU treaties, the information obligations mentioned above. The referendum ban, discussed in Part 1, also applies in the case of international treaties.

Apart from the occasional proposals mentioned above, submitting the conclusion of international agreements to a referendum and tightening democratic control are not on the agenda in academic or political circles. Instead, as mentioned, proposals to simplify the constitutional amendment procedure if constitutional amendment is necessary for ratifying a treaty, occasionally pop up.

Meanwhile, the requirement that, in the case of mixed treaties, all competent Parliaments have to give assent, has hindered the ratification of specific human rights treaties. Belgium has signed but not ratified both the Framework Convention for the Protection of National Minorities and Protocol No. 12 ECHR, because these treaties did not get the approval of the Flemish Parliament. Flemish politicians fear that these treaties might thwart linguistic balances which they consider to be vital to the stability of the divided Belgian state.

3.4 Judicial Review

3.4.1 Belgian courts do not have the power to review treaties and measures adopted under international law. However, as mentioned above, the Constitutional Court reviews treaties indirectly, through the Acts giving assent to these treaties. Proponents of the monist tradition have criticised this practice for violating the *pacta sunt servanda* principle.[215] On the other hand, denying the Court the right to assess whether a treaty was in conformity with the Constitution at the time of its ratification would allow the Government to circumvent, with a simple majority in Parliament, fundamental rights and principles laid down in the Constitution.

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[212] Popelier 2012, p. 91.

[213] Alen et al. 2012, pp. 31–32.

[214] Popelier 2012, p. 99.

[215] Bossuyt 2012, p. 424; Velu 1992, pp. 101–102.

We recall that Parliament interfered by denying the Constitutional Court the power to answer preliminary references regarding Acts of Parliament giving assent to EU treaties and to the ECHR and its Protocols. The limitation to these European treaties was heavily criticised in doctrine as well as by the advisory legislation division of the Council of State.[216] Indeed, Parliament's argument that interference was necessary to safeguard stability in international relations does not justify the distinction from other international treaties. Instead, proposals were launched in doctrine to complement the current prior advice provided by the Council of State on the constitutionality of treaties with an optional (or even obligatory), prior and binding judgment by the Constitutional Court.[217] Such proposals, however, have never been considered by Parliament.

3.5–3.6 The Social Welfare Dimension of the Constitution, and Constitutional Rights and Values in Selected Areas of Global Governance

3.5.1–3.6.1 While the effectiveness of institutions of global economic governance is debated in Belgian scholarship, the effects on constitutional protection of social welfare, constitutional rights and values seem more or less neglected. In literature, the proliferation of regulatory agencies that enjoy political independence has been discussed as an 'international impulse' trend that runs counter to domestic principles of representative democracy.[218] Again, the Constitutional Court seems to easily accept this if EU rules prescribe this type of independence. The Council of State has referred to the Constitutional Court the question of whether the conferring of broad powers to the Electricity and Gas Regulator (CREG), directly affecting citizens, violated the Constitution, as this agency's board does not consist of Government members that are controlled by an elected Parliament. The Constitutional Court rejected the claim, arguing that the CREG's decisions were submitted to full and independent judicial control by the judicial branch of the Council of State, and that the CREG was under the obligation to write an annual activity report for the Government, providing Parliament with a means of control. Interestingly, the Constitutional Court added that even if these arguments were not to be considered sufficient to justify the challenged Act in view of Arts. 33 and 37 of the Belgian Constitution, then the Act still found a basis in Art. 34 of the Constitution, which allows for a transfer of powers to supranational organisations, since the conferral of such powers to an independent agency was based on EU law.[219]

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[216] Council of State, Advice of 25 April 2000, *Parl. Doc*., Senate 2000–2001, No. 2-897/1, 26-30; Bombois 2004, pp. 154–155; Van Assche 2012, p. 441.

[217] Van Assche 2012, pp. 446–447.

[218] See in particular De Somer 2014.

[219] Const. Court No. 130/2010, 18 November 2010.

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Critical comments did arise regarding the human rights issues following from the inclusion of persons on a terrorist blacklist and the sanctions following such listing, such as the freezing of bank accounts and a travel ban.[220] The UN blacklist included three Belgians, including a couple suspected of financing Al-Qaida through the humanitarian organisation Global Relief Foundation. After more than two years, no evidence or criminal charges were brought against them. The Brussels Tribunal of First Instance therefore ordered the Belgian state to start the de-listing procedure. The Belgian state, however, was unable to obtain the removal of the Belgian couple from the blacklist. Eventually, the Human Rights Committee concluded that Art. 17 of the International Covenant on Civil and Political Rights and Arts. 12 and 17 of the Optional Protocol to the Covenant had been violated.[221] In particular, it reproached the Belgian state for transmitting the couple's names to the Sanctions Committee, without waiting for the outcome of the criminal investigation that was initiated at the request of the Public Prosecutor's office. It admitted that the state was unable to remove the names from the list, but imposed upon the state the duty 'to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal' and 'to ensure that similar violations do not occur in the future'.

Despite, on the one hand, the far-reaching implications of the procedure and sanctions on constitutional rights, and, on the other, the excavation of state sovereignty, there was no heated parliamentary debate on the subject. UN resolutions and EU acts were implemented through executive decrees. The Senate did initiate a debate regarding the subsidiarity and proportionality of an EU framework decision on combating terrorism, leading to some critical comments.[222] As for the specific case of terrorist blacklists, the Belgian example shows that even if domestic courts express human rights concerns and impose upon the state the duty to request de-listing, it is not within the power of the national authorities to actually secure constitutional rights.[223] This is disquieting to say the least, and calls for discussion at the UN level.

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[220] See amongst others, Dehert and Weis, pp. 242–259 and Dewulf and Paquée 1999, pp. 607–640.

[221] Human Rights Committee, Communication No. 1472/2006, 29 December 2008.

[222] *Parl. Doc.* Senate 2007–2008, 508/1.

[223] See also Dewulf and Paquée 1999, 635.

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The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity

Konrad Lachmayer

Abstract The report shows that the Austrian constitutional framework is composed of a range of domestic and international instruments. The core constitutional act from 1920 is detailed, as are amendments regarding EU and international law. However, the 1867 State Basic Law provides only a generic bill of rights, and therefore the ECHR is the main, constitutionalised source of fundamental rights protection. The Constitutional Court reads the relevant provisions from the different instruments together, to provide a comprehensive protection. Earlier, the constitutional culture had been characterised as formalistic; this changed in the 1980s under the influence of the German Constitutional Court and the ECtHR towards a strict approach to the rule of law and rights. Constitutional review is marked by the principles of legality and reasonability. It is notable that several cases at the heart of the present research project have originated from Austrian courts, such as *Data Retention* (*Seitlinger*), *Heinrich*, *Schmidberger* and *Weidacher*. Regarding the European Arrest Warrant, the Austrian courts stand out with a rights-protective approach. The challenge to the ESM Treaty led to constitutional amendments that ensure parliamentary authorisation for increased expenditure. The report outlines areas where EU law has improved fundamental rights protection as well as those where it has been weakened. The report makes a case for retaining the pluralism and diversity of constitutional cultures, finding that it is necessary to see the incommensurability of the various legal traditions and the impracticability of attempting to unify all traditions in one common constitutional tradition.

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All translations are from the official translation of the Austrian Constitution https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf and of other legal acts in English at the governmental website: https://www.ris.bka.gv.at/defaultEn.aspx.

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Judicial dialogues · ESM Treaty · The principles of legal certainty and legitimate expectations · Pluralism and diversity

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1–1.1.2 The Austrian Constitution, enacted in 1920, is based on monarchic dynamics of constitutionalism from the second half of the 19th century but was also drafted by Hans Kelsen.[1] The Kelsenian influence on the Constitution is still visible today, although Austrian constitutional law has changed significantly and dynamically in the last 30 years.[2]

The Kelsenian concept of constitution focuses on the constitution as law and not on the constitution as a state-based approach.[3] Consequently, the Constitution neglects concepts like sovereignty and nation-building. The Constitution is understood as a set of procedural rules to enable the state to function. The Constitution is viewed far more as a legal tool of Parliament than as the foundation of the state. Yet the Constitution still contains various provisions with regard to the organisation of the state, e.g. with regard to the federal structure of the country.[4]

A major political divide between the conservatives and socialists in the 1920s meant that it was not possible to create a new set of fundamental rights in the Constitution.[5] Instead, the old State Basic Law from 1867 was adopted, which granted civil liberties to the citizens.[6] The development of human rights in Austria is more closely linked to the European Convention on Human Rights (ECHR). The ECHR was adopted into Austrian law in 1958, and Parliament declared in 1964

[1] See Stelzer 2011, pp. 2–10; Wiederin 2007a, pp. 389–449.

[2] See Lachmayer 2017a, pp. 436–454.

[3] Jakab 2009, pp. 933–955; Wiederin 2007b, pp. 293–317.

[4] Stelzer 2011, pp. 107–174.

[5] The Treaty of St. Germain in 1919 includes certain rights, e.g. minority rights, but not a full fundamental rights catalogue.

[6] See the Basic Law on the General Rights of Nationals (Imperial Law Gazette 1867/142); see also Stelzer 2011, p. 209.

that the ECHR is part of Austrian constitutional law.[7] Since the 1960s, the ECHR has been a source of constitutional rights in Austria.

The Constitution can be amended by a two-thirds majority in Parliament. Only the abolition of the basic principles of the Constitution requires a popular referendum. For partly structural but mainly political reasons, constitutional law has been easily amendable over approximately the last 60 years.[8] The grand coalition government after WWII and the social partnership between worker and employer representatives[9] has guaranteed a constitution-amending majority in Parliament. This means that constitutional law is regularly amended and contains various details which are not usually part of constitutional law.[10] Another important characteristic of the Constitution is its fragmentation.[11] Austrian constitutional law consists not only of its core document, the Federal-Constitutional Act of 1920 (Constitution), but also of various other acts, including 'ordinary' constitutional acts, international treaties (that have constitutional rank) and so called 'constitutional provisions', which are provisions in ordinary statutes (which have constitutional rank). It is an Austrian particularity that certain sections within an act may have constitutional character. This fragmentation of constitutional law creates the impression among politicians that there is nothing special or unusual about making changes to constitutional law in Austria.

Austrian constitutional law has its historic core, but is highly dynamic, not only because of the regular formal amendments but also because of the interpretation on the part of the Austrian Constitutional Court, which has taken a considerably active role since the 1970s.[12] Influenced by the German Constitutional Court and the European Court of Human Rights (ECtHR), the Austrian Constitutional Court has developed a broad approach to human rights and, since the 1980s, has moved towards a more principle-based constitutional reasoning (e.g. principle of equality, principle of reasonability, rule of law principle, democratic principle, etc.).[13]

Austria acceded to the EU in 1995 (by a popular referendum) and has developed a Euro-friendly approach in its constitutional thinking over the last 20 years. The Constitutional Court has contributed significantly to this approach, and has also overseen other important legal developments. While the Constitutional Court established certain limits to privatisation in the 1990s, the Court has confirmed (e.g. in the European Stability Mechanism (ESM) case in 2013) that Austrian constitutional law is very open to the internationalisation of law.[14]

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[7] Federal Law Gazette 1964/59; see also Öhlinger and Eberhard 2016, para. 681.

[8] See below in Sect. 1.2.

[9] See Stelzer 2011, pp. 55–58.

[10] This especially refers to the detailed governance structure of the administration.

[11] Eberhard and Lachmayer 2008, pp. 113–116.

[12] See the website of the Austrian Constitutional Court available at www.vfgh.gv.at.

[13] Lachmayer 2014b, pp. 78–80.

[14] See most importantly regarding privatisation the Austro Control Judgment (VfSlg. 14.473/1996), and regarding internationalisation the ESM Judgment (VfSlg 19.750/2013) and the Judgment with regard to the Fiscal Compact (VfSlg. 19809/2013).

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To summarise, the Constitution has to be understood in its historical and evolutionary context, with its strong legal character. The core constitutional document is extremely detailed, with 150 articles that each have extensive and detailed sub-provisions. Besides this core document, the Constitution also includes various other constitutional acts and more than 300 constitutional provisions in various ordinary statutes. From a formal perspective the Constitution is highly dynamic: it is regularly amended and greatly influenced by the Constitutional Court. From a substantive perspective, the Constitution deals with questions of state organisation and is equally concerned with limiting state powers by the rule of law, separation of powers and human rights.

In terms of the broader type of constitutionalism, on the one hand the Austrian Constitution is a post-WWI constitution and thus not a classical post-authoritarian type of constitution. It may be said that in its early years it was characterised by the influence of Kelsen and by quite formalistic and not substantive constitutionalism. On the other hand, since the 1980s the influence of the German Constitutional Court and the case law of the ECtHR have changed the approach of the Austrian Constitutional Court significantly towards a strict approach to the rule of law and rights.[15] Thus, I would argue that nowadays the Austrian Constitutional system is a strong one, which significantly protects constitutional values, but still – to a minor extent – relates to its old, formalistic patterns.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1–1.2.4 The Austrian Constitutional Court and its doctrine distinguish two levels of constitutional law: ordinary constitutional law and the basic principles of the Constitution, which form the basis for higher constitutional law. The starting point of this distinction is Art. 44 para. 3 of the Constitution, which requires a popular referendum for a 'total revision of the Federal Constitution' in addition to a constitution-amending majority in Parliament. The 'total revision' of the Constitution is interpreted as a significant change in the basic principles of the Constitution (including democracy, federal state, republic, the rule of law, separation of powers and human rights). The two-level structure of the Constitution also has the effect that the Constitutional Court is able to review 'ordinary' constitutional law for compliance with the basic principles.[16]

An obligatory popular referendum to change the basic principles of the Constitution has only been used once in Austrian constitutional history: the

[15] Lachmayer 2017b, pp. 75–114.

[16] It is possible for constitutional law to be considered unconstitutional. Only once (in 2001), the Constitutional Court considered a constitutional provision as a breach of the basic principles and, thus, as unconstitutional. See Eberhard and Lachmayer 2008, p. 117.

Austrian EU accession in 1995 was preceded by a popular referendum in 1994, with 66% of those who participated voting in favour of the accession. The technical procedure of accession was as follows: a new Constitutional Act was drafted, which simply contained the statement that, with this referendum, the constitutionally competent institutions were authorised to accede to the Union.[17] The bill was accepted by a two-thirds majority in Parliament and a successful referendum held subsequently. As part of the procedure, the Constitution underwent a 'total revision', especially with regard to its acceptance of the EU system of democracy and 'federalism' or the EU rule of law. The scholarly debate was and still is influential regarding the Austrian approach towards the implementation of EU law in Austria. However, the 'total revision' of the Constitution makes it very easy to argue in favour of EU law in the Austrian context, as the 'total revision' changed the legally correct procedure of the whole constitutional and legal system.

Until 2008, it was possible to implement international treaties (including new EU treaties) as constitutional law in the Austrian legal system, which happened in the case of all the new European treaties in the same manner as the accession treaty (only without a popular referendum). Thus, in the case of the Amsterdam Treaty and the Nice Treaty, a separate constitutional act was enacted, which authorised the competent institutions to conclude these treaties. Since 2008, the Constitution has contained an explicit procedure stipulating how new EU treaties can be integrated in the Austrian legal system: Art. 50 of the Constitution clarifies that for all further changes to the EU treaties, Parliament has to authorise such changes with a two-thirds majority. A popular referendum is only necessary if the Union changes in a way that requires a 'total revision' of the Constitution and which was not already covered by the referendum in 1994.

Each new EU treaty has thus been adopted on the basis of the Constitution. The Constitutional Court has regularly had to decide whether a new treaty has gone beyond the 'total revision' of the Constitution in 1995; the Court has ruled that this has not been the case. In comparison to the German situation where the German Constitutional Court in Karlsruhe regularly creates hurdles for any new transfer of domestic powers,[18] the Austrian situation is completely different: first, the Constitution is not based on a strong concept of sovereignty and is thus open towards the transfer of powers on an international (European) level; secondly, the Austrian Constitution (in contrast to the German Constitution) was 'totally revised' by accession to the EU. Thus, the EU concepts of democracy, 'federalism' and the rule of law are already part of Austrian constitutional law.

As the Constitution is amended several times a year, it is not possible to analyse all of the constitutional amendments that have explicitly or implicitly related to EU law.[19]

[17] Federal Constitutional Act on the Accession of Austria to the European Union, Federal Law Gazette 1994/744.

[18] See e.g. the Maastricht or the Lisbon judgment; Thym 2009, pp. 1795–1822.

[19] An example would be the amendment in 2008 (Federal Law Gazette I 2008/2), when the possibilities for establishing independent authorities were extended significantly. The new Art. 20 para. 2 of the Constitution contains an explicit provision that the establishment of independent

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By way of a brief summary of EU-related amendments, the central provisions are contained in chapter B of the Constitution, entitled 'European Union', where Arts. 23 (a)–(k) contain extensive and detailed provisions regarding various EU-related matters. For example, Art. 23 (a) and (b) regulate the elections of the European Parliament, Art. 23c regulates Austrian appointments to high-level posts in the EU, e.g. the appointment of the members of the Court of Justice of the European Union (CJEU); Art. 23(d) regulates the right of information of the provinces in EU matters affecting their competence; Arts. 23 (e)–(i) regulate the involvement of Parliament (see Sect. 1.4.1); and Art. 23(j) regulates participation in the EU Common Foreign and Security Policy. Generally, numerous aspects of EU law are interwoven throughout the whole text of the Constitution, e.g. as regards elections of the European Parliament (Art. 6(4)); division of competences between the federal level and the provinces (Art. 10), independent administrative authorities (Art. 20(2)), ratification of changes to EU treaties (Art. 50), parliamentary participation in the ESM (Art. 50a–d), etc. Additionally, EU amendments are also frequently inserted into the constitutional provisions of statutes, as, for example, in the case of the European Arrest Warrant (EAW) amendment, which will be discussed in Sect. 2.3.

One notable amendment was the establishment of the administrative courts of first instance in 2014. This political project that was undertaken over 20 years was initiated by the ECtHR case law regarding Arts. 5 and 6 of the ECHR and was mainly influenced by the need under EU law to establish independent tribunals.[20] From a structural perspective it was the largest constitutional reform since accession to the EU. It is definitely possible to conclude that European influence on amendments to the Constitution is increasing.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The Constitution was never built upon a strict concept of sovereignty, but on a constitutional concept that is based on law and its constitutional framework. It is remarkable that in the 1990s the Constitutional Court developed constitutional limits to privatisation, which are based on sovereignty and state-based thinking. The Court argued in favour of certain core functions (core areas) of the state, which cannot be transferred to private persons or companies (e.g. military services, the police and justice systems, foreign policy). The Court has never developed a similar concept regarding the transfer of power to an international level. Article 9 para. 2 of

administrative authorities is in conformity with constitutional law 'to the extent necessary according to the law of the European Union'.

[20] See Öhlinger and Eberhard 2016, paras. 645–49; see also Sect. 2.9.

the Constitution provides a general provision on the transfer of powers on an international level, which was recently extended.[21]

The transfer of power to the EU follows its own constitutional concept. The first step refers to the amendment of the EU treaties. As mentioned above, Art. 50 of the Constitution requires a constitution-amending majority (two-thirds majority) in both chambers of the Austrian Parliament for the ratification of new EU treaties.[22] The transfer of power within the EU Treaties is no longer identified as a specific constitutional question and only depends on the regular participation of the Government and/or Parliament in European legislative procedures. There are no 'constitutional reservations' or further limits. The only limit refers to the 'total revision' of the Constitution. Only if the Union were to abolish or significantly reconceptualise democracy, the rule of law, Austrian federalism, the separation of powers or human rights would another popular referendum be required.

1.3.2–1.3.4 Although the direct effect and supremacy of EU law are not explicitly mentioned in the Constitution, these concepts were well established by the CJEU at the time of Austrian accession in 1995. The 'total revision' of the Constitution unquestionably also included these concepts in the Austrian legal system at the highest possible constitutional level. In academic literature, there were debates with regard to a constitutional core[23] which would resist any form of EU integration with regard to the basic principles of Austrian constitutional law. This, however, could not refer to EU law concepts, as they had been established before the accession in 1995, but only to fundamental violations of democracy, the rule of law or human rights in general, e.g. a European dissolution of the Austrian Parliament or the abolition of federalism in Austria as a whole. Any other kind of impact of EU law on the Austrian legal system seems to be possible within the Austrian constitutional framework.

The Constitutional Court has accepted the supremacy of EU law from the very beginning. There is no explicit provision in the Constitution that EU law is supreme, however, the total revision of the Constitution included EU supremacy. The Court has approached EU law from a point of view that neither defends its own position nor claims the particular importance of Austrian constitutional law. On the contrary, the Court follows a legalistic, pragmatic and procedural approach and has developed its case law towards the interrelation between Austrian constitutional law and EU law. Four years after Austria's accession to the EU, the Constitutional Court initiated its first preliminary reference proceeding.[24] In the same year, the Court used the supremacy of EU law to set aside a constitutional provision.[25] In the *Telekom-Control Case*[26] the Court refused to apply Art. 133(4) Constitution, which limited – in the understanding of the Court – the possibilities to establish

[21] See Federal Law Gazette I 2008/2; see also Handl-Petz 2010, pp. 288–289.

[22] See Handl-Petz 2010, pp. 296–300.

[23] See Öhlinger and Eberhard 2016, pp. 156–158.

[24] VfSlg 15.450/1999.

[25] VfSlg 15.427/1999; see also VfSlg 17.065/2003, 19.632/2012.

[26] See Sect. 2.6.

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independent administrative courts. Although the Court had declared that EU law would not be the standard model for constitutional review by the Court, in 2012 the Court declared that it would use the EU Charter of Fundamental Rights (Charter) as the standard model against which to review human rights violations in Austria on an equal basis with human rights provided by Austrian constitutional law.[27] The Court has developed an active and pro-European approach, which limits the application of Austrian constitutional law. The reasons for this approach can be found in the legalistic, Kelsenian culture of Austrian constitutional law, the total revision of the Constitution upon accession to the European Union and the overall Euro-friendly approach of the Court, which is also rooted in the fact that the ECHR is a formal part of constitutional law in Austria.[28]

Thus it can be said that the Constitution follows a very flexible concept of sovereignty, which does not provide significant limits to the transfer of powers to a transnational level. Only if a transfer of new powers were to go far beyond the concept of the Maastricht Treaty, which was approved by a constitutional referendum in 1994, might it be necessary to hold another referendum, which could always provide legitimation for another dimension of the transfer of powers to the European level. The Constitutional Court, however, has not seemed to have had any constitutional problems with the new EU Treaties (including the Lisbon Treaty) so far. When the Constitutional Treaty was being discussed by the EU, the Austrian position was quite clear – that another referendum would not be necessary.

1.4 Democratic Control

1.4.1 The Constitution involves the Austrian Parliament in the EU decision-making process. On the day of Austria's accession to the EU, a new chapter (Arts. 23a–f) was added to the Federal Constitutional Law.[29] Article 23e of the Constitution determines that the competent Federal Minister is obliged to inform Parliament of any EU legislative proposal. The first chamber of the Austrian Parliament (National Council) has the opportunity to provide an opinion, which binds the federal minister in his or her actions at the European level. The only possibility for a minister to deviate from the parliamentary opinion is on the grounds of 'mandatory reasons with regard to integration or foreign policy'. The same procedure applies for upcoming resolutions of the European Council or the Council concerning 'the change from unanimity to a qualified majority' or 'the change from a special legislation procedure to the regular legislation procedure'. Moreover, the second

[27] VfSlg 19.632/2012; see also Lachmayer 2013b, pp. 105–107.

[28] The Austrian Constitutional Court is used to applying international (human rights) treaties naturally, as Austrian constitutional law. This culture, developed over many decades (since the 1960s), has shaped Austrian constitutional thinking. From this perspective, it is easier to approach EU law and to implement it in the Austrian legal system.

[29] See Federal Law Gazette 1994/1013.

chamber of Parliament (Federal Council) has the same opportunities for involvement when the allocation of powers between the federation and the states is affected.[30]

While the Austrian Parliament rarely submitted an opinion in the first fifteen years of EU membership (five times), it has since 2010 done so regularly. For example, in 2013 a parliamentary opinion was issued with regard to the 'placing on the market of a genetically modified maize product'.[31] Genetically modified products are a very sensitive topic in Austrian politics. Thus, the Austrian position on this topic does not seem to be an area of conflict between the Government and Parliament, rather Parliament's opinion has to be understood more as an expression of Parliament that stresses the overall Austrian position.

As a consequence of the Lisbon Treaty, new provisions were added to the EU chapter of the Constitution regarding the involvement of national parliaments in 2010.[32] Article 23f of the Constitution clarifies that the Austrian Parliament will exercise the competences regarding subsidiarity and proportionality control, and provides further general provisions for parliamentary involvement (e.g. the right of the National Council to communicate its positions on legislative proposals to the EU institutions). The Constitution contains more detailed provisions for parliamentary opinions regarding subsidiarity (Art. 23g) and the possibility to refer a matter to the CJEU (Art. 23h). Finally, the new provisions allow Parliament to reject resolutions of the European Council or the Council concerning 'the change from unanimity to a qualified majority' or 'the change from a special legislation procedure to the regular legislation procedure' (Art. 23i).

1.4.2 The direct democratic dimensions of the Constitution have only been used in the case of the referendum to accede to the EU. This, however, involved the strongest and most important way possible: through a total revision of the Constitution. The Constitution provides a number of direct democratic instruments that in general are rarely used by Parliament. Although different popular initiatives have been initiated over the last few decades, they have ultimately been ignored by Parliament, which shows the political culture concerning direct democracy.[33] In recent years, however, there has been a huge debate to foster direct democracy in Austria.[34]

To summarise, the Constitution provides for different ways for the Austrian Parliament to participate in the EU legislative process. It is interesting to observe that Parliament has become more aware of its possibilities and is more engaged in the European dialogue. It has definitely helped that the necessary constitutional provisions were already in place and could easily be used.

[30] Öhlinger and Potacs 2017, pp. 30–36.

[31] http://www.parlament.gv.at/PAKT/VHG/XXV/SEU/SEU_00001/imfname_333335.pdf.

[32] See Federal Law Gazette I 2010/57.

[33] Eberhard and Lachmayer 2010, pp. 241–258.

[34] Öhlinger and Poier 2015.

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1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 As already mentioned above, the Austrian constitutional culture leads to regular constitutional amendments. This culture has formed a stable part of the Austrian legislative culture as long as the Government has had a constitution-changing majority in Parliament. However, even when there has been no required majority, for a 'reason of the state' (*Staatsräson*), over last few decades, opposition parties have usually tended to provide the necessary majority.[35] This, however, has changed in the last seven years, since the majority in the grand coalition has started to shrink, and the opposition parties have become aware of their political possibilities. The coalition Government nowadays has to negotiate with at least one opposition party to obtain the required constitution-changing majority. In most cases, the Austrian Government has had no problem finding a party in Parliament with which to cooperate.[36]

The constitutional amendments linked to the European Union are above all part of this culture. If it is necessary to change the Constitution because implementation is not possible without it, the Constitution is amended. This concept is rooted in the hierarchy of norms (*Stufenbau der Rechtsordnung*).[37] When it comes to constitutional amendments relating to the EU, the following examples show a more detailed picture of the concrete reasons for amending the Constitution. Five broader conceptual approaches can be distinguished:

(1) *Total revision as a starting point*. The importance of total revision as a starting point to introduce EU law in the Austrian constitutional system should not be underestimated. Many constitutional amendments have not been necessary thanks to this total revision, and many constitutional concerns cannot arise. The Constitution fully integrates the EU legal system, including direct effect and supremacy, at least in the state of integration since the Maastricht Treaty.
(2) *Constitutional law implementing procedure of new EU Treaties*. Besides the EU accession treaty in 1995, the subsequent EU Treaties, including Amsterdam[38] and Nice,[39] were implemented in the Austrian legal system by constitutional law that authorised these treaties domestically. A separate constitutional Act, which required a two-thirds majority in Parliament, was enacted. As mentioned above, this option was finally introduced in Art. 50 of the Constitution in 2008 and thus, today, the Constitution provides this option as the standard procedure for new EU Treaties.

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[35] See also regarding the role of the social partnership Stelzer 2011, pp. 55–58.

[36] The opposition parties have, however, been successful in negotiating further control competences in the context of parliamentary committees of inquiry. See Art. 53 Austrian Constitution (Federal Law Gazette I 2014/101).

[37] Stelzer 2011, pp. 23–27.

[38] Federal Law Gazette III 1999/83.

[39] Federal Law Gazette III 2003/4.

(3) *Treaty supplementing constitutional amendments*. Besides constitutional revision and the constitutional procedure for implementing new EU Treaties (by a two-thirds majority), there are further constitutional amendments that enable the implementation of a Treaty. Such constitutional amendments provide for the necessary adaptation of existing provisions or the introduction of new provisions in Austrian constitutional law to make a new Treaty more efficient and effective. For example, the accompanying law regarding the Lisbon Treaty introduced new provisions (Art. 23g–i Constitution) to enable Parliament to use the subsidiarity procedure.
(4) *Structural constitutional reforms*. Besides the constitutional amendments related to new EU Treaties, the Constitution has been reformed structurally – at least with regard to certain areas – to enhance the compatibility of the Austrian legal system with EU law. The most significant reform was the introduction of administrative courts of first instance, which completely changed the system of legal protection in administrative law.[40] Other examples relate to the amendment of Art. 20 para. 2 Constitution with regard to independent administrative authorities[41] and a new approach to allocation of powers with regard to public procurement[42].
(5) *Specific constitutional amendments*. Finally, Parliament does not avoid specific constitutional amendments to comply with EU law. The possibility of creating constitutional provisions in ordinary statutes is thus used to facilitate the implementation of EU law. For example, an independent EU style Energy (Control) Agency was established to comply with the third EU internal market package regarding electricity and gas.[43] Parliament established specific constitutional provisions referring to this Energy Control Agency in particular, which guaranteed the necessary independence from the state.

Thus, the constitutional amendments illustrate not only the unpretentious nature of the Austrian constitutional culture, but also the pro-European attitude of Austrian legislation. The flexibility of the Constitution leads to regular adjustments of constitutional law when there is a European necessity; in other words in order to make EU law effective in Austria, the Constitution is amended. However, not all constitutional questions lead to amendment, e.g. questions of state liability are not solved by introducing new procedures in the Constitution, but rather by interpretation on the part of the courts using existing mechanisms for these procedures. Although the text of the Constitution does not provide a legal basis, these procedures have been established by the dynamic interpretation of the courts (based on EU law principles like the principles of equivalence and effectiveness). Thus, the implementation of EU law in Austrian constitutional law is shared between

[40] See Öhlinger and Eberhard 2016, paras. 650–670; see also Sect. 2.9.
[41] See Eberhard and Lachmayer 2008, pp. 119–120.
[42] Article 14b Austrian Constitution.
[43] See Lachmayer 2014b, pp. 297–300.

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constitutional acts of Parliament and constitutional reasoning by the Constitutional Court.

1.5.2 Not applicable.

1.5.3 The exercise of power on an international and European level is changing the role of domestic constitutions. The constitutionalisation of international law[44] and the internationalisation of constitutional law are not only corresponding dimensions of legal globalisation but also create an increasing interrelation between the national and international constitutions. The author has described this phenomenon as International Constitutional Networks.[45] These networks cannot be described as a homogeneous legal system. On the contrary, the different constitutional systems follow different approaches, defend divergent values and are based on their very own particular constitutional cultures.

But is it necessary to amend national constitutions so that they are able to retain their importance? I do not think so.

First, formal constitutional amendments play different roles in different domestic constitutional cultures. Some constitutions are hard to amend and it is up to the (constitutional or supreme) courts to guarantee the functioning of the interaction between the national and the international levels. In other constitutional cultures it is much more the role of ordinary statutory legislation to build solid links with international or European law. Ultimately, the constitution might be the right domestic legal level to link international and national law, but it might not be. It depends on the particular constitutional culture.

Secondly, different domestic constitutional systems react differently to the transnational realm. Based on Vicki Jackson's distinction,[46] one might identify the following approaches: resistance, convergence and engagement. Although domestic constitutional systems are affected by legal globalisation, it is not guaranteed that they will develop a positive approach towards these developments. Constitutional amendments can also be used to strengthen anti-international concepts.[47] The example of Hungary illustrates that constitutional amendments, even more than constitutional revisions, do not necessarily lead to a more international approach.[48]

Thirdly, constitutional amendments per se do not effectively guarantee stronger ties to international law. This approach would be too formalistic. Substantive cooperation depends on the overall knowledge of and attitude towards international or European law of the relevant politicians, lawyers and other decision-makers. Constitutional amendments might be the right tool to support these developments, but they might also be completely irrelevant.

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[44] See Peters 2010, pp. 50–61

[45] Lachmayer 2013a, pp. 1490–1491.

[46] Jackson 2013.

[47] Schepple 2006, pp. 347–373.

[48] See Uitz 2015, pp. 279–300.

The author therefore follows a concept of constitutional pluralism,[49] in which the relevance and function of constitutions, as well as the amending procedures in the different domestic constitutions can differ significantly. The Austrian Constitution can serve as an example of a pro-European and internationally open constitutional culture, which fully uses the possibilities of constitutional amendments to strengthen European integration domestically. These constitutional developments, however, do not mean that the Austrian legal system (or even the Constitution) adopts European concepts perfectly. On the contrary, the permanent struggle to do so leads to further amendments. Finally, it is questionable whether these amendments maintain the relevancy of the Constitution. One could also argue that Austrian constitutional law is, step by step, losing its unique character and being harmonised towards a European model constitution.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The Constitution does not provide a coherent catalogue of human rights, rather must be understood in its evolutionary context. The Austrian system of human rights consists of a variety of catalogues and constitutional provisions enacted nationally and internationally over the last 150 years. The main parts consist of the following. First, the State Basic Law on the protection of the rights of citizens from 1867 contains traditional civil liberties and builds the classic catalogue of fundamental rights in Austria, which was adopted into the democratic Constitution in 1920.[50] The State Basic Law is still an independent document separate from the core constitutional document of 1920, and continues to provide an important constitutional basis for the Constitutional Court's case law.

Secondly, the constitutionalisation of the ECHR in 1964 (supplemented by the rights in the additional protocols) created the second human rights catalogue in Austria.[51] The rights of the ECHR are understood as constitutional rights, as they are formally part of Austrian constitutional law (rather than the ECHR being applied as an international treaty). In addition to these two major layers of constitutional rights, the Constitution provides few but important rights, especially the right to equality in Art. 7.[52] Moreover, Austria has signed various peace treaties such as the Treaty of St. Germain 1919 and the Treaty of Vienna 1955, which contain constitutional rights (e.g. with regard to minorities). Austria has ratified other international treaties and

[49] See Walker 2002, pp. 317–359.

[50] See Stelzer 2011, pp. 209–210.

[51] Stelzer 2011, pp. 211–215.

[52] See Pöschl 2008.

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adopted them on a constitutional level (e.g. the International Convention on the Elimination of All Forms of Racial Discrimination)[53] or implemented them through a special constitutional act (e.g. the Convention on the Rights of the Child)[54]. Finally, the EU Charter is of rising importance in the Austrian human rights system.[55] To summarise, the Austrian human rights system is very complex and focuses on liberal equality and procedural rights. A social rights catalogue is missing in the Constitution.[56] Some particular rights, however, contain a social rights dimension.[57]

The application of the different human rights catalogues and provisions by the Constitutional Court follows a very particular approach of 'reading the relevant provisions together'. Thus, the Court regularly applies all the relevant provisions from the different documents to provide a comprehensive protection of these rights.

2.1.2 There is no general constitutional provision on the limitation of rights, but certain rights include a specific limitation clause (such as in the provisions of the ECHR).[58]

2.1.3 The rule of law (*Rechtsstaat*) and (the existence of) human rights are two basic principles of the Constitution, which can only be abolished by a popular referendum.[59] This view regarding these basic principles, which is common to the Austrian courts and the doctrine, is not explicitly mentioned in the Constitution, but is the result of the constitutional reasoning of the Constitutional Court and the interpretation of the Constitution by academic scholarship in Austria.[60]

Article 18 para. 1 of the Constitution refers to the principle of legality, providing as follows: '[t]he entire public administration shall be based on law'. For a number of decades, this provision was understood to be the core of the Austrian (formal) understanding of the rule of law.[61] The substantive part of the rule of law is built on the legal protection of individuals through the existence of relevant institutions and procedures.

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[53] Adopted and opened for signature and ratification by UN General Assembly resolution 2106 (XX) of 21 December 1965, which came into force 4 January 1969. Transformation to Austrian constitutional law by Federal Law Gazette 1973/390.

[54] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, which came into force 2 September 1990. Austrian Constitutional Act on the Rights of the Child, Federal Law Gazette I 2011/4.

[55] VfSlg 19.632/2012; see also Lachmayer 2013b, pp. 105–107.

[56] See further details in Sect. 3.5.

[57] E.g. the Convention on the Rights of the Child, the Equality Principle (Art. 7 Austrian Constitution), or the Right to Education (Art. 2, Add. Protocol No. 1 ECHR).

[58] The State Basic Law on the Rights of Citizens from 1867 includes specific paragraphs on the limitation of rights in relation to certain provisions, e.g. Art. 13 State Basic Law on the Freedom of Expression demands a statutory basis for legislation and Art. 10 State Basic Law regarding privacy of correspondence requires a judicial order. The concept of limitations of rights in the State Basic Law is – in contrast to the ECHR – a formal one and does not include substantive criteria.

[59] See Art. 44 para. 3 Constitution.

[60] See Öhlinger 1990, pp. 2–9.

[61] Mayer et al. 2015, paras. 165, 569.

The concept of legal protection against administrative action and law enforcement is (still) bound to certain forms of administrative action (*Handlungsformen*), which leads to an increasing lack of legal protection, because newer forms of administrative action do not necessarily fit into this relatively strict and old system of forms of administrative action (*relative Geschlossenheit des Rechtsquellensystems*). In particular, since the 1990s the Constitutional Court has started to actively develop its case law on the rule of law in new dimensions. The core of this new case law is linked to the principle of effective legal protection, which is directly derived from the rule of law principle. The rule of law principle includes many elements, including the rule that only published laws can be valid, and the requirement of legal certainty and of a certain level of clarity, which will be explored in Sect. 2.5. Other elements of the rule of law include non-retroactivity; the rule that the imposition of obligations, administrative charges or penalties and criminal punishments is only permissible on the basis of a parliamentary statute; and the prohibition on applying sanctions retroactively, by inferring from objectives through teleological reasoning or by analogy.

The rule of law does not constitute a constitutional right in itself; however, procedural rights and other constitutional rights can be brought forward with regard to violations of fundamental rights before the Constitutional Court.[62] An applicant can then claim a violation of the rule of law. The rule of law is an independent and – especially since the 1990s – frequent ground for annulment. Thus, a protective mechanism exists which allows for claims against rule of law violations at the Constitutional Court.

The system of constitutional review and judicial review in Austria The Constitutional Court was one of the first specialised courts with centralised constitutional review.[63] However, the Court is one out of three highest courts in the Constitution.[64] The other two are the Supreme Administrative Court and the Supreme Court of Justice. Following a subject-oriented approach, the Constitutional Court mainly reviews statutes and ordinances with regard to their constitutionality and reviews administrative acts with regard to constitutional rights, whereas the Supreme Administrative Court reviews the legality of administrative acts with regard to statutes. The Supreme Court is the highest of the ordinary courts, which deal with civil rights and obligations[65] as well as criminal charges. The system of ordinary courts is mainly separate from the administrative authorities and administrative courts.[66] Higher courts of appeal and the Supreme Courts have the right to initiate preliminary proceedings at the Constitutional Court to review the constitutionality of a statute or an ordinance.

[62] See Art. 144 Constitution.

[63] Gamper and Palermo 2008, pp. 64–79.

[64] Stelzer 2011, pp. 188–189.

[65] The distinction between civil and administrative law in the Austrian legal system does not comply with the understanding of civil rights and obligations in Art. 6 ECHR.

[66] See Art. 94 Austrian Constitution; however, a newly (in 2012) enacted Art. 94 para. 2 Constitution broadened the possibility to create cross-subject procedures.

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In contrast to the German legal system, the Constitution does not provide for a constitutional complaint against a final decision of an ordinary court or the Supreme Court. Since 2015, it is possible to file a constitutional complaint at the Constitutional Court in relation to a judgment of an ordinary court of first instance.[67] The claim, however, can only refer to the unconstitutionality of the statute on which the judgment is based, but it cannot be argued that the ordinary court judgment is unconstitutional itself.[68] The important consequence of this court system is that it is mainly up to the ordinary courts and the Supreme Court to protect the Constitution and constitutional rights. Although this protection of constitutional rights has improved over the last 20 years, several famous judgments of the ECtHR (with regard to violation of the freedom of speech according to Art. 10 ECHR) illustrate the struggles of the ordinary courts to fully guarantee constitutional rights in Austria.[69]

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 The fundamental rights in the Constitution also contain economic rights, especially the freedom to conduct a business (*Erwerbsfreiheit*) and the right to property (*Eigentumsfreiheit*). Both of these economic rights have played an important role in the case law of the Constitutional Court in the last few decades. The Court has also contributed to the liberalisation of protected professions (e.g. taxi drivers).[70] Moreover, the Court itself has had to balance these economic rights with other fundamental rights. One example was the *Kleiderbauer* case,[71] in which animal rights activists protested in front of a clothing store which was selling fur coats. The Court argued that the gathering of the animal rights activists was unlawful because it took place at the entrance of the store and thus made it more difficult to enter the store. The outcome of the Court's ruling was that the freedom to conduct a business had priority in this case but that the activists were allowed to demonstrate five meters from the entrance. Thus, independently of the EU freedoms, the Constitutional Court has also considered economic freedom as significantly relevant in its case law.

The Austrian *Schmidberger* case at the CJEU[72] never reached the Constitutional Court, because the transportation company 'Schmidberger' sued the Austrian state

[67] Federal Law Gazette I 2013/114.

[68] See Art. 140 Austrian Constitution.

[69] See already the ECHR case *Lingens v. Austria*, 8 July 1986, Series A no. 103; see the further case law in Öhlinger and Eberhard 2016, paras. 918–918a.

[70] VfSlg 10.932/1986.

[71] VfSlg 18.601/2008.

[72] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

in the ordinary courts for allowing a demonstration that blocked a major motorway in Tyrol. There is currently no legal protection against judgments of the ordinary courts in the Constitutional Court.[73] The *Schmidberger* case also illustrates the relevance of classic fundamental rights in Austria. The CJEU's Data Retention case – although it is known as '*Digital Rights Ireland'* – is also based on a preliminary reference from the Constitutional Court. Thus, the CJEU also showed that the Court is able to address fundamental rights concerns when it comes to the harmonisation of the internal market.[74]

From the perspective of the Austrian constitutional culture, the integration of the four freedoms thus does not seem too difficult. On the one hand, Austria acceded to the European Union at a time when rights were already on the rise and, on the other hand, the Constitutional Court has also accepted that economic rights form an important part of fundamental rights. Moreover, Austrian constitutional culture is rooted in its legal (and thus technical) approach to the interrelation between the European and the domestic legal system. The Court was able to accept economic freedoms as an important part of the EU legal systems, which can also take precedence over Austrian constitutional law.[75]

Another Austrian conflict that better shows the struggle between Austria and the EU[76] is the 'German students' case.[77] The CJEU decided that Austria had to open its free access to universities to all European Union citizens. The effect of that judgment was that German students who were not accepted to certain programmes of study in Germany, especially medical studies, because of their insufficient grades obtained at German high schools, applied for entrance to medical studies in Austria. The Austrian state universities were unable to offer enough places and had to restrict the number of students by introducing a preliminary exam. The result was – for many reasons[78] – that more German students passed the exam successfully, but after finishing their studies, they went back to Germany. The Austrian Government has drafted various bills to comply with EU standards, but has ultimately introduced an increasing number of exams before the beginning of the studies, thus changing the Austrian legal system. Although there were many complaints about the CJEU's judgment in Austria, the

[73] Since 2015, it is possible to file a constitutional complaint at the Constitutional Court regarding a judgment of an ordinary court of first instance. The claim, however, can only refer to the unconstitutionality of the statute on which the judgment was based, but not argue that the ordinary court judgment is unconstitutional itself (see Art. 140 Austrian Constitution); see Ziniel 2014, pp. 437–444.

[74] See sceptical Albi 2015, pp. 158–161.

[75] In the *Telekom Control* case, the Austrian Constitutional Court accepted the supremacy of European legislation over Austrian constitutional law. Although the case did not relate either to the four freedoms or to domestic constitutional rights (but to questions regarding the concept of administrative authorities), the case showed the willingness of the Court to give EU law supremacy over domestic constitutional law. See VfSlg 15.427/1999.

[76] See also the debate on genetically modified food as discussed in Sect. 1.4.

[77] Case C-147/03 *Commission v. Austria* [2005] ECR I-05969.

[78] The German students tended to be older, had more preparation time and were more focused on the test.

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Austrian courts did not try to obstruct the EU decision. On the contrary, the Constitutional Court declared several other attempts to resolve the overall problems facing universities in Austria as unconstitutional.[79] This example shows that Austrian struggles with European Union law might not be the result of EU economic freedoms but rather the result of the rights of EU citizens. The case also illustrates the willingness to adapt domestic law to comply with EU law standards.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

Introductory note Defence rights are mainly based on the ECHR (e.g. on fair trial, right to judicial protection), and are considered constitutional rights.

The overall constitutional framework for judicial and constitutional review in Austria, described at the end of Sect 2.1, was crucial when it came to the introduction of the EAW in Austria. EAWs have to be applied by the ordinary courts and are reviewed by the Supreme Court.[80] As the Constitutional Court is not involved and the Supreme Court and the ordinary courts are not primarily concerned with human rights, constitutional concerns have not arisen in the same manner as they might have within the jurisdiction of the Constitutional Court.

The implementation The introduction of the EAW was accompanied by a scholarly debate on the constitutionality of the EAW, but the matter never reached the Constitutional Court nor was there an overall objection to the EAW in Austria. However, there has been an intensive academic debate among criminal lawyers during the last 10 years, which includes concerns regarding the presumption of innocence, *nullum crimen, nulla poena sine lege*, fair trial and *in absentia* judgments, practical challenges regarding a trial abroad and the right to effective judicial protection.[81]

For example, regarding Art. 6 ECHR, Hinterhofer and Schallmoser[82] have criticised the Framework Decision[83] and stated that it requires improvement regarding *in absentia* cases, because the defendant should receive the decision before he is transferred to the Member State that issued the EAW and should have

[79] See Lachmayer 2014c, pp. 77–120.

[80] The ordinary courts, however, had and have the possibility to file a complaint at the Constitutional Court themselves if they have doubts about the constitutionality of the act implementing the EAW, but have never actually approached the Constitutional Court on this matter.

[81] See e.g. Medigovic 2006, pp. 627–642; Murschetz 2007a, pp. 98–106; Murschetz 2007b, pp. 302–369; Zeder 2003, pp. 376–386; Sautner 2005, pp. 328–343; Hinterhofer and Schallmoser 2010, p. 365; Hinterhofer and Schallmoser 2011a, b, para. 7; Schallmoser 2012, pp. 134–235.

[82] Hinterhofer and Schallmoser 2010, p. 365.

[83] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

the possibility to request a review of the judgment. Medigovic, for example, has exposed the problems of the partial relinquishment of the requirement of double criminality due to the broad and vague terminology of the list of offences.[84]

The scholarly debate and scepticism towards certain topics relating to the EAW were considered in the Austrian implementation of the EAW from the very beginning. One main criticism concerned the lack of a human rights clause in the Framework Decision. A human rights clause was introduced upon implementation of the EAW in Art. 19 para. 4 of the Judicial Cooperation in Criminal Matters in the Member States of the European Union Act:[85]

> The execution of the arrest warrant can be refused on the following grounds: if the surrender would violate the principles of Art. 6 TEU or any objective indications exist that the warrant was issued for discriminatory purposes (e.g. regarding sex, race, religion, ethnicity, citizenship, language, political opinion or sexual orientation). The examination of these objections can remain undone when the person had the possibility to object before the competent judicial authorities in the issuing state, the ECtHR and the CJEU.

Thus, the Austrian legislator has created a real possibility to claim abuse of human rights in extradition proceedings. This legal practice not only accepts objections by the persons concerned (as indicated by the statute), but the courts also consider this clause *ex officio*. Moreover, the Austrian scholarship considers this clause to be in conformity with EU law.[86] This statutory starting point for the EAW gives Austrian legal practice the necessary flexibility in EAW cases. However, no specific Austrian EAW case has yet reached the CJEU, and thus the Luxemburg Court has not yet had to decide on the Austrian human rights clause.

The Constitution was involved in the introduction of a constitutional provision with regard to the extradition of Austrian citizens in the context of the execution of an EAW. The Austrian EAW implementation act includes Sect. 5, which is a constitutional provision,[87] to allow the extradition of Austrian citizens. The Austrian Parliament thus amended the Constitution to make the EAW possible. This provision, however, is mainly concerned with cases in which extradition is not possible (e.g. where the person concerned did not commit any act on the territory of the issuing state or where acts of the same type would not be subject to Austrian criminal law, thus issues regarding '*nulla poena sine lege*'). These exemptions to prohibit extraditions of Austrian citizens are formulated extensively and protect Austrian citizens broadly. As a result, up until 2013, in legal practice only one Austrian citizen who did not agree to extradition was extradited on the basis of an EAW.[88]

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[84] Medigovic 2006, p. 642.

[85] *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union* (EU-JZG), Federal Law Gazette I 2004/36.

[86] Hinterhofer and Schallmoser 2011b, paras. 18–28.

[87] See regarding constitutional provisions Sect. 1.1; see also Eberhard and Lachmayer 2008, pp. 113–116.

[88] Hochmayr 2013, pp. 182–187.

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To summarise, the Austrian Parliament has not only used the flexibility of the EAW Framework Decision to introduce a form of the EAW that is compatible with the Constitution, but has also been willing to adopt constitutional provisions to enable the integration of the Framework Decision in Austria. The changes to the Constitution, however, still guarantee the Europe-friendly implementation of the Framework Decision in Austria.

The Austrian case law The case law of the Supreme Court on the EAW is very limited and mostly technical. It does not touch upon sensitive questions related to the EAW. As mentioned above, for procedural reasons, the Constitutional Court has no involvement with the Austrian statute that implements the EAW. Politicians have also not considered the EAW as a particular threat to human rights, and none of the political actors with the possibility to seek a review by the Constitutional Court have initiated a review procedure. Some individual cases that have been covered by the media are discussed in Sect. 2.12 regarding the public debate.

There has been, however, an interesting case between Italy and Austria before the Austrian Supreme Court, which was based on traditional extradition and not on the EAW, because the EAW had not been implemented at that time.[89] The judgment was decided in 2008 and concerned an *in absentia* judgment of an Italian Court. The Austrian appeal court stated that there was no violation of the principle of fair trial (Art. 6 ECHR), because the person concerned left Italy after his pre-trial detention ended and he never informed the Italian authorities of his usual residence in Austria. The Supreme Court, however, recognised a violation of Art. 6 ECHR, because he had never waived his right to present an oral argument and his return to his life in Austria could not be understood as an attempt to escape. Finally, his failure to inform the Italian authorities of his residence did not release the Italian courts from the obligation to provide effective legal protection. The Supreme Court considered the Italian *in absentia* judgment as a violation of Art. 6 ECHR and did not agree that the requirements for an extradition had been fulfilled.[90] The Supreme Court especially referred to the case law of the ECtHR.[91] This leading case was the first (!) time that the Supreme Court had denied extradition on the basis of Art. 6 ECHR. The Austrian academic literature came to the conclusion that the same decision would have had to be made by the Supreme Court if the very same case would have been decided within the legal framework of the EAW. Section 11 of the Austrian implementation act provides similar human rights guarantees.[92] Although

[89] OGH 21. 1. 2008, 15 Os 117/07f.

[90] Murschetz 2009, pp. 29–33.

[91] See e.g. ECtHR *F.C.B. v. Italy*, 28 August 1991, Series A no. 208-B; *T. v. Italy*, 12 October 1992, Series A no. 245-C; *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II.

[92] Sect. 11 EU-JZG formulates the following criteria for the enforcement of an EAW on the basis of a custodial sentence imposed *in absentia*. The preconditions are that the Defendant: (1) was informed in due time by personal summons of the time and place of the trial and was also informed that a decision could be taken *in absentia;* (2) was aware of the time and place of the trial and was entrusted a lawyer and was in fact represented by this lawyer during the trial; (3) was served the decision taken *in absentia* and was instructed about the right to appeal against the decision and

the EAW Framework Decision does not invoke Art. 6 ECHR in its Art. 5, the consideration of human rights is set out in recitals 12 and 13 of the Framework Decision. This case therefore shows that Austrian courts are willing to invoke human rights in extradition cases. The actual number of cases is, however, very small.

The Austrian debate on the EAW has not been a public one, but rather a scholarly one.[93] Moreover, it has primarily been a discussion within the community of criminal law scholars and has not significantly involved constitutional lawyers.[94] As already mentioned above, the Constitutional Court has not been involved because criminal charges cannot not be reviewed by the Constitutional Court, only by the Supreme Court. The rising awareness of the Supreme Court of human rights has only led to consideration of Art. 6 ECHR on one occasion in the Italian extradition case, which did not refer to the EAW. The debate of Austrian criminal law scholars, however, can be observed in the context of the increasing case law of the CJEU.

The CJEU's case law The emergence of the CJEU case law on the EAW has had different effects on the Austrian approach towards the EAW. First of all, certain rights issues have been discussed within the Austrian community of criminal lawyers. Secondly, the Austrian legislator has amended the act implementing the Framework Decision.

A critique by Austrian scholars e.g. referring to the *Melloni* case[95] is that the interpretation of the CJEU overlooks that the Charter only determines a minimum standard, which is also evident from the vagueness of the provisions. The core idea of minimum standards is, however, that in the individual case the minimum standard may be transcended. With its interpretation of Art. 53 of the Charter, the CJEU prohibits this possibility.[96] In the *Radu* case the CJEU neglected to elaborate more on the rights' standards.[97] The Austrian act implementing the EAW was amended to integrate the CJEU's case law (*Kozłowski*, *Wolzenburg*, *Lopes da Silva Jorge*)[98] regarding the discrimination of EU citizens by including a new Sect. 5a in the Act.[99]

The CJEU's role in EAW cases shows an ambivalent approach, which primarily strengthens the overall concept of mutual recognition and the EAW. The Lisbon

explicitly declared that he or she would not appeal against the decision, or within the existing time limits did appeal against the decision; or (4) has personally been served the judgment immediately after his or her surrender and on this occasion has explicitly been instructed about his or her right to appeal against the decision and thus achieve a new evaluation and suspension of the decision, and about the time limits for this.

[93] See also Sect. 2.12.

[94] See, however, Merli 2007, pp. 125–140.

[95] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[96] Wirth et al. 2014, p. 381.

[97] See with regard to the Austrian analysis of this judgment Zeder 2013b, p. 85.

[98] Case C-123/08 *Wolzenburg* [2009] ECR I-09621; Case C-66/08 *Kozlowski* [2008] ECR I-06041; Case C-42/11 *Joao Pedro Lopes Da Silva Jorge* [2012] ECLI:EU:C:2012:517.

[99] Federal Law Gazette I 2013/175.

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Treaty gave the Court the full potential to embrace a rights-based approach. The future position of the Court will decide on further rights development in the context of the EAW. The end of the transition period for the Lisbon Treaty (2009–2014) will further impact the rising role of the CJEU as a human rights court in relation to judicial cooperation in criminal matters.[100]

Enhancing the EU's judicial cooperation While the EU tends to intensify police and judicial cooperation relatively quickly, the enactment of the complementary rights of citizens in the same policy field takes significantly more time. The establishment of a framework decision on data protection in police and judicial cooperation is one such example, and the establishment of rights of defence demonstrates the same problem. Certain developments in recent years indicate the first steps in a rights-oriented direction. The rise of defence rights in European criminal procedural law is illustrated by Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings and the Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.[101,102] A fully-fledged system of rights in transnational criminal proceedings still seems far away. Many elements have still not been properly addressed, and it remains a challenge for the domestic courts (but also legislators) to guarantee constitutional rights properly in transnational prosecution and extradition. The problem of imbalances between European prosecutorial concepts and the lack of rights of defence could get even worse with the introduction of a European Prosecution Office.[103]

As regards abolition of the exequatur in civil matters, whilst one of the most important cases where the first instance court refused to forcibly send a child to live with her father in Italy was an Austrian case (both before the CJEU and the ECtHR – *Povse v. Austria*),[104] this is not regarded as a matter of constitutional rights or the right to access to courts in the Austrian discourse, because the Constitutional Court was not involved in this case law (which is the result of the Austrian court system as explained in Sect. 2.1). The case did, however, attract media attention.[105]

Conclusion Austria presents a very particular approach towards the EAW. It is not possible to find any significant case law on constitutional rights and the EAW. The reason for this can be traced to the limited possibility of the Constitutional Court to review criminal law statutes and the lack of a constitutional complaint against judgments of the Supreme Court. The Supreme Court itself is relatively reluctant

[100] Zeder 2015, pp. 126–130.

[101] COM (2011) 326 final.

[102] Zeder 2012b, p. 155.

[103] Zeder 2013a, p. 179–200; Zeder 2012a, p. 105.

[104] Case C-211/10 *Povse* [2010] ECR I-06673; ECtHR *Povse v. Austria*, no. 3890/11, 18 June 2013.

[105] Aichinger, P. and Winroither, E. (2013, August 6) *Gegen alle Instanzen: Kampf ums Kind.* Die Presse. http://diepresse.com/home/panorama/oesterreich/1438411/Gegen-alle-Instanzen_Kampf-ums-Kind.

when it comes to constitutional rights and has only shown a changing approach in recent years. The main elements of the Austrian rights approach towards the EAW can be identified in the implementing legislation, which employs an extensive interpretation of the Framework Decision to broaden the human rights guarantees. In Austrian legal culture, the Constitution is also involved in the general enabling of the extradition of Austrian citizens. The particular provisions are very complex, but tend to protect Austrian citizens against extradition in most cases.

With regard to rights in a criminal law context and the EAW, Austria generally has chosen a non-constitutional approach, using the potential of the implementing legislation. Concerns, especially regarding certain case law of the CJEU, have been raised by criminal law scholars, but real conflicts regarding the possibly of different approaches by the CJEU and the Austrian implementing legislation have not yet occurred. In the meanwhile, the pro-rights approach in the context of the EAW prevails in Austria.

2.4 The EU Data Retention Directive

2.4.1 Before the EU introduced its Data Retention Directive,[106] the Austrian legal system did not have the police powers provided by the Directive. The Government waited a long time before implementing the Data Retention Directive in 2011.[107] Austria had already been punished by the CJEU for missing the implementation deadline for the directive.[108] This situation reflected the political scepticism in Austria. Finally, the bill was drafted by the Ministry of Technology in cooperation with a human rights institute to strengthen the constitutional rights elements in the Austrian implementation.[109]

The state of Carinthia, as well as human rights activists, immediately initiated proceedings at the Constitutional Court as soon as the implementing act entered into force. The Constitutional Court initiated preliminary proceedings in the CJEU,[110] where the Irish case[111] was already pending. The Constitutional Court submitted a number of questions, in particular regarding the validity of the Directive in the light of Arts. 7, 8, 11 of the Charter and regarding interpretation of the Directive in the context of the Data Protection Directive and the Charter. The Constitutional Court

[106] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[107] See details regarding the political debate in Sect. 2.12.

[108] See CJEU Case C-189/09 *Commission and Council v. Austria* [2010] ECR I-00099.

[109] See http://bim.lbg.ac.at/de/informationsgesellschaft/bimentwurf-zur-vorratsdatenspeicherung-begutachtung.

[110] VfSlg. 19.702/2012.

[111] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

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also referred to constitutional law (especially Art. 1 of the Data Protection Act) and extensively to Art. 8 ECHR, which is also understood to be Austrian constitutional law. The Court did not refer to its own case law on privacy; however, the Court referred to the German case law on data retention as well as to the German concept of informational self-determination and to Polish constitutional provisions. After the judgment of the CJEU in April 2014,[112] the Constitutional Court ruled in June 2014 on the (un)constitutionality of the Austrian statutory provisions implementing the EU Directive. The Court declared the relevant provisions in the Austrian Telecommunication Act, the Security Police Act and Criminal Procedural Act to be unconstitutional and thus null and void.[113]

The Court came to this decision by reviewing the Austrian implementing provision primarily under Sect. 1 of the Data Protection Act, which is a constitutional provision and contains constitutional rights on data protection.[114] This particularity of Austrian constitutional law, that ordinary statutes can contain constitutional provisions and even constitutional rights, was presented in Sect. 1.1; Sect. 1 of the Data Protection Act is a significant example. The Court used the usual proportionality test to review the provisions. By also explicitly considering the reasoning of the CJEU, the Court came to the conclusion that the Austrian provisions were disproportionate. Similarly to the Data Retention Directive, the Austrian provisions did not distinguish enough with regard to the criminal offences ('… it is not guaranteed that retained data is only then provided if it serves the criminal prosecution and resolution of the investigation which in the individual case is a serious threat to the objectives stated in Art. 8 para. 2 ECHR and which justifies such interference').[115] The Court further reasoned/stated that 'the "distribution range" of the unfounded storage exceeds those interferences in the legal sphere which it ever had to decide and which is protected by Sect. 1 DSG 2000. … This applies to the affected category of individuals, the scope and nature of the data as well as the purposes for which it is required and also the modalities of the use of data.'[116] The Court concluded that:

> The limitations of the fundamental right of data protection according to the legal reservation in S 1 para. 2 DSG 2000 are only permissible based on laws which are necessary for the reasons mentioned in Art. 8 para. 2 ECHR and which regulate in a sufficiently precise manner that is clear to everyone, the conditions under which the investigation or use of personal data for the performance of specific administrative tasks is allowed.[117]

The existing provisions, however, did not fulfil these requirements.

The Austrian police used the retained data for several purposes but not for prosecuting terrorism suspects. However, the pressure from police authorities to reintroduce these powers in the Austrian legal system is currently very high. The

[112] Ibid.

[113] VfSlg 19.892/2014; see Lehner 2014, pp. 445–457.

[114] The Court also considered Art. 8 ECHR, and Arts. 7 and 8 of the Charter in its reasoning.

[115] VfSlg 19.892/2014, para. 172.

[116] VfGH 27.06.2014, G47/2012 et al., para. 181.

[117] VfGH 27.06.2014, G47/2012 et al., para. 199.

powers gained under the Data Retention Directive seemed to be very advantageous. The Minister of the Interior and the Minister of Justice have publicly stated on several occasions that there is a need to reintroduce these powers for police and judicial authorities.[118]

2.5 Unpublished or Secret Legislation

2.5.1 The *Heinrich* case[119] was an Austrian case which did not happen by chance. The Austrian understanding of the rule of law focuses particularly on the necessity of publication of legal acts. There is a specific line of case law based on Arts. 89, 139 and 140 of the Constitution, which determines the requirements for the proper publication of ordinances (by ministries or administrative authorities). A 'proper public announcement' has to fulfil the constitutional or statutory provisions for public announcements. If there are no particular legal rules, a typical customary announcement has to be made. If an ordinance is not published at all, the ordinance cannot be deemed valid.[120] If an ordinance is not properly published, the Constitutional Court still has the possibility to invalidate the ordinance, while other courts will not apply the ordinance (*Fehlerkalkül*).

The Constitutional Court has created a link between the question of public announcements and the rule of law in general in its case law.[121] It is understood as an element of the rule of law that generally binding legal acts have to be published adequately, which above all means in accordance with statutory law. This understanding of the rule of law was already part of the traditional formal understanding of the rule of law in its elaboration as the principle of legality.[122] The principle of legality serves the function of legal certainty, which was also recalled by the CJEU in the *Heinrich* case.[123] Thus, the initiation of a preliminary reference procedure in the *Heinrich* case and the formal questions regarding the principle of legality reflect a typical Austrian constitutional understanding of the rule of law. The European result, however, that the measure remained valid but not enforceable vis-à-vis individuals, is not quite the same as the Austrian constitutional approach, as the Austrian approach would have been to invalidate the act.

With regard to the *Skoma-Lux* case, the publication of legal acts in the right language is crucial.[124] Article 8 of the Constitution determines that German is the

[118] See e.g. Wimmer, B. *Polit-Zwist um Neuregelung für Vorratsdaten.* Futurezone. http://futurezone.at/netzpolitik/mikl-leitner-fordert-neuregelung-fuer-vorratsdaten/125.315.643.

[119] Case C-345/06 *Heinrich* [2009] ECR I-01659.

[120] Mayer et al 2015, paras. 602–603.

[121] VfSlg 16.852/2003; see VfSlg 14.851/1997; 11.867/1988.

[122] Mayer et al 2015, paras. 165, 569.

[123] Case C-345/06 *Heinrich* [2009] ECR I-01659, para. 68.

[124] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841.

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official language of the Austrian state. Further minority languages (e.g. Slovene and Croatian) are also accepted as official languages for these minorities. Moreover, the author has carried out scholarly research on questions of the official state language in the context of police cooperation in operative measures.[125] The TFEU provides the legal basis for operative cooperation between the police forces of different Member States. Thus, foreign police officers have police powers without even speaking any of the languages of these citizens and without knowing the legal provisions (at least not the legal details) which they have to apply. Thus, there is a general problem regarding language in the operative cooperation of police forces in the EU.

Another interesting element of the Austrian principle of legality refers to a certain level of clarity which a statute has to provide. The Constitutional Court has developed case law regarding too complicated or too complex forms of legislation. The Court has stated that it is not the task of the citizens to show a level of diligence normally demonstrated by keepers of archives ('*archivarischer Fleiß*') to understand the content of statutory legislation.[126] Moreover, the Court has emphasised that it is not necessary for statutory interpretation to incite the desire to solve brain teasers or word puzzles ('*Lust zum Lösen von Denksportaufgaben*').[127] Again, the Court has established limits to legislation, which – although published – is not comprehensible to individuals.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 After the accession to the EU, the Constitutional Court declared in its early case law that the Court would not review domestic statutes on the basis of European legislation.[128] It would be the responsibility of the Supreme Administrative Court to review administrative decisions with regard to European regulations and directives. The Constitutional Court accepted the direct effect and supremacy of EU law even in relation to constitutional law. In the *Telekom Control* case, the Court clearly accepted that EU law takes precedence over constitutional provisions (which were related to the concept of administration in Austria and thus contributed to the rule of law).[129] Other cases in the context of energy regulation, for example, were already constitutionally considered by Parliament through the enactment of new constitutional legislation in Austria.

[125] Lachmayer 2011, p. 419.
[126] VfSlg. 3130/1956.
[127] VfSlg. 12.420/1990.
[128] VfSlg 14.886/1997.
[129] VfSlg 15.427/1999.

The Court has not been confronted with any cases involving European market regulations limiting property rights, legal certainty, etc.[130] On the contrary, European market regulations have usually broadened the rights of individuals as well as business corporations against the state. Thus, while limiting the power of the state, the rights of individuals have been strengthened by European legislation.

In state aid cases, it might be possible to argue that the Constitutional Court, according to its own case law, would in certain cases have provided a higher standard of legitimate expectations.[131] Due to the European concept of limitation of state aid, however, the European Commission is more restrictive in these cases.[132]

It can therefore be said that the Constitutional Court is willing to adapt Austrian constitutional provisions to European legislation and the CJEU's case law, especially in the context of the rule of law. With regard to constitutional rights, the Court follows a hierarchical approach and uses the preliminary reference procedure to refer to the CJEU to declare European legislation void.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 The implementation of the ESM Treaty in the Austrian legal system consisted of two stages. The Parliament first authorised the international treaty[133] and subsequently included new provisions (Art. 50a–d) regarding the role of Parliament within the ESM in the Constitution.[134] Parliament has to authorise the voting of the Austrian Government with regard to any 'proposal for a resolution to grant stability aid to a member state in principle'; 'an alteration of the approved share capital and an adaptation of the maximum loan volume of the European Stability Mechanism as well as the calling of approved share capital not having been paid in' and 'amendments of the financial aid instruments'.[135] Moreover, the competent minister has to inform Parliament about recent developments. Parliament has – similarly as in the case of EU policy matters[136] – the power to bind the minister by a parliamentary opinion. Furthermore, the Constitution authorises Parliament to establish further competences of Parliament by an ordinary statute. Parliament was therefore included significantly in the decision-making of the Government upon implementation.

[130] However, regarding judicial review at EU level, legal certainty and non-retroactivity were unsuccessfully raised in a case regarding excess stocks (Case C-179/00 *Weidacher* [2002] ECR I-00501) after Austria's accession.

[131] Öhlinger and Eberhard 2016, paras. 787–788.

[132] See e.g. Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-09957.

[133] Federal Law Gazette III 2012/138.

[134] Federal Law Gazette I 2012/65.

[135] Article 50b Austrian Constitution.

[136] See above in Sect. 1.4.

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Besides this constitutional integration and the democratic considerations, the Constitutional Court has had to decide on a constitutional complaint against the ESM Treaty.[137] The complaint was filed in an abstract review procedure by the Carinthian state government and addressed manifold concerns regarding the ESM Treaty, including the unconstitutional adoption of the interpretative declaration on the ESM, the undue transfer of various sovereign powers and the lack of reasonability of the ESM.[138] In an unusually long judgment, the Constitutional Court dismissed all arguments which were raised. According to Art. 9 para. 2 of the Constitution, the Republic of Austria is authorised to transfer individual governmental powers to international institutions. This provision had already traditionally been interpreted broadly. The Constitutional Court in its ESM judgment, however, broadened its already international-friendly approach even further. The Court based its decision on the CJEU's *Pringle*,[139] case and referred to the German Constitutional Court's judgment.[140] The Court declared that the ESM does not contradict the constitutional principle of an 'overall economic balance and sustainable balanced budget' nor the principle of reasonability nor the principles of economy, efficiency and expediency. The maximum amount allowed under the ESM for Austria would be about 27% of the Austrian annual state budget and 5% of the annual GDP. The Constitutional Court stated that these economic decisions still fall within the political leeway that must not be restricted by the Court.

2.7.2 With regard to further financial matters it is – by Austrian standards – remarkable that it was not possible to find a constitutional amending majority in Parliament for the constitutionalisation of the golden rule (debt brake, *Schuldenbremse*), which was then only implemented on a statutory level.[141] Other political reasons (opposition parties tried to get further parliamentary minority rights) were behind this. However, the Austrian federation (*Bund),* the states (*Länder)* and the municipalities concluded an inter-state agreement with regard to financial stability within the Republic of Austria.[142]

Moreover, the Constitutional Court has had to decide on the European fiscal compact.[143] The Constitutional Court defended – with a similar approach as in the ESM case – the fiscal compact. The Court (especially in relation to the complaints) justified the involvement of European institutions in general and the powers transferred to them from a domestic level on the basis of Art. 9 para. 2 of the Constitution. Moreover, the Court stated that the establishment of a balanced

[137] VfSlg. 19.750/2013; see also Mayer 2013, pp. 385–400.

[138] The irrevocable and unconditional clause was not addressed by the complainant. As the Constitutional Court was bound by the arguments put forward in this specific procedure of abstract review, the Court could not address any other topics.

[139] Case C-370/12 *Thomas Pringle* [2012] ECLI:EU:C:2012:756.

[140] *Urteil des Bundesverfassungsgerichts vom 12.09.2012*, 2 BvR 1390/12 ua.

[141] See regarding a European comparison Adams et al. 2014.

[142] See the Austrian Stability Pact, Federal Law Gazette I 2013/30.

[143] VfSlg. 19809/2013.

budget is the task of an ordinary majority of Parliament (and thus no constitution-amending majority is needed).

On the whole, Austrian legislation and the Constitutional Court seem to be open to European fiscal cooperation. However, it is important to mention the domestic challenges relating to bail-outs and hair-cuts. The Carinthian bank, Hypo Alpe Adria, which is completely bankrupt (heavily influenced by Jörg Haider's politics and systems of corruption), created a major threat to the economic situation in Austria and the state budget. Heavy financial losses have had a significant impact on the Austrian state budget, have increased national debt significantly and have demonstrated that in the Austrian Federal System economic challenges need further legal frameworks, stronger accountability and effective control. The Constitutional Court has declared certain forms of hair-cuts to be unconstitutional.[144] The Court argued that the Hypo Reorganization Act, in an unconstitutional manner, distinguishes between 'normal' creditors and 'junior creditors', whose position in the event of insolvency is junior, and 'further differentiates within the group of junior creditors merely on the basis of the cut-off date (set at 30 June 2019). Exposures of junior creditors falling due before this date are deemed to be expired; claims falling due after that date remain unaffected. Such procedure, i.e. the application of an unequal treatment regime within the group of junior creditors depending on the cut-off date, is unconstitutional. This constitutes a violation of the fundamental right to the protection of property.[145]

2.7.3 Austria has not been subject to a bailout or austerity programme.

2.8 Judicial Review of EU Measures: Access to Justice and the Standard of Review

2.8.1 Since the accession of Austria to the EU in 1995, Austrian courts have referred to the CJEU in more than 200 cases overall. Since 2001, Austrian institutions have requested a preliminary ruling from the CJEU in seven cases with regard to the validity of EU legislation; thus, only a very small number have related to questions of validity. A closer look at these seven cases shows a highly diverse approach by the CJEU.

The most prominent preliminary reference is *Seitlinger and others* with regard to the Data Retention Directive, as discussed in Sect. 2.4. Another case regarding the Data Retention Directive submitted by the Austrian Data Protection Commission was not considered because the case submitted by the Constitutional Court was already pending.[146] As is widely known, the CJEU declared that the Data Retention Directive contradicts the Charter and is thus void.

[144] See VfGH 3 July 2015, G 239/2014, G 98/2015.

[145] Ibid.

[146] Case C-46/13 *H* [2014] ECLI:EU:C:2014:1998.

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In case C-309/10, the referring Administrative Court challenged the temporary scheme for the restructuring of the sugar industry in the European Community, as well as with regard to the principle of conferral of powers. The CJEU did not only review the EU principle of conferral of powers but also many other principles, including the 'obligation to state reasons' and the principle of proportionality. The CJEU, however, concluded that its review had not 'revealed anything which might affect the validity of Art. 11 of Regulation No 320/2006'.[147]

Regarding some of the other cases, the CJEU stated in its judgment in case C-439/01 that the relevant provisions (Art. 8 of Regulation No 3820/85 on the harmonisation of certain social legislation relating to road transport)[148] do not contradict the principle of legal certainty.[149] In CJEU case C-216/03, the Court declared the preliminary reference to be inadmissible.[150]

In CJEU case C-329/13 (*Stefan*), the Austrian State Independent Administrative Authority questioned the validity of a provision of Directive 2003/4/EC, which granted an exception to the obligation to disclose environmental information where the disclosure compromises the right of any person to receive a fair trial with regard to Art. 47 para. 2 of the Charter. The CJEU could not find any violation of the right to fair trial. Finally, another preliminary reference at the CJEU in the context of environmental law concerned Commission Decision 2013/448/EU and questioned whether this decision is invalid because of an infringement of Directive 2003/87/EC.[151]

From the very beginning, the Constitutional Court has been willing to initiate preliminary reference proceedings at the CJEU. The Constitutional Court has not used these proceedings very often (four times), but it seems that they have always been a viable possibility for the Court. With regard to constitutional rights, the Constitutional Court has changed its approach since the enactment of the Lisbon Treaty. The Constitutional Court has used the EU Charter as the standard of its review since 2012 with the following effect: if Austrian statutes contradict domestic or European fundamental rights, the Court will declare them void and unconstitutional. Moreover, if European legislation contradicts European fundamental rights, the Court will file a preliminary reference with the CJEU for the European Court to determine whether the European legislation is invalid. The Court applied this approach with regard to the Data Retention Directive.[152] The *Schmidberger* case also exemplified that ordinary courts in Austria follow this approach.[153]

In summary it can be said that the Austrian cases in the context of preliminary rulings regarding validity are very limited. Other than in the Data Retention case,

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[147] Case C-309/10 *Agrana Zucker* [2011] ECR I-07333.

[148] [1985] OJ L 370/1.

[149] Case C-439/01 *Cipra and Kvasnicka* [2003] ECR I-00745.

[150] Case C-216/03 *DLD Trading Company Import-Export.*

[151] Case C-191/14 *Borealis Polyofine* [2016] ECLI:EU:C:2016:311 and Case C-192/14 *OMV Refining & Marketing*.

[152] VfSlg. 19.702/2012.

[153] Case C-112/00 *Schmidberger* [2003] ECR I-05659.

the CJEU has not found any problems with validity. If one excludes the cases which are still pending and those which have been rejected, only four cases remain. In one of the four cases the CJEU accepted the concerns (25%). The overall number is, however, too small to base any specific argument on the outcomes.

2.8.2–2.8.3 The system of constitutional review in Austria is outlined in Sect. 2.1. According to the 2014 annual report of the Constitutional Court, in 41 cases of statutory review (out of 198) the Court declared a provision to be at least partly unconstitutional and void. In 102 cases the court declared the review to be inadmissible.[154] Thus, in 20% of all cases and 50% of admissible cases the Court declared a statutory provision to be void. Clearly the greatest challenge for a complainant is the acceptance of the case by the Court.

The Constitutional Court traditionally does not review EU legislation. It is up to the Supreme Administrative Court and the Supreme Court of Justice to review the implementation of EU legislation in the final instance. In 2012, however, the Constitutional Court introduced an exemption that concerns the Charter.[155] The Constitutional Court also uses the Charter to review administrative decisions within the scope of EU law.

If one compares the general standard of review between the Constitutional Court and the CJEU it is possible to argue that the domestic constitutional court has developed higher standards in different areas: the Constitutional Court has, based on the Constitution, a very distinctive and restrictive concept of the principle of legality.[156] The Constitutional Court has developed a principle of reasonability, which enables the Court to control every act of legislation regarding its reasonability.[157] Finally, the influence of the ECtHR has led to a detailed review of the principle of proportionality.[158]

The comparison of these two courts, however, has to be put into perspective, as the CJEU and the Constitutional Court fulfil different functions and both courts work together in the European network of (constitutional/supreme) courts. First, the CJEU has to guarantee general principles in 28 different jurisdictions, which makes it necessary not to exercise review in an overly detailed manner, since this would make it difficult for jurisdictions to consider these principles properly. Secondly, the CJEU is not the only court to review EU principles and human rights, but rather builds on the cooperation of courts in Europe. Thus, it makes sense that the CJEU does not have the same intensity of review of general principles or human rights as domestic constitutional courts.

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[154] See the annual report of the Court for 2014: https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2014.pdf. The statistic, however, does not consider the many cases in which an individual proposed a statutory review procedure that the Court did not consider.

[155] VfSlg 19.632/2012; see also Lachmayer 2013, pp. 105–107.

[156] Mayer et al 2015, paras. 165, 569.

[157] Stelzer 2011, pp. 242–244.

[158] Lachmayer 2014a, pp. 85–86; Grabenwarter 2007, p. 125.

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2.8.4 The *Bosphorus* case law[159] shifted the human rights responsibilities from the ECtHR to the CJEU, which has intensified its human rights approach accordingly in the last 10 years. The *Data Retention* judgment was the climax of these developments. The Lisbon Treaty even raised the protection of human rights within the Union to a new level; the accession of the EU to the ECHR should have been the next step in these developments. The opinion of the CJEU can be regarded as a backlash against these attempts to create a complex but coherent system of human rights protection.[160] This also means that it would be necessary to revisit the *Bosphorus* case law, should the CJEU fail to guarantee human rights protection. The CJEU's approach, however, can be understood in coherence with its claims of autonomy, which were already stated in the *Kadi* judgment.[161] The CJEU's approach could lead to a new balance in the European network of human rights protection if the ECtHR were to again intensify its own review of EU legislation.

2.9 Other Constitutional Rights and Principles

The rule of law as a domestic concept European administrative law fundamentally challenges the Austrian system of legal protection in administrative law. The Austrian system is based on certain forms of administrative acts and action (e.g. ordinance, decision, law enforcement).[162] Depending on the type of administrative act, different types of legal protection are available. The problem that arises in the Austrian system in relation to EU administrative law is that new forms of administrative acts have been introduced which do not fit in with the system of Austrian administrative law and thus lack the necessary legal protection. The result is that the Austrian Parliament and Government have sought to transform European concepts into Austrian administrative forms – attempts which have not always been entirely successful.

Two examples of this are air quality assessments and air quality management in environmental law.[163] Rights for individuals and legal protection against omissions by administrative authorities must be provided to enact these plans. Such plan would usually take the form of an ordinance in Austria, but the legal protection available against ordinances is quite limited in Austria and only directly possible at the Constitutional Court. Legal action against administrative authorities who fail to enact a plan is not directly possible. Moreover, the Austrian legal system provides a relatively narrow definition of 'parties' in administrative proceedings. In contrast to

[159] *Bosphorus Hava Yollarr Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

[160] Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

[161] See Halberstam 2015, pp. 105–146.

[162] See Öhlinger and Eberhard 2016, para. 81.

[163] See Directive 2008/50/EC on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1; see also Case C-237/07 *Janecek* [2008] ECR I-06221.

the French model, which inspired the EU legislation, the Austrian system cannot provide the right for everybody to participate in administrative proceedings. The necessary changes to Austrian administrative law are not that easy to bring about because all of these questions are deeply rooted in constitutional law and it would be necessary to develop a completely different concept of the rule of law. The result is that currently the Austrian constitutional system cannot provide effective legal protection in all cases.[164]

The introduction of administrative courts of first instance in 2014, however, shows that the Constitution and the rule of law have been changed significantly to create a constitutional framework that better fits EU administrative law.

The rule of law as a European value The European Union has developed its own concept of the rule of law over the last 60 years. The Maastricht Treaty identified the rule of law and human rights as two of the core values of European constitutionalism, which have to be fulfilled by countries applying to join the EU, as well as by the existing Member States of the Union. The case of the 'EU 14 sanctions against Austria' in the year 2000 and the Hungarian case showed the increasing aspiration of the Union to strengthen the rule of law in the Member States' constitutions.[165] Although the Union's approach struggles between strong legal powers (Art. 7 TEU) and too weak political debates as well as too detailed infringement proceedings, the EU institutions are intensifying their efforts to protect the rule of law and human rights as part of European constitutionalism.[166]

2.10 Common Constitutional Traditions

2.10.1 The search for common constitutional traditions seems to follow a harmonising and universalising approach. From the author's perspective, two levels of common constitutional traditions can be distinguished: first, a general level of basic principles and rights, and secondly, a deeper understanding of the very same principles and rights, which focuses on the particular constitutional cultures.

The first and general level of a basic collection of principles and rights seem to be found easily. The core constitutional values of democracy, the rule of law and human rights are common to the EU Member States. It is even possible to elaborate these three values in more detail and to find certain principles and rights which can be understood as common constitutional traditions. With regard to democracy, the parliamentary concept of representation shares certain elements of democratic accountability or public debate, as well as the party system in general. With regard to the rule of law, the independence of the judiciary, the principle of legality and

[164] Giera 2015, pp. 218–245; Potacs 2009, pp. 874–879.

[165] Lachmayer 2017a, pp. 436–454.

[166] See European Commission Communication: A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2.

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access to justice are relevant. Finally, the ECHR creates a common foundation of European human rights. Common constitutional traditions can thus be identified and built upon, which leads to a harmonising and universalising approach.

On a second, deeper level of constitutional principles and rights, nothing seems to be the same. Each country has shaped its own constitutional approach by historical experiences, political decision-making or constitutional culture. The countries can be distinguished as federalised or centralised systems, presidential or parliamentary democracies, by the role of direct democracy, social rights or by civil or common law traditions. Particular rights are interpreted completely differently in the case law of the courts. Finally, the details of constitutional culture are shaped by history, language, politics and legal culture in general. While on a general level a common constitutional tradition seems obvious, it is more than doubtful that on a deeper level common constitutional traditions exist at all.

2.10.2 If one tries to address the question of common constitutional traditions, it is the author's view that it is necessary to see the incommensurability of attempting to unify all traditions in one common constitutional tradition. Thus, it cannot be the task of the CJEU to create a proper unification of all traditions, but it was and is necessary that the European courts develop their own approach to addressing constitutional principles.[167] Beyond the surface of common constitutional traditions it is necessary to see the plurality of constitutional cultures. The solution that seems preferable to the author is to engage more intensely in a dialogue from a pluralistic perspective with these different constitutional traditions. It is not possible to unify them, but it is possible to actively approach and confront them with the European approach, which has to be different (at least from some constitutional cultures).

The author stresses the still unexploited potential of comparative research in practice and in academia to strengthen the dialogue on constitutional traditions in Europe. The potential for comparative research in e.g. the courts' practice does not, however, only refer to the European Courts, which could informally as well as formally engage more in the comparative project. This comparative approach is primarily addressed to the domestic courts, to raise awareness of the different constitutional cultures in the other Member States. It is not only a 'hierarchical' dialogue between the European and the domestic levels, but a cooperative dialogue between the domestic courts on a transnational level. The transnational dialogue can also currently be 'hierarchical', as certain courts, like the German Constitutional Court, (pro)claim a certain order of priority in constitutional reasoning when it comes to the EU/Member State interrelation of constitutional principles. This practical comparison, however, would need strong academic support to provide the relevant constitutional knowledge for the courts.[168] Finally it seems necessary that

[167] Tridimas 2007.

[168] See different projects like this one on the role of national constitutions by Anneli Albi (http://www.kent.ac.uk/roleofconstitutions/), András Jakab's CONREASON project on constitutional reasoning (http://www.conreasonproject.com/) and Robert Schütze's project on neo-federalism (www.federalism.eu).

the courts not only engage in this dialogue but also reveal their approach towards legal comparison, their comparative methodology and the practical outcome of the comparison.[169]

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 Article 53 of the Charter has to be understood in its broader context as part of a very complex legal coordination of different human rights standards in Europe. The Charter, the ECHR and domestic constitutional rights systems compete legally to provide effective human rights protection. This legal complexity is created by the mutual interdependence of the different legal orders: the ECHR binds the domestic legal systems internationally and the EU is also bound by the Convention by its own reference in Art. 52 of the Charter. EU law in general binds the legal systems of the Member States by direct effect and supremacy supranationally. The human rights dilemma arises because the systems (EU, ECHR, domestic constitutions) do not provide the exact same constitutional rights, but vary significantly. On the one hand, the *Solange* approach – developed by the German Constitutional Court – gives EU law supremacy in human rights protection and was strengthened by the *Bosphorus* decision of the ECtHR. On the other hand, Art. 53 of the Charter and Art. 53 ECHR return the competence to advance human rights protection to the Member States. Within the scope of EU law, however, higher domestic constitutional protection might be in contradiction with the supremacy of EU law and the CJEU's function to 'ensure that in the interpretation and application of the Treaties the law is observed' (Art 19 TEU). The possibility to apply stricter human rights standards would create a different kind of EU law.[170] The increasing judicial conflicts between the European courts (CJEU, ECtHR)[171] and domestic constitutional/supreme courts[172] will increase the complexity and plurality of the whole human rights network.

An interesting element of this interrelation might be provided by the Constitutional Court's approach towards human rights. Austria is an interesting test case because it has worked with different national and international human rights catalogues for the last 50 years. The fragmented structure of Austrian constitutional rights[173] made it necessary for the Constitutional Court to create its own concept of constitutional reasoning regarding fundamental rights. The Constitutional Court

[169] Lachmayer 2013a, pp. 1490–1491.

[170] See also Sect. 2.3.

[171] See Opinion 2/13, supra n. 160.

[172] In Austria, a new rivalry between the domestic supreme courts can be observed.

[173] See above Sects. 1.1 and 2.1.

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'reads the different texts together'[174] and creates a mixture of all the textual layers of fundamental and human rights. In particular, the Constitutional Court has had to apply the ECHR as Austrian constitutional law. Certain judicial divergences exist (e.g. with regard to the scope of Art. 6 ECHR) between the Constitutional Court and the ECtHR, but nowadays the Constitutional Court mainly follows the case law of the ECtHR.[175] Finally, the Constitutional Court – as mentioned above – has applied the EU Charter as the standard of its review since 2012. The Constitutional Court thus involves domestic and European (ECHR as well as Charter) human rights catalogues in its case law. The strategy of the Court does not follow a formal application of Art. 53 Charter or Art. 53 ECHR, but a more sophisticated interpretation of all different human rights catalogues, which takes each particular case into account. In its prominent judgment relating to the Charter, the Constitutional Court tried to combine Art. 6 ECHR case law and Art. 47 of the Charter.[176] Although the author is sceptical whether the interpretation in this concrete case is convincing, the inter-textual approach seems promising.

Thus, while Art. 53 of the Charter does not provide the solution to the complex interdependence of the different human rights catalogues, it might be useful in sensitive cases to consider the possibility of integrating Art. 53 of the Charter in the constitutional reasoning of domestic supreme and constitutional courts.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 In Austria no democratic debate on the EAW Framework Decision or on the EU Data Retention Directive took place at the time of adoption of these European acts. In the case of the Data Retention Directive, public information was released by the media,[177] and the EAW was even introduced on a European level without any significant public knowledge at the Austrian level. The implementation of the EAW and the following discussion in Austria show that the Austrian media did not perceive the EAW as a particular threat to the Austrian legal system or to the people living in Austria.[178]

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[174] See VfSlg. 19349/2011.

[175] See Mayer and Wutscher 2014, pp. 201–211; see also regarding the dialogue on the *ne bis in idem* principle Fuchs 2010, pp. 181–197.

[176] VfSlg 19.632/2012.

[177] Editorial (2006, May 12) *Umstrittene EU-Richtlinie zur Datenspeicherung in Kraft getreten.* Der Standard. http://derstandard.at/2435410/Umstritten-EU-Richlinie-zur-Datenspeicherung-in-Kraft-getreten.

[178] Editorial (2006, May 2) *Europäischer Haftbefehl: 'Österreich kann eine Auslieferung verhindern'.* Der Standard. http://derstandard.at/2426050/Europaeischer-Haftbefehl-Oesterreich-kann-eine-Auslieferung-verhindern.

Two cases shall be mentioned to illustrate the Austrian approach. The first is the *Elsner* case. Mr. Elsner is an Austrian banker who was sentenced for embezzlement and fraud in a huge bank scandal (BAWAG affair).[179] In the context of his prosecution, Austria issued an EAW against Mr. Elsner, who resided in France, because of an increased risk of escape.[180] The EAW was received as a positive opportunity for Austria to prosecute potentially corrupt Austrian bankers abroad. It showed the effectiveness of European judicial cooperation in criminal matters. The second is the *Haderer* case. Mr. Haderer is an Austrian cartoonist, who created a Jesus comic in which Jesus was basically portrayed as a junkie who smoked marijuana all the time. Mr. Haderer was sentenced by a Greek Court *in absentia* for the violation of religious feelings. Although the EAW was not relevant in the *Haderer* case because the violation of religious feelings does not fall within the scope of the EAW and the judgment was revised by the court of appeal, the case showed the tensions between human rights (freedom of speech) and transnational extradition in a European context, which was critically reported by the Austrian media.[181]

While the EAW was neither really discussed in Austria nor led to any negative reaction on the part of the Austrian media or public, there was a huge debate surrounding the implementation of the EU Data Retention Directive.[182] The media and civil society were critical of the implementation of the Data Retention Directive in Austria. Constitutional lawyers openly expressed their concerns.[183] Moreover, Austrian politicians were reluctant to implement the directive. Only when Austria was threatened with a penalty for non-implementation of the directive[184] did Austria finally implement the directive. Austrian civil society groups immediately filed an action against the implementation, and the Constitutional Court initiated preliminary proceedings. Thus, Austrian society and the state did everything possible to escape this unconstitutional situation and finally succeeded. The damage, however, was already done. The taboo was broken and since then, Austrian police authorities have increased political pressure for re-implementation.[185]

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[179] *Chronologie: Der Bawag-Skandal*. Die Presse. http://diepresse.com/home/wirtschaft/economist/bawag/316119/Chronologie_Der-BawagSkandal.

[180] Editorial (2006, September 15) *Für Elsner klickten die Handschellen.* Wiener Zeitung. http://www.wienerzeitung.at/nachrichten/oesterreich/politik/282080_Fuer-Elsner-klickten-die-Handschellen.html.

[181] Editorial (2005, January 25) *Gerhard Haderer in Griechenland wegen Jesus-Buch verurteilt*. Der Standard. http://derstandard.at/1923749/Gerhard-Haderer-in-Griechenland-wegen-Jesus-Buch-verurteilt; Rohrhofer, M. (2005, April 21) *Freispruch für Gerhard Haderer am Olymp.* Der Standard. http://derstandard.at/2013477/Freispruch-fuer-Gerhard-Haderer-am-Olymp.

[182] Editorial (2007, June 8) *Vorratsdatenspeicherung: Neue Allianz sieht Bedenken Faymanns.* Der Standard. http://derstandard.at/2907222/Vorratsdatenspeicherung-Neue-Allianz-sieht-Bedenken-Faymanns.

[183] See e.g. Editorial (2008, January 9) *Karl Korinek: 'Da passt alles hinten und vorne nicht'*. Der Standard. http://derstandard.at/3098462/Karl-Korinek-Da-passt-alles-hinten-und-vorne-nicht.

[184] Case C-189/09 *Commission and Council v. Austria*, supra n. 108.

[185] Wimmer, B. (2015, April 16) *Polit-Zwist um Neuregelung für Vorratsdaten.* Futurezone. http://futurezone.at/netzpolitik/mikl-leitner-fordert-neuregelung-fuer-vorratsdaten/125.315.643.

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The Austrian example shows that the domestic debates started very late: at the time of implementation or even later when the effects of the implementation became obvious. The EU Data Retention Directive, however, also illustrates that the implementation of an apparently unconstitutional EU legislative act will cause damage when it is implemented and effective (even if it is in force only for some years). Sufficient consideration of these concerns in the European legislative processes might provide an interesting step forward towards a truly European constitutional network.

First and foremost, there is a lack of domestic public debate taking place before new EU legislation is adopted on a European level. The integration of the national parliaments in the EU legislative process with regard to the subsidiarity principle is already an interesting step in the right direction. The European Parliament seems to be the place where these concerns should be relevant. I think that nowadays it would be possible for the concerns of domestic constitutional courts with regard to domestic constitutional issues to be raised in advance of the debates in the European Parliament. I do not think that further formal procedures are necessary at this stage. On the contrary, an over-formalised political process would create too many obstacles to enacting legislation on a European level at all.

When it comes to the implementation of EU legislation in the Member States, it seems an interesting idea to give constitutional or supreme courts (at least a certain number of courts) the possibility to raise their concerns in an infringement procedure with regard to the validity (constitutionality) of an EU act of legislation. Such a procedure, however, could not refer to the domestic constitution, but would have to be based on concerns regarding the EU Treaties, especially the Charter.

2.13 Conclusion: Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 The interrelation between the protection of constitutional rights and EU law can be characterised as complex and ambiguous. At least three different effects of EU law on domestic constitutional rights can be distinguished: first, the strengthening of constitutional rights through EU law, secondly the changing (and maybe challenging) of constitutional rights and thirdly, the weakening of constitutional rights. These three developments shall be exemplified from an Austrian perspective.

Strengthening human rights through EU law The strengthening of human rights through EU law in Austria can be related to many different legal sources, including EU secondary law, CJEU case law (especially regarding the general principles of the Union) and, finally, the Charter. After 20 years of EU membership, it is definitely possible to conclude that the EU has contributed significantly to the extension and increase of human rights in Austria.

EU secondary law was mentioned first for a reason. Although it is ordinary legislation of the Union, equipped with direct effect and supremacy, it has at least

the same legal force as domestic constitutional rights. EU regulations and directives contain significant rights and thus change the rights of individuals significantly. There are many examples, but the most significant ones might be the anti-discrimination directives[186] and the General Data Protection Regulation.[187]

As for CJEU case law, the general principles of the Union have also shaped the Austrian possibilities with regard to constitutional rights.[188] The right to effective judicial protection is the most prominent example, which changed the Constitutional Court's approach to grant (significantly more) judicial protection than was offered under the Constitution.[189] The EU concept of state liability, as another example, has also broadened the opportunities for legal protection in Austria.

Finally, the EU Charter will significantly widen the scope of rights which are protected by the Constitutional Court. With its important decision on the EU Charter in 2012, the Constitutional Court declared that the Charter will be the standard of review by the Constitutional Court in the scope of application of EU law. The consequence will be that completely new rights (like human dignity and the right to good administration) will be introduced in the Austrian constitutional system.

In conclusion, EU law has had many positive effects on domestic constitutional rights in Austria.

Changing human rights through EU Law The Austrian system of legal protection is primarily based on certain forms of administrative procedures and actions. The EU has introduced many new concepts in Austrian administrative law (e.g. in the context of emissions certificates and environmental protection), which do not fit in with the Austrian system.[190] The consequences, at least in certain fields, are structural constitutional problems which lead to a lack of judicial protection and, thus, challenge human rights protection in Austria. It will be up to further constitutional changes in Austria to adapt to these challenges.

Weakening human rights through EU Law The examples of the EAW and data retention illustrate that the transnational dimension of EU law creates deeper challenges to domestic constitutional systems and their protection of constitutional

[186] See e.g. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16; Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

[187] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.

[188] See Tridimas 2007.

[189] See Hiesel 2009, pp. 113–114.

[190] See VfSlg 17.967/2006, 19.020/2010, 19.157/2010, 19.305/2011, 19.415/2011; see also Oberndorfer and Mayrhofer 2006, pp. 529–554.

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rights. Certain well-established constitutional concepts like the non-extradition of a Member-State's own citizens have to be changed to be in line with the European concept of judicial cooperation in criminal matters. Moreover, the Union seems to be developing cooperation that impacts on constitutional rights faster than the necessary complementary rights protection regimes, especially with regard to transnational procedural rights. These effects can only be addressed by a robust rights regime, which has to be enacted on a European level. The proposed directive on data protection regarding police and judicial cooperation in criminal matters[191] serves as an example of adopting rights standards at the same time; however, the substantive value of the rights guarantees involved seems questionable.

From an overall perspective, it is possible to conclude that with regard to the Austrian legal system, EU law has had and continues to have positive and challenging effects on constitutional rights. The Austrian approach towards European human rights illustrates an active participation in the European constitutional network and the adaptation to European standards in constitutional law, including a broadening of Austria's own constitutional rights approach. Even such a domestic approach towards EU law, however, cannot absolve the Union of its responsibility to foster its own human rights regime, especially when it comes to challenges which clearly arise from the particular transnational nature of EU law.

The European approach towards human rights might be characterised as integration dynamics between rights' activism and rights' restraints. The constitutionalisation of the Union was significantly increased by the enactment of the EU's own Charter of Fundamental Rights, which subsequently became legally binding under the Lisbon Treaty. The integration of human rights by the CJEU is a process that has evolved over decades, which was given a further impetus by the Lisbon Treaty.[192] However, the EU also has to ensure that it develops its own human rights approach, as this approach affects the remaining competences of the Member States.[193] Thus, the strengthening of human rights has to be understood as a step in the right direction and the next dimension of European integration. This development of European integration will create even stronger ties between the EU and the Member States within a European constitutional network.

[191] COM/2012/010 Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data.

[192] See e.g. Douglas-Scott, 2011, pp. 645–682.

[193] See e.g. Barnard 2008, pp. 257–283.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.3 Article 9 of the Constitution provides the major provisions for opening the Constitution to international law. While para. 1 states that '[t]he generally recognised rules of international law are regarded as integral parts of federal law', para. 2 authorises Parliament to transfer state powers (including parliamentary, governmental and judicial powers) to international organisations or other (foreign) states.[194] Parliament has to enact a statute to authorise an international organisation and can only transfer specific powers.[195] The Constitutional Court recently confirmed its wide interpretation of Art. 9 para. 2 Constitution in the context of the ESM Treaty and the European fiscal compact. The Court argued in favour of broad competences to transfer powers to international organisations.[196]

Further constitutional provisions refer to the parliamentary authorisation process (Art. 50), the role of the President of the Republic in the ratification process (Art. 65), the possibilities of the states (*Länder*) to conclude international treaties (Art. 16) and the review competences of the Constitutional Court (Art. 145).

Austria has adopted certain international treaties on a constitutional level (e.g. the ECHR and its additional protocols).[197] The WTO Agreement, the Rome Statute and the International Covenant on Civil and Political Rights were adopted on a statutory level; however, certain provisions of the first two treaties were adopted as constitution-amending provisions. It is significant that amendments of the Constitution have been reduced since 2008 through the abolishment of the possibility to transform international treaties directly into Austrian constitutional law. At the same time, certain constitutional provisions in international treaties (like the WTO Treaty) have been de-constitutionalised and are now 'only' statutory law.[198] If international treaties are to be ranked as constitutional law, a particular constitutional act is now necessary. In 2008, the possibilities to transfer powers to international organisations and foreign states were broadened. The following sentence was added to Art. 9(2) of the Constitution: 'Within this framework it may be provided for that Austrian agents shall be subject to the authority of institutions of other states or intergovernmental organizations or such be subject to the authority of Austrian institutions.'

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[194] Art. 9 para. 2 Constitution starts with the following sentence: 'By Law or state treaty having been approved according to Art. 50 para. 1 may be transferred specific federal competences to other states or intergovernmental organizations'.

[195] The limitation to transfer only 'specific' powers is traditionally interpreted widely.

[196] See above in Sect. 2.7.

[197] See already Federal Law Gazette 1964/59, but e.g. also International Convention on the Elimination of All Forms of Racial Discrimination, Federal Law Gazette 1972/377.

[198] Federal Law Gazette I 2008/2.

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3.1.4 Does it make sense to amend constitutions to integrate international developments in the constitutional text? As mentioned in Sect. 1.5, the author argues that this depends on the constitutional culture of the particular country. Regarding Austria, it is interesting to observe that Parliament has actively amended constitutional law to adapt it to developments in EU law. It is, however, not possible to argue the same when international law is at stake. The Constitution is, as mentioned above, very open to international legal developments, but does not adapt to international law in the way it is used to adapting to EU law.[199] On the whole, I would not generally argue in favour of the internationalisation of domestic constitutional documents, but I would think that – when it comes to Austrian constitutional culture – it would make more sense to adapt international law more vigorously on a constitutional level and amend the Constitution regularly on the basis of international legal developments, than to de-constitutionalise international law, which does not correspond to Austrian constitutional culture. This development would weaken the Austrian approach towards constitutional law.[200]

3.2 The Position of International Law in National Law

3.2.1 The Austrian discussion on the position of international law in domestic law is divided into three different parts: customary international law, international treaties and decisions of international organisations.

First, as regards customary international law, Art. 9 para. 1 of the Constitution declares that it is part of the domestic legal system. There is controversial debate on the level of customary international law in the Austrian hierarchy of norms.[201] The first and most important theory states that customary international law has the status of domestic statutory law. Other theories assume that it depends on the content of the customary international law. If the content would affect a certain level of domestic law (e.g. an Act of Parliament), the customary international law would require the same level.[202] Finally, a third theory positions customary international law between constitutional law and domestic statutory law (mezzanine theory).[203]

Secondly, with regard to international treaties, the situation is clear: Art. 50 Constitution provides the relevant procedures. If an international treaty affects statutory law, Parliament has to authorise the ratification. As a consequence, a

[199] See regarding the comparative approach in Austria Gamper 2013, pp. 213–228.

[200] The abolition of the possibility to implement international treaties directly as constitutional law is an interesting development. The adaptation of constitutional law no longer means a simple integration of international law on a constitutional level, rather has become much more a conceptual consideration of international law in constitutional amendments.

[201] Handl-Petz 2010, pp. 330–335.

[202] Mayer et al 2015, paras. 219–220.

[203] Öhlinger and Eberhard 2016, para. 113.

particular international treaty has the same level as statutory law.[204] If no authorisation by Parliament is needed, the international treaty has the same level as an administrative ordinance. Since 2008, it has no longer been possible for Parliament to authorise an international treaty on a constitutional level (not even with a constitution-amending majority). It is, however, possible for Parliament to enact a specific constitutional act, which transforms the content of the international treaty into Austrian constitutional law.[205]

Thirdly, as regards decisions of international organisations, it seems to be a general scholarly opinion that their position is not clear.[206] The implementation of decisions of international organisations depends again on the content and the way the particular international organisation is integrated by international treaty in the Austrian legal system. For example, in the 1990s, the Supreme Court considered UN Security Council Resolutions as higher international law, and that *jus cogens* prevails in the context of UN Security Council Resolutions.[207] The lack of further debate shows a significant deficit in the Austrian approach towards international law.

3.2.2 Although there has been debate on monism and dualism in Austrian scholarship for almost 100 years,[208] when it comes to the adoption of international law in domestic law, the relevance of the debate is relatively minor. The moderate monism and the moderate dualism are similar in their effect. The explanatory value of the theories seems to be increasingly diminishing. The theories are based on a traditional understanding of international law as law between nation states. International law is, however, confronted with manifold developments, like the rise of the individual in international law, the role of transnational corporations, the fragmentation of international law, the increase of transnational and supranational law and the privatisation of public international law. Both approaches (monism and dualism) thus seem to be suffering the same fate. These theories are not complex enough to address the complex legal interrelation between different legal systems sufficiently: international legal pluralism or governance theories approach the legal complexities more convincingly.[209]

3.3 Democratic Control

3.3.1 Article 65 of the Constitution states that it is the role of the Austrian President to conclude state treaties. Although the President is a representative of the administrative branch, the President is elected directly in Austria (and not by

[204] Handl-Petz 2010, pp. 296–300.
[205] Mayer et al 2015, paras. 239–242.
[206] Öhlinger and Eberhard 2016, para. 127.
[207] Handl-Petz 2010, pp. 333–334.
[208] Öhlinger and Eberhard 2016, paras. 109–111.
[209] Berman 2014; Zumbansen 2013, pp. 506–522.

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Parliament). The President's direct democratic legitimacy is, thus, also part of the democratic control of the ratification of international treaties in Austria.

Article 50 of the Constitution determines the involvement of Parliament in the ratification process. Parliament has to authorise political treaties as well as international treaties that modify or complement statutory law in Austria. These treaties have the level of statutory law in the Austrian legal system. All other international treaties can be ratified by the President and have the status of administrative ordinances. If a treaty which has been authorised by Parliament provides a simplified modification procedure, Parliament does not have to be involved in that procedure as long as Parliament itself does not make a reservation in the primary authorisation.[210] In the context of competences of the states (*Länder*), the federal council (2nd chamber of the Parliament) has to authorise an international treaty. Finally, Parliament has the power to authorise an international treaty on the condition that the treaty itself will not become part of the Austrian legal system, but Parliament has to implement the treaty by a separate Act of Parliament.

Besides these 'traditional' competences of Parliament, it is quite unusual that the Austrian Parliament is subsequently involved in the activities of international organisations that do not result in another Act of Parliament. As mentioned above, the decisions of international organisations have not even been properly addressed by legal scholars. An example of the lack of involvement and awareness of Parliament are bilateral investment treaties.[211] Democratic concerns were only raised with regard to the free trade agreements with Canada (CETA) and the US (TTIP).[212] This democratic ignorance towards international legal development is complemented by a very open-minded Constitutional Court, which interprets the possibilities to transfer powers to international organisations very broadly.

The ESM Treaty, however, illustrates a new approach. The involvement of Parliament in the ESM activities was introduced in the Constitution as mentioned in Sect 2.7. The concept of this parliamentary involvement is similar to the possibilities that Parliament has to influence the Government in EU legislative matters. Because of its close proximity to the Union, it would seem obvious that parliamentary involvement in the ESM would be introduced by a constitutional amendment in the Constitution. The ESM Treaty, however, is an international treaty and the parliamentary involvement serves as an example of how democratic control could be improved in the Austrian constitutional order with regard to the increasing power of international organisations.

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[210] Mayer et al. 2015, paras. 239–242.

[211] See the list of Austria's bilateral investment treaties on the website of the Austrian Ministry of Economics: https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen-Laender.aspx.

[212] See e.g. the parliamentary opinion on the TTIP (see in general Sect. 1.4), which was only published internally; there was also a parliamentary discussion on the TTIP in June 2015 (see http://www.parlament.gv.at/PAKT/PR/JAHR_2015/PK0725/).

3.3.2 Direct democracy is not the usual approach to international law in Austria. This, however, reflects the overall constitutional culture regarding direct democracy and domestic issues.[213] In Austria, a referendum is only obligatory when the Constitution is 'totally revised'. As seen in Part 1, this rule has only been applied once, for the referendum on EU accession. Other, optional referendums are possible for all other constitutional amendments and statutory acts. The optional referendum has only been used once, in the 1970s, with regard to the operation of a nuclear power plant in Austria. Thus, it is highly unusual for Parliament to ask the Austrian population for a referendum on domestic issues. This applies all the more in the case of international law.

3.4 Judicial Review

3.4.1 Article 140a of the Constitution empowers the Constitutional Court to review international treaties regarding their conformity with domestic constitutional and statutory law (depending on the legal level of the particular treaty).[214] The Constitutional Court's competence only refers to the domestic dimension of its validity. If the Constitutional Court declares an international treaty unconstitutional, it obviously does not affect the international treaty on an international level, but only its application in Austria. By the ruling of the Constitutional Court, the international treaty is no longer applicable and cannot legally affect any institution or authority domestically.[215] A domestic declaration of unconstitutionality might, however, violate Austria's obligations in international law.

The last prominent cases concerned – as mentioned in Sect. 2.7 – the ESM Treaty and the European fiscal compact. The Constitutional Court stated in both cases that these international treaties were in conformity with the Constitution and confirmed its open approach towards the transfer of state powers to international and supranational organisations. Since 1980, there have been 18 proceedings in which provisions of international treaties have been – at least to a certain extent – reviewed by the Constitutional Court. In all of the cases the Constitutional Court rejected the complaints, for various (formal and substantive) reasons. The right of individuals to file a complaint with regard to an international treaty is very limited. The practical relevance of the review mechanism to limit the transfer of powers or to raise constitutional rights concerns is therefore quite limited. However, the Constitutional Court performs quite a thorough review and will declare a provision unconstitutional if necessary. Thus, the potential that the Court will use its

[213] Eberhard and Lachmayer 2010, pp. 241–258.

[214] The provision was introduced in 1964 (Federal Law Gazette 1964/59). With the very same constitutional amendments, certain provisions from 13 international treaties were declared to be constitutional provisions. Most prominently, the ECHR was declared to be constitutional law.

[215] Handl-Petz 2010, pp. 304–306.

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competence to effectively use its power to limit the transfer of state powers to the international level still exists.

According to Art. 145 of the Constitution, the Constitutional Court could gain the power to review domestic law on the basis of international law. The Constitution requires a specific statute as a precondition for this power, which Parliament can enact. Such specific statute has never yet been enacted and thus, the Constitutional Court cannot review domestic law from an international law perspective. It would be up to Parliament to empower the Court to do so. Due to the increasing importance of international law, this constitutional potential might be an interesting perspective for the changing role of the Constitutional Court in the future.

In conclusion it can be said that the Constitution provides significant possibilities for judicial review of international law and the involvement of international law in constitutional review. The case law of the Constitutional Court illustrates its open approach towards international law. The potential of judicial review, however, has not been fully developed as of yet.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 As mentioned in Sect. 2.1, the Constitution does not specifically provide a social rights catalogue. This was due to tensions between the conservatives and the social democrats in the 1920s, which made it impossible to agree on a human rights catalogue at all.[216] The reason for the impossibility to agree on a human rights catalogue lay explicitly in the social rights, which the social democrats insisted on integrating and the conservative refused to integrate. The subsequent developments in human rights in Austria have only been possible because of the influence of international law in Austria. The last serious attempt to enact an Austrian human rights catalogue was in 2003–2005 at the so-called 'Austrian Convention', which tried to significantly reform the Constitution.[217] The Convention, however, failed, and again, one reason was a failure to agree on social rights. International influence did not lead to the constitutionalisation of social rights in Austria.

Certain elements of social rights can be identified in the Constitution: the right to equality has certain social dimensions,[218] the right to education as guaranteed in the ECHR is part of Austrian constitutional law as well as the (limited) constitutional implementation of the UN Convention on the Rights of the Child in 2011.[219] As mentioned above, the most important impact on social rights has been the European Union, first with regard to EU legislation and secondly with regard to the EU

[216] Stelzer 2011, p. 210.

[217] www.konvent.gv.at.

[218] Pöschl 2008, pp. 659–737.

[219] See the Federal Constitutional Law on the Rights of the Child, Federal Law Gazette I 2011/4; see also Fuchs 2011, pp. 91–110.

Charter. The decision of the Constitutional Court to apply the Charter similarly to Austrian constitutional rights will significantly affect the development of social rights case law in Austria.[220] No social welfare clause like in Germany can be found in the Constitution.

This constitutional situation regarding social welfare does not, however, change the overall legal situation in Austria as a social welfare state. The Austrian legal system provides manifold self-governing institutions, especially in the context of social security, which provide a broad and effective system of health insurance, casualty insurance, unemployment insurance, etc. The social security system is currently struggling with new forms of employment, the costs of the public health system and the increasing number of unemployed people due to the economic crisis. Other social benefits include a tuition-free university system provided by the states and, for example in Vienna, free kindergarten. Thus, the social welfare system is still very solid and provides various rights to individuals on a statutory but not constitutional level. The economic crisis is, however, affecting the social rights system in Austria.

To summarise, due to Austrian constitutional history and politics, social welfare is not addressed constitutionally, rather mainly by administrative law. Social rights are not constitutionalised, but are institutionalised. The Austrian social welfare system is still an effective model for providing social rights, but not on a constitutional level.

3.6 Conclusion: Constitutional Rights and Values in Areas of Global Governance

3.6.1 While Austrian constitutional law is ready to adapt its standards to European law very flexibly and quickly, constitutional developments regarding international law are less dynamic. However, some adjustments, like the re-conceptualisation of Art. 50 of the Constitution in 2008 required that international law, which affects constitutional law, has to be implemented by a specific Act of Parliament and cannot merely be authorised by Parliament.

The general constitutional approach in Austria towards international law is open in many cases. The Constitutional Court has the power to review international law domestically and uses its powers to defend an open and flexible transfer of powers to the international level. The constitutional possibilities to transfer powers were recently even broadened by Parliament.[221] It still seems that the Austrian constitutional scholarly debate and legal practice underestimate the impact of the transfer of powers to international organisations and other forms of international institutions. Within the Austrian constitutional culture there is still plenty of leeway to

[220] VfSlg 19.632/2012.

[221] Art. 9 para. 2 Austrian Constitution, Federal Law Gazette I 2008/2.

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develop further constitutional concepts regarding international law. A plausible path to pursue is shown by the Austrian approach towards the ESM Treaty: amending the Constitution and involving the Austrian Parliament. Further international treaties would have the potential to be integrated in the same constitutional manner. Moreover, the legal integration of decisions of international organisations would be another important element for constitutional reform.

International counter-terrorism measures, including police and judicial cooperation in criminal matters, UN terrorist lists, asset freezing and secret prisons, have not played a significant role in the Austrian debate. The obligations of banks to freeze accounts have never been debated substantially either in public or academically.

However, one topic has triggered extensive public debate and scepticism in Austria: the introduction of an international conflict resolution mechanism in investment disputes with regard to the free trade agreement.[222] The TTIP debate is changing the public perspective and widespread public scepticism in Austria still remains; the parliamentary opinion on the matter was noted in Sect. 3.3.1. Although Austria has already concluded more than 60 bilateral investment treaties, there has been no debate on the constitutionality of the international conflict resolution mechanism, mainly because Austrian companies already use these opportunities and Austria itself has not been affected by any claims. However, a first investment treaty claim has been filed against Austria by an Austrian bank from its Malta branch.[223] Based on a bilateral investment treaty between Austria and Malta, the owners of Meinl bank, which was involved in corruption scandals and had been prosecuted, claimed it had suffered 200 million EUR in damage caused by unjust public prosecution over seven years.

With regard to constitutional issues arising in the context of constitutional rights and values in global governance, it is first and foremost important to stress that the most important improvements in rights have been incorporated in Austrian constitutional law from the international level. Austrian constitutional rights are mainly shaped by international law; thus, Austrian constitutional law is internationalised when it comes to rights.

A final remark on global governance and Austrian constitutional law relates to the structure of global governance itself. When discussing global governance, two important developments also have to be taken into account: the fragmentation of international law and the role of private actors. The fragmentation of international law[224] makes it necessary for domestic constitutional law to not only address one coherent and unified international law, but the various forms and concepts of international law separately. Global governance also includes private actors, e.g. powerful

[222] (2015, March 4) *Mehrheit der Österreicher gegen TTIP*. Der Standard. http://derstandard.at/2000012479763/Freihandel-Mehrheit-der-Oesterreicher-gegen-TTIP.

[223] (2014, December 18) *Causa Meinl bringt Vorgeschmack auf TTIP*. Der Standard. http://derstandard.at/2000009536985/Meinl-Bank-Aktionaer-klagt-Republik-Oesterreich.

[224] See Martti Koskenniemi's Report on the Fragmentation of International Law: http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

NGOs like the International Standardization Organisation and transnational corporations like Google and Facebook.[225] In Austrian constitutional law, the legal power of these private actors is not constitutionally recognised. The consequence is that this dimension of global governance is neglected significantly. Only if both developments are addressed constitutionally in Austria will it be possible to uphold the role of the Constitution as guardian of the rule of law and constitutional rights.

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[225] See e.g. the Austrian Initiative Europe versus Facebook: http://www.europe-v-facebook.org/.

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Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country

Gerard Hogan

Abstract The 1937 Constitution of Ireland draws on the following three main influences: (1) the US Constitution as regards judicial review of legislation; (2) UK common law heritage regarding the fused Westminster style legislative/executive model; and (3) a variety of continental constitutions regarding some fundamental rights. The report observes that apart from constitutional guarantees on fair trial and *habeas corpus*, most fundamental rights provisions are expressed at a high level of generality. A distinctive feature is that the Constitution can only be amended by a referendum, and this is indeed frequently done, including with regard to EU law. The central EU amendment is the so-called 'necessitated obligations' clause (Art. 29.4.(6)), which has the effect of overriding all other constitutional provisions. The Constitution is a key part of the political debate, and extensive constitutional issues have also arisen in relation to EU law. Three of the most important data retention cases that have come before the ECJ have all originated from Ireland. Another notable case is *Pringle*, where an MP raised concerns about the large size of the financial liabilities undertaken by the ESM Treaty. With regard to the European Arrest Warrant, whilst the Irish courts carry out more extensive judicial review, the automaticity involved in mutual recognition has nevertheless been a constant source of concern for judges. The rule of parliamentary reservation of law has led to extensive adjudication, e.g. in relation to the introduction of indictable offences by governmental regulations under EU measures, and in relation to the ratification of an IMF loan agreement and an extradition treaty.

Keywords The Constitution of Ireland · The Supreme Court of Ireland
Constitutional amendments regarding EU and international co-operation
The 'necessitated obligations' clause/Article 29(6) · Fundamental rights

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Digital Rights Ireland and the Data Retention Directive · Schrems
European Arrest Warrant, mutual recognition, automaticity of extraditions, defence rights and judicial review · *Pringle* and the ESM Treaty · *Meagher*, *Maher*, indictable offences and parliamentary reservation of law · Property rights *Crotty* and referendums · Ratification of an IMF loan agreement and an extradition treaty by governmental regulations

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Constitution of Ireland entered into force on 29 December 1937 following its approval at a referendum which was held on 1 July 1937.[1] Since June 1941 the Constitution can only be amended by means of a referendum. It replaced the Constitution of the Irish Free State 1922, although key elements of that Constitution were preserved. That Constitution itself was the product of the Anglo-Irish War of 1919–1921 and the subsequent Treaty of December 1921.

Despite the (relative) frequency with which the Constitution has been amended, its basic structure has remained unchanged. In general, it may be said that the majority of the amendments have been designed either to delete the more nationalistic[2] or specifically Roman Catholic inspired provisions[3] or to deal with the various amendments to EU Treaties. Several amendments deal with the vexed question of abortion. Perhaps the single biggest institutional change has been the creation of a new Court of Appeal in October 2014 and the (de facto) re-constitution of the Supreme Court along US lines.[4]

1.1.2 The Constitution mandates a (relatively) strict separation of powers, save that it follows the fused legislative/executive model in the Westminster style. It is also quite prescriptive in terms of matters such as parliamentary privilege, elections,

[1] See generally, Hogan 2012.

[2] Thus, for example, the territorial claim to Northern Ireland contained in the original Art. 2 and Art. 3 of the Constitution was deleted by the 19th Amendment of the Constitution Act 1998, which also gives effect to aspects of the Belfast Agreement between the UK and Ireland. See generally Hogan 2000.

[3] Thus, for example, the 5th Amendment of the Constitution Act 1972 deleted the reference to the 'special position' of the Roman Catholic Church 'as guardian of the faith professed by the great majority of the citizens', along with the named recognition of other religious denominations and 'the Jewish Congregations'.

[4] By the 33rd Amendment of the Constitution (Court of Appeal) Act 2013 which came into effect on 28 October 2014. The practical effect of this was that all appeals now go from the High Court to the Court of Appeal. The decision of that Court is final save for those cases where the case either raises a point of law of exceptional importance or the interests of justice so require. There is also provision for 'leapfrog' appeals directly from the High Court to the Supreme Court, also confined to exceptional cases.

legislative procedure, executive powers and the powers of the (largely ceremonial) President. It gives strikingly impressive powers of judicial review of legislation to the High Court, Courts of Appeal and the Supreme Court. The Constitution also contains elaborate protections for a range of civil and political rights, including trial in due course of law, equality before the law, the protection of life, person, good name and property rights, liberty and habeas corpus, the home, free speech and assembly. The right to family life, the protection of children and the right to education are contained in Art. 41, Art. 42 and Art. 42A. Freedom of religion is also protected.[5]

While the Constitution is often unfavourably – and, in many respects, quite unfairly – compared with the European Convention on Human Rights (ECHR) by political activists and non-governmental organisations, it has nonetheless succeeded in becoming a key part of the political debate and is increasingly seen as a badge of national identity. In many respects its longevity and the vast corpus of important case law thereby generated, along with the fact that it can only be amended by referendum, have all contributed to this development.

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1–1.2.4 As is by now (relatively) well known, the Irish rules governing the transfer or delegation of powers to the European Union are complicated and, in many respects, quite singular. While the recent decision in *Pringle v. Government of Ireland*[6] has in some respects presaged a significant change in direction, in practice every significant treaty change over the last forty years or so has had to be enacted by referendum. Why is this so?

The Constitution of Ireland of 1937 is relatively 'rigid' in that since June 1941 it can *only* be amended by means of a referendum. If, therefore, it is considered that the ratification of an EU Treaty requires a constitutional amendment, then this can be achieved *only* by means of a referendum. Articles 46 and 47 of the Constitution require that a special Bill must be passed in both Houses of the Oireachtas (Parliament). The Bill must then be submitted to referendum and the amendment is carried if a simple majority vote in its favour. The Constitution has been amended in this manner on 29 occasions, but there have also been 11 occasions where such a proposal has been defeated. The referendum procedure is regarded as the

[5] See generally Kelly 2003; and Casey 2000.

[6] [2012] IESC 47, [2013] 3 IR 1.

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quintessence of the overriding principle contained in the Constitution itself, namely that of popular sovereignty.[7] The Supreme Court has twice rejected the notion that there are implied limits to the capacity of the People to amend the Constitution.[8]

There have been nine referendums in respect of European treaties:

1.	1972	Entry into the EEC
2.	1987	Single European Act
3.	1992	Maastricht
4.	1998	Amsterdam
5.	2001	Nice I (defeated)
6.	2002	Nice II (successful)
7.	2008	Lisbon I (defeated)
8.	2009	Lisbon II (successful)
9.	2012	Fiscal Treaty

These referendums have led to the inclusion of several constitutional amendments that authorise the ratification of the relevant EU treaties, including the following clauses in Art. 29.4:

> 4° Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.
> 5° The State may ratify the Treaty of Lisbon …, and may be a member of the European Union established by virtue of that Treaty. …
> 7° The State may exercise the options or discretions –
>
> i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
> ii under Protocol No. 19 on the Schengen acquis …, and
> iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice …,
>
> but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.
>
> 8° The State may agree to the decisions, regulations or other acts –
>
> i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,
> ii under those treaties authorising the adoption of the ordinary legislative procedure, and
> iii under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice,
>
> but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas.

[7] See *Pringle v. Government of Ireland* [2012] IESC 47, [2013] 3 IR 1, 101–103 *per* O'Donnell J.

[8] *Re Art. 26 and the Regulation of Information Bill 1995* [1995] 1 IR 1, *Riordan v. An Taoiseach*.

9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.
10° The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union … .[9]

The Constitution is, of course, the quintessential product of orthodox nationalist thinking about the nation state. It proceeds on the assumption that state sovereignty resides in one of the three organs of state, namely, the executive, legislative and judiciary. Thus, even to this day, Art. 15.2.1 of the Constitution makes the following claim that:

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [Parliament]: no other legislative authority has power to make laws for the State.

This latter claim is, of course, quite unrealistic in the context of EU membership, but broadly similar claims are also made in the context of both the executive and judicial powers. How, then, can these constitutional provisions be reconciled with EU membership? The short answer is that they cannot in themselves be so reconciled.

Faced with this problem on entry to the (then) EEC in 1972, the device was adopted by the Third Amendment of the Constitution Act 1972, whereby Art. 29 of the Constitution, which deals with international relations, was amended to permit entry. The effect of this general amendment,[10] which was expressed to override all other constitutional provisions, was that (a) Ireland was empowered to join the European Economic Community, and (b) no law or administrative act which was 'necessitated' by Ireland's Community law obligations could be found unconstitutional ('the necessitated obligations' clause). The 'necessitated obligations' clause, now contained in Art. 29.4.6, provides as follows:

6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union …, or prevents laws enacted, acts done or measures adopted by –

[9] For the text of the Constitution, see http://www.irishstatutebook.ie/eli/cons/en.

[10] Originally numbered as Art. 29.4.3. It has subsequently been renumbered on several occasions to accommodate a variety of constitutional amendments. Following on the 28th Amendment of the Constitution Act 2009 (which permitted the ratification of the Lisbon Treaty), it is now numbered as Art. 29.4.6. A version of the 'necessitated obligations' clause in relation to legislation enacted pursuant to obligations imposed by the Fiscal Treaty is contained in Art. 29.4.10 following the enactment of the 30th Amendment of the Constitution Act 2012 (which permitted the ratification of the Fiscal Treaty).

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i the said European Union … institutions thereof,
ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
iii bodies competent under the treaties referred to in this section, from having the force of law in the State.

The formula contained in what was then Art. 29.4.3 of the Constitution worked relatively well until its limitations were highlighted by the Supreme Court's decision in April 1987 in *Crotty v. An Taoiseach.*[11] The plaintiff in this case had challenged the decision of the Government to ratify the Single European Act (SEA) by means of parliamentary legislation only, without a referendum. The Supreme Court ultimately held that ratification of Title II of the SEA (dealing with the creation of the single market) was within the scope of the 1972 constitutional amendment, since it did no more than attempted to give effect to market integration policies which had been contained in the original 1957 EC Treaty. The Court took a different view of Title III (which provided for formalised common foreign policies rules), holding that a constitutional amendment was necessary to ratify this aspect of the Treaty.

The Supreme Court's reasoning may be summarised thus:

(a) There was no Community *legal* – as distinct from political – obligation to ratify the SEA. Ratification by parliamentary legislation was therefore not protected from constitutional attack by the 'necessitated obligations' clause in the 1972 amendment.
(b) Without the protection of the 'necessitated obligations' clause, ratification was unconstitutional, since Title III of the SEA curbed an essential feature of state sovereignty. In the Court's view the power to conduct the foreign affairs of the state was an essential part of sovereignty, and the Government could not by a binding Treaty commitment agree to transfer that power to other states or to the Community.

While the reasoning and ultimate decision in *Crotty* remain controversial, it has been nonetheless accepted by successive Governments of the day. A special referendum was then passed in May 1987[12] allowing ratification of the Single European Act. But the long-term implications have also been significant. In practice, this means that the ratification of every Treaty change involving any further appreciable transfer of sovereignty or the creation of new competences for the Union has required – or at least has been thought to require – a referendum.[13]

[11] [1987] IR 713. ('An Taoiseach' are the Irish words for 'the Prime Minister'). For the background to this important decision and its implications, see generally, Hogan 1987; Bradley 1987; and Temple Lang 1987.

[12] 10th Amendment of the Constitution Act 1987.

[13] Of course, there have been several instances where Ireland has ratified Treaty changes without the necessity for a constitutional amendment, not least in the case of Treaty changes required to permit accession by new Member States.

One of the difficulties with *Crotty* is that it is a single, isolated judgment from the Supreme Court which is by now over twenty-five years old. Not surprisingly, the composition of that Court has changed completely in the intervening years. Moreover, both Irish constitutional law and European Union law have developed significantly in the last thirty years.

A more nuanced view emerged from the Supreme Court's decision in *Pringle v. Government of Ireland*.[14] In *Pringle*, the plaintiff's case was that the ratification of the European Stability Mechanism Treaty was such a momentous decision on the part of the Government that, following *Crotty*, it required approval by a referendum. The plaintiff pointed to the fact that it involved a potential liability of up to 11.1454 billion EUR by way of contribution to a fund totalling some 700 billion EUR for the express purpose of securing the stability of the eurozone in circumstances where the allocations from the fund could, at least in certain circumstances, be made by a qualified majority of the contracting states, which might not include Ireland, either because Ireland disagreed with the allocation or was excluded from voting.

O'Donnell J. put the matter well when he stated:

> There can be little doubt that if the essence of sovereignty, at least as contemplated by the Irish Constitution, is to be understood as meaning that Ireland fetters its sovereign right to decide by joining any organisation which acts collectively, or at least one in which Ireland does not retain a veto (and therefore the right to say no), then the ESM Treaty would be of dubious constitutional validity, along with, it must be said, many other important international agreements.[15]

Following a very close analysis of the relevant provisions of Art. 28 and Art. 29 of the Constitution dealing with executive responsibility to Dáil Éireann (the lower House of Parliament) and the executive's powers in the field of foreign affairs, respectively, O'Donnell J. went on to point out that

> [f]rom these provisions may be drawn the unremarkable conclusion that the Constitution contemplates that the conduct of the State's foreign relations will necessarily involve the making of binding agreements with other states, which agreements could have financial consequences for the State, and on occasions require an alteration of its domestic law. … It can be deduced from these constitutional provisions, at a minimum, that the Constitution clearly anticipated the Executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide. … This again contemplates that the business of the conduct of foreign affairs might necessarily involve the making of agreements with foreign States, cooperation with, and membership of, international bodies, and occasionally, and regrettably, the possible occurrence of disputes including the commitment of the State to a war.

O'Donnell J. then stressed the extent to which judicial review of the executive function in the sphere of foreign affairs remained limited:

[14] [2012] IESC 47, [2013] 3 IR 1.

[15] [2013] 3 IR 1, 104.

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> The courts' function in this regard is to enforce those boundaries of, and limitations to, the exercise of the Executive power in foreign relations which are either express in, or to be implied from, the constitutional text, and at the same time to reject any attempt to impose limitations on Governmental conduct of foreign relations not justified by the Constitution. … Since it is to the Government alone that the conduct of foreign affairs is consigned by the Constitution, it follows that such international relations must be conducted by the Government, which cannot abdicate, alienate, transfer or subordinate its functions to any other State or body.

O'Donnell J. stressed the extent to which membership of international organisations – such as, for example, the United Nations or the International Monetary Fund – was regarded as the very exercise of sovereignty and not a restriction upon its exercise. What was critical, therefore, was whether the power to conduct foreign affairs had been transferred or alienated to another body. Short of that, the fact that the Government had made a momentous decision with potentially profound consequences was in itself irrelevant.

It is hard to disagree with the conclusion of many observers that the effect of *Pringle* has been to neutralise at least part of the earlier decision in *Crotty*, which dealt with restrictions on the executive power of the state.[16] One should not, however, deduce from this that the Government now has a free hand, because the other aspect of *Crotty* – namely, that a proposal to amend an EU treaty does not enjoy constitutional immunity for the purposes of Art. 29.4.6 of the Constitution because it is not (yet) an obligation of EU law – continues to hold sway. There will thus continue to be constitutional objections where an EU Treaty imposes specific obligations on Member States over and above any perceived restrictions on the right to conduct foreign policy. Accordingly, even if the decision in *Pringle* had been delivered before the dates of both the Lisbon Treaty and the Fiscal and Stability Treaty, it is hard to see how a referendum would still not have been required in both instances. In the case of the Lisbon Treaty, the decision to accord Treaty status to the Charter of Fundamental Rights would probably have required a constitutional amendment, given the uncertain reach and scope of the Charter and the manner in which it might potentially overreach some of the corresponding fundamental rights provisions of the Irish Constitution. The same is true in respect of the Fiscal Treaty: the specific obligations in relation to fiscal discipline and budget deficits would cut across the autonomy of Dáil Éireann in relation to such matters granted by the Constitution.

The provisions of Art. 29.4.7 and Art. 29.4.8 have their origins in the variable geometry provided for in the aftermath of the Amsterdam Treaty. Given that the United Kingdom had secured opt-outs from the Schengen agreement and in the entire area of justice and home affairs, it was for practical purposes necessary for Ireland to do likewise, as otherwise the entire common travel arrangements with the United Kingdom (and specifically free access over the land border with Northern Ireland) would have been placed in jeopardy. From a constitutional perspective it

[16] See in particular the important articles written by two former members of the Supreme Court: Keane 2014, pp. 195–213; and Geoghegan 2014, pp. 213–219.

was considered that the 'necessitated obligations' clause would break down in the face of the adoption of measures in respect of which Ireland later elected to opt in and which were thus plainly optional in the sense just described. Article 29.4.7 and Art. 29.4.8 are accordingly designed to give democratic legitimacy to such decisions by securing the prior assent of both Houses of the Oireachtas. In practice, however, this generally amounts to giving parliamentary assent to matters which have already been diplomatically agreed in principle at EU level, and there is no real sense in which the negotiating hand of the executive has been constrained by the need to secure subsequent parliamentary approval.

1.3 The Supremacy of EU Law

1.3.1–1.3.4 The constitutional provisions and court judgments regarding sovereignty are outlined in the preceding section.

Regarding supremacy, Ireland may be regarded as a classic example of a dualist state on the basis of Art. 29.6 of the Constitution (see Sect. 3.2). However, the situation is very clearly otherwise in the case of European Union law, since the effect of Art. 29.4.6 of the Constitution, the wording of which was provided in the preceding section, is to confer supremacy on EU law over the domestic law and Constitution to the extent that this is necessitated by the obligations of EU membership. To date, application of the supremacy clause has been largely unproblematic. It is nonetheless clear that from the standpoint of Irish law, EU law is supreme within its proper sphere of application because Art. 29.4.6 of the Constitution says it is, and not because of some autonomous, freestanding notion of European Union law which the Irish courts feel obliged to apply independently of this constitutional provision.

1.4 Democratic Control

1.4.1 While Art. 15.2.1 of the Constitution provides that the exclusive lawmaking power resides in the Oireachtas,[17] it has on the whole performed poorly as a law making institution. In practice, legislation is drafted by specialist teams within the Attorney General's Office, who in turn take their instructions from the civil service departments that sponsor the measure. Very few measures which have been drafted or prepared otherwise than with the approval of the Government become law. To

[17] I.e., the Parliament which consists of Dáil Éireann (the lower House), Seanad Éireann (the upper House) and the President.

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that extent, therefore, the Oireachtas might better be regarded as 'a law-declaring rather than a law-making body'.[18]

Added to this is the fact that, at least in the past, legislation was often drafted in wide and loose terms, such that in many instances the underlying policy was really to be found in the statutory instrument giving effect to the legislation. Admittedly, Art. 15.2.1 of the Constitution has been deployed on a number of occasions to invalidate legislation which has been held to confer open-ended powers on members of the Government (and, in some cases, other bodies) to make ministerial orders on the basis that the powers so delegated were essentially legislative in nature.[19] This important development notwithstanding, the basic problem remains that of weak parliamentary oversight of the legislative drafting process.

This problem was especially acute in the context of the transposition of European Union directives, as the European Communities (Amendment) Act 1973 permitted the relevant minister to give effect to a directive by means of a statutory instrument. In essence, the weak parliamentary oversight at Union level[20] was magnified by even weaker legislative scrutiny at national level, so that important legislative measures are transposed into national law without really any effective parliamentary scrutiny at all. The constitutionality of this system was upheld by the Supreme Court in *Meagher v. Minister for Agriculture*[21] and *Maher v. Minister for Agriculture*[22] with few, if any, reservations in respect of its implications for a democratic system of government.

The present system can, however, be defended on the very practical ground that it ensures that directives are transposed into national law in a timely fashion:

> The ever-increasing number of directives requiring implementation within strict deadlines inevitably puts pressure on members of the Irish executive to implement directives by statutory instruments even in circumstances where enactment by statute might otherwise have been more appropriate.[23]

A key limitation on the power to implement Union law by regulation was contained in Sect. 3(3) of the European Communities Act 1972: an indictable offence may not be created by regulation. However, apparently sensible – and eminently justifiable – judicial intervention here, aimed at upholding the rule of law, has had unforeseen consequences. The issue arose in *Browne v. Attorney General*,[24] where the applicant had been charged with violating a ministerial order

[18] Chubb 1974, p. 65.

[19] See, e.g., *McGowan v. Labour Court* [2013] IESC 21, [2013] 2 ILRM 376, *Bederev v. Ireland* [2015] IECA 38, [2015] 1 ILRM 301.

[20] Even if post-Lisbon the power of co-decision at European Parliament level has been strengthened and enhanced.

[21] [1994] 1 IR 329. See generally Fahey 2010, pp. 51–69 for a very helpful overview of the case law.

[22] [2001] 2 IR 139.

[23] Tomkin 2004, p. 150.

[24] [2003] 3 IR 205.

which restricted drift-net fishing. The restriction was required by a Council regulation. Indeed, the ministerial order had expressly recited that it was being promulgated in order to permit the enforcement of a Council regulation. In order to circumvent the prohibition in the 1972 Act, the respondent claimed that he possessed the authority to create an indictable offence under Sect. 223A of the Fisheries (Consolidation) Act 1959 (as amended), under which he could 'prescribe and adopt either or both of the following measures, namely, measures of conservation of fish stocks and measures of rational exploitation of fisheries'. The Supreme Court held that the power to make regulations could not be used to circumvent this statutory prohibition:

> There is no indication whatever in the language of section 223A that it was envisaged by the Oireachtas that the second respondent could give effect to principles and policies which had never been considered or adopted by the Oireachtas by means of a statutory instrument under that section which effectively circumvented the prohibition on the creation of indictable offences in section 3(3) of the Act of 1972.[25]

The effect of *Browne* was reversed by the European Communities Act 2007, in which the Oireachtas permitted the creation of indictable offences by secondary legislation implementing Community law.[26] Section 4 of the 2007 Act also allows the minister to exercise the power to make a statutory instrument for the purposes of implementing an EU act, if the 'obligations imposed on the State under the European act concerned relate, in whole, to matters to which that [power] relates'. Other legislative innovations increasing the armoury of the executive in Community law matters have followed. For example, Sect. 4 of the Communication Regulations (Amendment) Act 2007 inserted a new Sect. 46A into the Communication Regulations Act 2002, which now allows the minister to create indictable offences by regulation in order to give effect to various provisions of Community law. Thus, worries about the democratic deficit aside, an unfortunate – and entirely unforeseen – consequence of the Supreme Court decision in *Browne* has been that instead of compelling the Oireachtas to introduce new criminal offences by primary legislation with the full panoply of political safeguards, there has been an increase in the number of areas in which a minister can introduce new indictable offences by regulation. The requirement of the rule of law that statutory requirements be public and precise has been undermined somewhat by these developments.[27]

In addition, the principle of legal certainty, central to the rule of law, has been undermined by the sheer volume of Community law that is put on the statute books:

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[25] Ibid., p. 220, per Keane C.J.

[26] European Communities Act 1972, s. 3(3), as substituted by European Communities Act 2007, Sect. 2.

[27] *Cf. Quinn v. Ireland* [2007] IESC 16, [2007] 3 IR 395, where Denham J. held that regulations having statutory effect (Sect. 4 of the European Communities Act 1972 having given birth to such strange creatures) cannot themselves be amended by subsequent regulations.

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> There is no official publication that gives up to date information as to whether or not a particular statutory instrument has been amended or revoked. In fact, the only certain way of establishing as to whether or not a particular statutory instrument is in force, is by going through every subsequent statutory instrument manually, and checking to see if another statutory instrument under a different name, amends the earlier statutory instrument.[28]

1.4.2 On EU referendums in Ireland, see Sect. 1.2.

1.5 Waning Constitutional Influence?

1.5.1–1.5.3 While concerns have been frequently expressed that the on-going expansion of the scope and reach of European Union law might ultimately lead to a waning of the influence of the Constitution of Ireland, this has not (as yet, at least) happened. These concerns were particularly voiced during the two Lisbon referendums, as it was suggested that by 'constitutionalising' the Charter of Fundamental Rights and by the ever expanding potential reach of EU law, key decision-making on aspects of fundamental rights by the Irish judiciary (and especially by the Irish Supreme Court) might be supplanted in practice by the Court of Justice.

It has to be said that there is no immediate sign of this, partly because of the absolute centrality of the Constitution to Irish political, social and legal discourse. In addition, the fact that the People have an important role in key decision-making via the referendum process reinforces this legal and cultural tendency. This was immediately visible in the recent same-sex marriage referendum on 22 May 2015. The striking scenes of popular joy and celebration in Dublin as the referendum results were announced were remarkable, even astonishing.[29] While some disagree as to the wisdom of the referendum process in relation to matters of this kind,[30] what is undeniable is that a decision of this sensitivity brought about in this fashion is likely to have greater long-term democratic acceptability even by comparison with a purely legislative change or a change imposed by either the Irish Supreme Court, the Court of Justice or the European Court of Human Rights.

[28] Tomkin 2004, p. 152.

[29] See e.g. O'Hanlon, G (2015, June 1) Scenes of joy in Dublin Castle on May 23rd felt like a kind of secular Pentecost. The Irish Times.

[30] See e.g. Weeks, L. (2015, June 2). Rule by way of referendum is not the best way to make decisions. The Irish Times.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Articles 40 to 44 of the Constitution of Ireland are headed 'Fundamental Rights' and deal with what might be regarded as standard civil and political rights: thus the principle of equality, life, person, good name, property rights, personal liberty, habeas corpus, inviolability of the dwelling, free speech and assembly, family and children, education and freedom of religion are all protected. In addition, Art. 38.1 of the Constitution guarantees that '[n]o person shall be tried on any criminal charge save in due course of law', and Art. 38.5 guarantees the right to jury trial. In some cases the guarantees are detailed and specific: this is true, for example, of the procedure to be followed in habeas corpus applications.[31] In most other cases, however, the guarantees are expressed at a high level of generality.[32]

Two specific features of these fundamental rights provisions should, however, be noted. First, the courts have developed a doctrine of unenumerated or implied rights designed to capture standard fundamental rights which are not otherwise expressly provided for in Arts. 40 to 44: rights protected under this heading include free movement and travel, the right to fair procedures, the right to marry and the right to privacy. Secondly, Art. 45 contains a list of what would nowadays be described as socio-economic rights which are not 'cognisable by any Court under any provision of this Constitution'.[33]

Over and above the specific constitutional provisions lie the general principles of law – such as proportionality, non-retroactivity and legal certainty – some of which have a specific constitutional grounding. Thus, for example, Art. 5 of the Constitution describes the State as a democracy, and this provision is increasingly cited by the courts to justify decisions supporting the rule of law.[34] Article 15.5.1

[31] Article 40.4.1 provides that '[n]o citizen shall be deprived of his personal liberty save in accordance with law'. Para. 2 continues as follows: 'Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint … and the High Court shall … after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.'

[32] Thus, for example, Art. 40.5 provides: 'The dwelling of every citizen is inviolable and shall not be entered save in accordance with law.'

[33] Thus, for example, Art. 45.4.2 provides: 'The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and the citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.'

[34] See e.g. *Mallak v. Minister for Justice* [2012] IESC 59 (The Minister does not enjoy an absolute discretion with regard to a naturalisation application if by this is meant that he or she is free to act in an autocratic or arbitrary fashion, since this would be the antithesis of the guarantee contained in Art. 5); *Waterville Fisheries Development Ltd v. Acquaculture Licensing Appeals Board (No.2)*

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expressly forbids the enactment of legislation 'which declare[s] acts to be infringements of the law which were not so at the date of their commission'.

2.1.2 The Constitution itself uses different language to describe the rights it protects and sometimes employs different language to set out the circumstances in which the right can be curtailed or restricted. Although some rights are described as 'inviolable' or 'inalienable', this is not universally the case. Similarly, while the power of the State 'to delimit the exercise of constitutionally protected rights' is expressly given in some cases and not referred to at all in others, this does not mean 'that, where absent, the power does not exist'.[35]

For the best part of twenty years, however, the Irish courts have employed a standard proportionality doctrine in assessing the validity of legislative restrictions on the exercise of constitutional rights. The classic test remains that articulated by Costello J. in *Heaney v. Ireland*:[36]

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective.

This test has been consistently applied and it has helped to provide an objective template whereby the legitimacy of such restrictions on the exercise of constitutional rights can be assessed.[37]

2.1.3 Irish courts frequently employ the concept of the rule of law, although this is sometimes no more than a rhetorical makeweight. Nevertheless, the rule of law principles reflect the idea that the State is described as a democracy in Art. 5 of the Constitution and that Art. 34 of the Constitution commits the administration of justice to the judiciary. Among the key ideas contained in the rule of law decision making found in the Irish jurisprudence are the following:

– The principle of legality: every decision affecting legal rights must have an appropriate legal basis.

[2014] IEHC 381 ('absolute discretion' given by statute does not mean that the Board was not obliged to give reasons for its decisions).

[35] *Murray v. Ireland* [1985] IR 532, 538, *per* Costello J.

[36] [1994] 3 IR 593, 607, *per* Costello J. The test was expressly borrowed from a then contemporary decision of the Supreme Court of Canada: *Chaulk v. R.* (1990)3 SCR 1335–1336.

[37] See, e.g., *Daly v. Revenue Commissioners* [1996] 3 IR 1 *Re Art. 26 and the Health (Amendment) Bill (No.2)* [2005] IESC 7, [2005] 1 IR 105 , *King v. Minister for Environment (No.2)* [2006] IESC 61, [2007] 2 IR 296. See generally: Hogan 1997, Foley 2010 and Kenny 2014.

- The executive cannot constitutionally be given the power by statute to act in an arbitrary or autocratic fashion.[38]
- The right of access to the courts: legislation which restricts the right of access to the courts will be construed narrowly.[39] Legislation which unfairly restricts access to the courts will be found to be unconstitutional.[40]
- The law must be certain and accessible.[41]
- Legislation cannot retroactively create new criminal offences or other legal wrongs.[42]
- Fundamental rights should not be affected adversely by legislation save through the use of clear language.[43]
- Legal penalties cannot be created by the use of oblique language in a statute. It is, for example, a 'cardinal principle in the judicial interpretation of statutes that the range of criminal liability should not be held to have been statutorily extended except by clear, direct and unambiguous words'.[44]

[38] *Mallak v. Minister for Justice* [2012] IESC 59; *Waterville Fisheries Development Ltd. v. Acquaculture Licensing Appeals Board (No.2)* [2014] IEHC 381.

[39] *Murphy v. Greene* [1990] 2 IR 560, *Re MJBCH* [2013] IEHC 256, [2013] 1 IR 407.

[40] *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345, *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 IR 275.

[41] But note the decision of the Supreme Court in *Minister for Justice and Equality v. Adach* [2010] IESC 33, [2010] 3 IR 402. The background to that case was that the European Arrest Warrant Act 2003 had been amended by legislation enacted by the Oireachtas (Parliament) and duly signed by the President on 21 July 2009. Notice of this had been published in the official gazette in the manner required by Art. 25 of the Constitution. The amending legislation required that no appeal would be taken in European Arrest Warrant cases save with leave of the High Court. In October 2009 the requested person, Mr. Adach, purported to appeal without leave of the High Court, contending that the new legislation had not been officially published until November 2009. This was admitted – a translation into Irish had been awaited – but the Supreme Court noted that the appellant and his advisers were fully aware of the effect of the new provision and they had been advised of its terms by the trial judge. The Court rejected arguments that case law such as Case C-345/06 *Heinrich* [2009] ECR I-01659 had any relevance to this question, since the matter was governed entirely by the publication requirements of Art. 25 of the Constitution. While Hardiman J. acknowledged the importance 'of accessibility, clarity and foreseeability when considering laws mandating the deprivation of a person's liberty', this was not such a case, as the legislation in question was essentially a law prescribing new procedural rules.

[42] *Doyle v. An Taoiseach* [1986] ILRM 693. See also *The People v. Geraghty* [2014] IECA 2.

[43] See e.g. *Albatross Feeds Ltd v. Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 IR 271.

[44] *Director of Public Prosecutions v. Flanagan* [1979] IR 265, 280 *per* Henchy J. Additionally, laws which create unclear or arbitrary offences have been held to be unconstitutional: see, e.g., *King v. Director of Public Prosecutions* [1981] IR 233, *Douglas v. Director of Public Prosecutions* [2013] IEHC 343, [2014] 1 IR 510.

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2.2 The Balancing of Fundamental Rights and Economic Freedoms in EU Law

2.2.1 During the referendums on the Lisbon Treaty, certain decisions of the Court of Justice of the European Union (CJEU), such as *Laval* and *Viking*,[45] prompted concerns about the EU prioritising economic liberties over traditional human rights, and that the CJEU imposed significant limitations on the right of workers to take collective action where the exercise of that right interfered with the freedom of establishment and freedom to provide services.[46] This issue has, however, simply not arisen in practice, and it remains to be seen how the Irish courts would endeavour to reconcile traditional liberties with the free movement objectives which were prioritised in *Laval* and *Viking*.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

Introduction: Implementation of the European Arrest Warrant (EAW) in Ireland and the main principles in its judicial application The European Arrest Warrant Act 2003 (as amended) (the 2003 Act) has given effect to the EAW Framework Decision.[47,48] The system mandated by the 2003 Act requires that all applications be made to the High Court, generally under the supervision of a specially assigned judge. Since 2009, leave is required before an appeal can be taken from the High Court to the Supreme Court.[49] Following the establishment of the new Court of Appeal in October 2014, appeals now lie (with leave) to the Court of Appeal. In exceptional cases the Supreme Court can grant leave to hear an appeal from the Court of Appeal.

A further consideration is that prior to 1 December 2014, no Irish court had jurisdiction to make a reference to the CJEU in respect of the interpretation of a framework decision. Article 10(3) of Protocol No. 36 to the Treaty of Lisbon provided for jurisdiction to make a reference after a five-year transitional period. The Lisbon Treaty entered into force on 1 December 2009, and the transitional period expired on 1 December 2014. Given the sheer volume of case law which the

[45] Case C-341/05 *Laval* [2007] ECR I-11767 and Case C-438/05 *Viking Line* [2007] ECR I-10779.

[46] Kiernan et al. 2012, p. 539.

[47] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[48] See generally, Fahey 2010, pp. 107–128 and more generally, Farrell and Hanrahan 2011.

[49] Section 16(11) of the 2003 Act (as substituted by Sect. 10 of the EAW (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012).

2003 Act has generated to date,[50] one may expect – should this trend continue – that a steady stream of references will be made by the Irish courts over the next number of years.

Indeed, this case law has been such that it could not be said that the Irish courts have largely acted as 'rubber stamps', since the Irish courts have paid particular attention to the procedural safeguards prescribed by the 2003 Act. Accordingly, applications for surrender which have not specified with 'unambiguous clarity … the number and nature of the offences for which the person sought is so sought'[51] or have not clearly indicated whether the warrant sought is in respect of a conviction *in absentia*[52] will be rejected. There is likewise no prospect of surrender if the foreign offence does not 'correspond' to an offence known to Irish law.[53] The High Court has nonetheless provided a very complete explanation of the difference between the EAW system and the former system of extradition in *O'Sullivan v. Irish Prison Service*,[54] which admirably sums up the prevailing judicial attitude to the EAW regime:

> Despite superficial similarities between extradition and surrender, namely that both can result in the forcible departure, by compulsion of law, of a person from this State, the EAW regime must be considered as a regime different, separate and distinct from extradition. The principles upon which each rests are materially different: one driven by executive motivation, the other by mutual judicial trust and respect. The EAW regime was developed to solve many notable and renowned problems, which developed with the extradition system which existed previously. The former regime, and indeed the one which still regulates our relationship with the vast majority of States worldwide, was technical, slow, and lacked reciprocal judicial trust and respect. Without the latter it is incumbent on both the State and its Courts to apply a heightened level of scrutiny in relation to those being extradited; many of the world's legal systems do not uphold the same principles or rule of law or democracy which we enjoy here, the risk of wrongful conviction or *mala fides* prosecution are therefore much greater outside of the EU. Even with our more developed neighbours, procedural safeguards and concepts of justice and punishment may be at significant variance with our own. A more thorough investigative procedure is therefore both justified and required, so as to safeguard the rights of those whose extradition is sought … .
>
> The EAW regime and the Framework Decision upon which it is based are the result of ever-increasing cooperation in criminal and judicial matters, particularly with regards to extradition … within the Union, which was necessitated by the opening up of the free market. … This has meant the removal of a number of traditional exceptions for extradition, for example with regards to the political offence exception and the non-extradition of nationals.

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[50] The Supreme Court appears to have given some 40 written judgments on diverse aspects of the EAW.

[51] *Minister for Justice and Equality v. Connolly* [2014] IESC 34, [2014] 2 ILRM 241, 253, *per* Hardiman J.

[52] *Minister for Justice and Equality v. Palonka* [2015] IECA 69.

[53] 2003, Sect. 38(1)(b) and see generally *Minister for Justice and Equality v. Marjasz* [2012] IEHC 233. Differences in terminology between domestic and foreign offences do not, however, generally lead to a lack of correspondence: see *Minister for Justice v. Szall* [2013] IESC 7, [2013] 1 IR 470.

[54] [2010] 4 IR 562.

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> Therefore it cannot be accurate to assimilate, ideologically or practically, the case law or mind-set of extradition into those of *intra*-Union surrender. … I am satisfied that this represents an entirely new system. Surrender is not extradition. There is no hearing into the merits of the prosecution, pending or anticipated in the requesting jurisdiction; nor should there be; and the Executive no longer has a role. There is a special relationship between the Member States of the Union. By virtue of this unity there is increased judicial co-operation between Members. However there is necessarily a great level of trust that the other Member State will act in accordance with the highest and fundamental principles of the Union; namely rule of law, peace, freedom and democracy. Nonetheless, there may be circumstances where certain Member States may be lacking in this regard. It is for this reason that procedural safeguards are placed within the Framework Decision.[55]

In addition, as will be seen, some hugely complicated EAW cases have come before the Irish courts. Two in particular – *Minister for Justice v. Tobin* and *Minister for Justice v. Bailey* – require elaborate consideration. But before examining this case law, a number of special features and safeguards of the 2003 Act should be noted.

First, Sect. 38 of the 2003 Act contains important safeguards in terms of the correspondence of the offence and the seriousness of the offence. Section 38(1)(b) of the 2003 Act provides:

> Subject to *subsection* (*2*), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless (a) the offence corresponds to an offence under the law of the State, and
>
> (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or
> (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment or (a) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies or is an offence that consists of conduct specified in that paragraph, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years.

Secondly, the provisions of Sect. 37 include the following safeguards that will be of importance to the cases that follow:

> (1) A person shall not be surrendered under this Act if:
>
> (i) …
>
> (a) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which *section 38(1)(b)* applies[56]),

[55] [2010] 2 IR 562 at 597–598, *per* McKechnie J.

[56] This is a technical provision to ensure that applicants cannot resist extradition on the ground that they would be deprived of their right to jury trial for serious offences punishable for more than one year in the requesting state.

(b) there are reasonable grounds for believing that:

(i) …

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who:

(I) is not his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(ii) were the person to be surrendered to the issuing state:

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

Section 37 of the 2003 Act may be thus be said to give effect to Recital 12 of the Framework Decision, which provides that the EAW procedure does not:

> [p]revent a Member State from applying its own constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

In fact, Sect. 37 of the 2003 Act probably goes a good deal further than this by protecting the full panoply of constitutional rights and not just those reflecting due process and freedom of speech.[57] In the course of the parliamentary debates on the 2003 Bill, the sponsoring minister justified Sect. 37 of the 2003 Act on the ground that it would ensure that 'no state in the European Union [would] have a higher degree of real and substantial protection for those who seek the protection of the [Irish] courts'.[58]

It is perhaps not altogether surprising that these provisions have generated a good deal of case law. While it might seem that the Irish courts are under a particular duty to treat surrender applications under the EAW procedure in 'a most serious fashion', the 'practical operation of the Act of 2003 has not matched the

[57] The Commission Staff Report Document, Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2007), at pp. 5–6 commented adversely on this development:

'… EL, IE, IT and CY have transposed the text into their legislation in such a way that it goes beyond the Framework Decision and therefore creates the risk that a EAW will be refused on the basis of grounds not envisaged in the Framework Decision. In addition to referring to the European Convention on Human Rights, IE and IT require refusal where surrender would breach their national constitutions. Although this may cover situations arising under both Art. 6 TEU and Recital 12 (such as rules on due process), it nevertheless goes beyond the Framework Decision, in particular as Art. 6 TEU refers only to those constitutional principles common to Member States.'

[58] 577 *Dáil Debates* Col. 10 (17 December 2003).

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ideal and the role of Sect. 37 has been "read down" dramatically through judicial interpretation'.[59]

In *Minister for Justice v. Altaravicius*[60] the Supreme Court stressed that the 2003 Act must be interpreted in the light of the objectives of the Framework Decision, which include 'to remove the complexity and potential for delay inherent' in the pre-existing extradition arrangements between the Member States (Preamble) and to ground the EAW procedure on the principle of mutual recognition of judicial decisions (Recital 6 and Art. 1(2)) and 'on a high level of confidence between Member States' (Recital 10). It was against that background that the Supreme Court stressed that the residual power to refuse surrender contained in Sect. 37(1)(b) of the 2003 Act must be understood: this provision was a residual power which was to be confined to exceptional cases. As Murray C.J. stated, it could not constitute a breach of the Constitution to effect a surrender 'simply because [the foreign] legal system of trial differed from ours as envisaged by the Constitution'.[61]

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[59] Fahey 2010, p. 110. For a similar view, see Walsh 2009.

[60] [2006] IESC 23, [2006] 3 IR 148.

[61] [2007] 3 IR 732, 743. The Chief Justice had earlier stated ([2007] 3 IR 732, 741):

'The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting State including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 1973 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision … and other countries applied such a test from their own perspective, few, if any, would extradite to this country … . …

The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. …

That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting State according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act.'

This trend was continued in the subsequent decision of the Supreme Court in *Minister for Justice v. Stapleton*.[62] Here the question was whether the respondent could invoke undue delay as a ground to resist surrender to the UK under Sect. 37 of the 2003 Act. In effect, the argument was that if he were to face trial in Ireland at that time, he could invoke the jurisprudence arising from the due process provisions of Art. 38.1 in order to demonstrate that such trial would infringe his constitutional rights due to undue delay. Proceeding from that premise, the applicant then argued that his surrender to the UK would amount to an infringement of his constitutional rights.

In his judgment for the Supreme Court, Fennelly J. observed that the principle of 'mutual confidence' in the respective legal systems was broader and went further than the systems of mutual political and judicial trust which were contained in the European Convention on Extradition 1957 and, in our own legal system, the Extradition Act 1965, as it 'encompasses the system of trial in the issuing member state'.

Fennelly J. further noted that the question of whether there had been any undue delay could be best resolved within the context of the legal system of the requesting state. The mere fact that there was a difference in criminal procedure between the two jurisdictions was not in itself enough. Fennelly J. then stated:

> I cannot see that any of the differences discerned by the trial judge between the right to seek prohibition of trial in the English courts and our own could amount to the establishment of an infringement of the right to fair trial, or fair procedures, whether by reference to the [European] Convention [on Human Rights] or to the Constitution. They certainly do not amount, to repeat the words of Murray C.J. [in *Brennan*], to 'a clearly established and fundamental defect in the system of justice of [the] requesting State'.
>
> On the facts of this case, there is available to the respondent a procedure which will enable him, on surrender to the issuing Member State to seek a remedy based on the very long period of time which has elapsed since the alleged commission of the offences. Moreover, on the facts of the case, it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained. There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware.[63]

It is accordingly clear from this case law that Sect. 37(1)(b) of the 2003 Act can only be successfully invoked by a respondent if it can be demonstrated that the very act of surrender would either itself *ex facie* amount to an unconstitutionality in the circumstances or where the Court, acting on the clearest of evidence, has significant grounds for apprehending that the requested person would, if surrendered, face a

[62] [2007] IESC 30, [2007] 1 IR 669.

[63] [2007] 1 IR 669, 691–692.

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manifestly unfair trial which does not meet contemporary minimum standards presupposed by the Framework Decision itself.

There appears to be only two cases where the Court has refused to sanction surrender in the light of the provisions of Sect. 37. In *Minister for Justice and Equality v. Nolan*,[64] the requested person was facing surrender to the UK to serve out the balance of a sentence which had been imposed by a British court. Aspects of that particular sentencing regime had already been held by the European Court of Human Rights (ECtHR) to be contrary to Art. 5.1 of the ECHR insofar as it provided for detention beyond the tariff stipulated by the trial judge.[65] The Supreme Court held that to surrender the applicant in these circumstances would amount to a breach of Sect. 37(1)(a)(i) of the 2003 Act, since it would be contrary to the state's obligations under the ECHR. In effect, therefore, the Court refused the surrender of the respondent where he would be delivered up to complete the balance of a sentence which had been held to be non-ECHR compliant. In the other case, *Minister for Justice and Equality v. Rostas*,[66] the High Court refused to sanction the surrender of a Romanian of Roma ethnicity in respect of a conviction for robbery in 1995, where there were clear and detailed reasons to suggest that the conviction represented a miscarriage of justice.[67]

The decision in Tobin and abuse of process The Irish courts have also been obliged to deal with some particularly difficult EAW cases, of which the Tobin litigation is perhaps the paradigm example. In *Minister for Justice v. Tobin* (*No. 1*),[68] an Irish national[69] had been arrested in Hungary following the death of two young children in a road traffic accident. He was then permitted by the authorities to leave Hungary, but was subsequently convicted in his absence by the Hungarian courts. The Supreme Court ultimately refused to sanction his surrender from Ireland under the EAW procedure on the basis that it had not been shown that he had 'fled' Hungary in the manner then required by Sect. 10 of the 2003 Act.

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[64] [2013] IESC 54.

[65] See *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012.

[66] [2014] IEHC 391, [2015] 1 ILRM 1.

[67] Edwards J. noted ([2015] 1 ILRM 1, 58–59) while the trial took place 'in a very different Romania to today's Romania', nevertheless:

'while it is impossible to determine definitively whether the respondent in fact received a fair trial, there is sufficient supporting evidence demonstrating the consistency of her narrative with what is known to have been commonplace in Romania and its criminal justice system at the material time, and concerning the manner in which persons of Roma ethnicity were frequently ill-treated and discriminated against by police and officials within that system, to give the court substantial grounds for believing that there is a real risk that the respondent has suffered a flagrant denial of justice in the requesting country.'

[68] [2008] IESC 3, [2008] 4 IR 42.

[69] Later described by Hardiman J. as a person of 'unblemished character' who 'has had a distinguished career in an Irish public company': *Minister for Justice v. Tobin (No. 2)* [2012] 4 IR 147, 266.

While Fennelly J. accepted that the 'fleeing' requirement was not compatible with the requirements of the Framework Decision, he concluded that in view of the express language of the 2003 Act, it could not be construed in a manner compatible with the Framework Decision without giving the Act an interpretation which would be *contra legem*.

The Oireachtas subsequently enacted the European Arrest Warrant (Amendment) Act 2009, Sect. 6 of which deleted the 'fled' requirement. At that point, the State sought a fresh surrender of Mr. Tobin. A majority of the Supreme Court ultimately refused the request. The two judges of the minority, Denham C. J. and Murray J., took the view that the State was obliged to alter the law in order to ensure that it conformed with the requirements of the Framework Decision, and that obligation effectively superseded any issue concerning the rights of the accused. The majority could not accept this approach and, in lengthy and passionate judgments, they concluded that the surrender would amount to an abuse of process by re-opening a final decision and interfering with vested rights.[70]

2.3.1 The Presumption of Innocence

2.3.1.1–2.3.1.2 The automaticity underlying the EAW system has been a constant source of judicial concern for the Irish courts. This can be seen in two important

[70] Note, for example, that some members of the majority went to pains to stress that they were entitled to rely on a fundamental legal principle of domestic law – namely abuse of process – in the context of the interpretation of the Framework Decision, provided that the application of these rules did not infringe the principle of non-discrimination or effectiveness. As Fennelly J. observed ([2012] 4 IR 147, 212):

'The legislation was then amended by this State. Indeed this had to be done in order to bring Irish law into conformity with the Framework Decision. That is cold comfort for the appellant. He is the only person whose surrender had been refused by reason of the 'fled' provision. The amendment … exposed him to the possibility that a second European Arrest Warrant would be issued, which is indeed what has occurred. If the legislation had been enacted originally in conformity with the Framework Decision, he would at least have had his case decided on appropriate grounds. He would either have been surrendered to Hungary or he would have succeeded on appeal on one of the other grounds advanced in *Tobin (No. 1)*. He would not have been subjected to the same judicial process twice.

The consequence of the amending legislation was that the appellant has faced a second process of arrest, objection, High Court hearing and appeal. All this is the result of what appears to have been a legislative error followed by its correction. None of this was the responsibility of the appellant. … [T]his is quite different from cases where an earlier proceeding has failed by reason of defects in a warrant. In those cases it will be apparent that the surrender … is the result of a particular defect in the warrant and that … the error can be remedied and a new warrant can be issued without the defects.

These are in essence the reasons why I agree … that the appeal should succeed on the ground of abuse of process. The principle of national procedural autonomy permits the courts of the Member States to apply national procedural rules so long as they do not infringe either the principle of non-discrimination or of effectiveness.'

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recent Supreme Court decisions in *Minister for Justice and Equality v. Bailey*[71] and *Minister for Justice and Equality v. Ostrowski*.[72]

In *Bailey* the applicant, a British national, had been a suspect in the murder of a noted French actress, Sophie Toscan du Plantier, in rural west Cork in December 1996. This murder was one of the most controversial murder cases in Irish criminal justice history. The Director of Public Prosecutions decided not to prosecute Mr. Bailey who had been identified as a suspect in the crime.[73] Section 42(c) of the 2003 Act as originally enacted had provided that no surrender could take place where the Director of Public Prosecutions had already decided not to prosecute the suspect for the crime in question, but this prohibition was later deleted in 2005.[74]

At that point the French authorities issued an EAW request for Mr. Bailey, but this was ultimately refused by the Supreme Court for two fundamental reasons. First, the Court concluded that it was implicit in Art. 4(7)(b) of the Framework Decision that it imported a requirement of reciprocity. A murder committed outside of Ireland is a crime in Irish law only if committed by an Irish citizen, so that, for example, a court in Ireland could not seek the surrender of a British national in respect of a murder committed in France. It followed that Ireland could not surrender a British national to France in respect of a murder committed in Ireland. Secondly, it was also clear that Mr. Bailey was being sought for the purposes of a preliminary investigation and that no decision had yet been taken to charge the person whose surrender had been sought.[75]

In *Ostrowski* the surrender of a Polish national was sought on the ground that he was found in possession of 0.72 g of marijuana. In the High Court, Edwards J. refused to order surrender on the ground that this was wholly disproportionate, not least as the accused was most unlikely to receive a prison sentence in respect of this offence. This decision was, however, reversed on appeal by the Supreme Court. Denham C.J. stressed that once the offence met the minimum gravity test[76] specified by the 2003 Act, the High Court had no further role in the matter in assessing any question of proportionality. She also took the view that the Irish courts had no role in assessing what type of sentence the offender was likely to

[71] [2012] IESC 16, [2012] 4 IR 1.

[72] [2013] IESC 24.

[73] This has always been a matter of considerable controversy. It is sufficient perhaps to state that in the course of the EAW proceedings evidence emerged to show that the Director of Public Prosecutions considered that the police inquiry 'into the case was "prejudiced" against [Mr. Bailey] and flawed': *Minister for Justice v. Bailey* [2012] 4 IR 1, 65, *per* Hardiman J.

[74] Criminal Justice (Terrorist Offences) Act 2005, Sect. 83.

[75] Article 1(1) of the Framework Decision requires that the warrant must be 'for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.' Section 21A of the 2003 Act requires the High Court to refuse to order the surrender where the Court is satisfied 'that a decision has not been made to charge the person with and try him or her for the offence specified in the warrant'. See also to same effect, *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 IR 260 and *Minister for Justice v. Olsson* [2011] IESC 1, [2011] 1 IR 384.

[76] In this case the offence carried a maximum penalty of three years imprisonment.

receive in the requesting state. It is interesting, however, that two other members of the Court, McKechnie J. and MacMenamin J., while concurring in the result, expressed deep unease at this result. Both intimated that the EAW system required revision to ensure that the proportionality of any request was assessed both by the requesting and, indeed, the surrendering state.

2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 It may seem surprising, given the extensive litigation regarding the EAW, that the issue of *nullum crimen sine lege* has not featured prominently in Ireland. This is probably because of the protections contained in Sect. 38 of the 2003 Act, the wording of which was provided in the introduction to Sect. 2.3. In the vast majority of cases the requesting state will be required to show that the offence in question has a corresponding Irish offence.

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The issue of *in absentia* judgments has also proved troubling. Section 45 of the 2003 Act contained a general prohibition on surrender for such purposes, but this prohibition has itself been re-cast on two separate occasions.[77] In the present form, Sect. 45 provides that '[a] person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA … '.

It should be noted, however, that the Sect. 45 prohibition is not absolute, reflecting the exceptions expressly provided in Art. 5 of the Framework Decision.[78] It does not apply to persons who have had adequate notice of the trial but who elect not to participate.[79] To that extent it may be that Sect. 45 of the 2003 Act is not inconsistent with the decision of the Court of Justice in *Melloni.*[80] At the same time, these safeguards are real. Thus, for example, it is inappropriate to order surrender

[77] Section 45 of the 2003 Act was first replaced by Sect. 20 of the Criminal Justice (Miscellaneous Provisions) Act 2009. That substitution was itself replaced by Sect. 23 of the European Arrest Warrant (Application to Third Countries) and Extradition (Amendment) Act 2012.

[78] *Minister for Justice and Equality v. McCague* [2008] IEHC 154, [2010] 1 IR 154, *per* Peart J.

[79] *Minister for Justice and Equality v. McCague* [2008] IEHC 154, [2010] 1 IR 154 (the accused who discharged his legal team in advance of a scheduled trial date cannot contend that he was sentenced *in absentia*, even where the accused contended that he was ill and feared for his life if he attended the trial).

[80] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

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where the accused did not appear at the trial, unless the requesting authority has actually completed and filled in the table contained in Sect. 45 of the 2003 Act.[81]

2.3.4–2.3.5 The Right to a Fair Trial/The Right to Effective Judicial Protection

See matters covered in previous sections.

2.3.6 Proportionality and EU Criminal Law

As can be seen from this brief discussion, the Irish courts have expressed unease with aspects of the operation of the EAW system, particularly its automaticity and lack of proportionality. While there is no doubt that the Oireachtas sought to provide the greatest level of protection possible when enacting the 2003 Act, the courts have struggled to fully live up to these expectations,[82] as they have felt obliged to give effect to the language and objects of the Framework Decision,[83] save where to do so would be plainly *contra legem*.[84] It should also be noted that the courts have at times expressed unease regarding aspects of the lack of proportionality inherent in the EAW system[85] and the automaticity involved in giving effect to foreign prosecutorial and judicial decisions.[86]

2.4 The EU Data Retention Directive

2.4.1 As it happens, three of the most important data protection cases which have either recently come before the CJEU or are pending before that Court have come

[81] *Minister for Justice and Equality v. Palonka* [2015] IECA 69.

[82] See e.g. the very narrow reading given to the 'protecting constitutional rights' provisions of Sect. 37 of the 2003 Act as demonstrated in cases such as *Stapleton* and *Brennan*.

[83] The principle of *interprétation conforme* as expressed in cases such as Case C-105/03 *Pupino* [2005] ECR I-05285 features prominently in the Irish EAW jurisprudence. As one might expect, the effect has been in nearly every case to dilute the specific *national* safeguards contained in the 2003 Act in favour of a more standardised interpretation which conforms with the requirements of the Framework Decision: see generally the comments of Murray J. in *Minister for Justice and Equality v. Tokarski* [2012] IESC 61.

[84] As happened with respect to the 'fleeing' provisions discussed in *Minister for Justice v. Tobin (No.1)* [2008] IESC 3, [2008] 4 IR 42. See generally, *Minister for Justice v. Palonka* [2015] IECA 69, *per* Finlay Geoghegan and Peart JJ.

[85] See, e.g., the comments of Denham C.J., McKechnie and MacMenamin J.J. in *Minister for Justice v. Ostrowski* [2013] IESC 24.

[86] See, e.g., the disagreement even among the majority in *Minister for Justice v. Tobin (No. 2)* [2012] 4 IR 147 as to whether the Irish courts could look behind the merits of the Hungarian conviction.

from Ireland: *Ireland v. Parliament and Council* (2009),[87] *Digital Rights Ireland*[88] and, most recently, *Schrems.*[89] These will now be explored in greater detail.

Ireland v. Parliament and Council The first of these cases, *Ireland v. Parliament and Council*, was a challenge to the legal basis on which the Data Retention Directive[90] was adopted, with the CJEU rejecting the argument that the Union legislator was not entitled to adopt this provision as an internal market measure. While the case is doubtless an important one in terms of the jurisprudence on internal market measures, it would be hard to say that it had implications for data protection rights as a topic in itself. At the same time, the fact that the action was dismissed may have given the wrong impression that the Directive itself was impregnable to future legal challenge. Many commentators may thus have overlooked the Court's express saver at the commencement of its discussion of the merits of the action:

> It must also be stated that the action brought by Ireland relates solely to the choice of legal basis and not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy contained in Directive 2006/24.[91]

While the Court acknowledged that data retention is directly concerned with criminal justice and the prevention of terrorism,[92] it also stressed that this topic has significant implications for the internal market:

> It is also clear from the file that the obligations relating to data retention have significant economic implications for service providers in so far as they may involve substantial investment and operating costs.
>
> The evidence submitted to the Court shows, moreover, that the national measures adopted up to 2005 pursuant to Article 15(1) of Directive 2002/58 differed substantially, particularly in respect of the nature of the data retained and the periods of data retention. …
>
> In the light of that evidence, it is apparent that the differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market and that it was foreseeable that that impact would become more serious with the passage of time.

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[87] Case C–301/06 *Ireland v. Parliament and Council* [2009] ECR I-00593.

[88] Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

[89] Case C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650.

[90] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[91] Case C-301/06 *Ireland v. Parliament and Council*, n. 87, at para. 57.

[92] Ireland had argued that the 'centre of gravity' of the measure related to the prevention of crime and the protection of national security. Cf. the later comments of the Court in *Digital Rights Ireland* (at para. 41): '…[t]he material objective of that directive is, therefore, to contribute to the fight against serious crime and thus, ultimately, to public security.'

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> Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonised rules.[93]

While there was disappointment in official Irish circles that the objections to the legal basis of the Directive were rejected – it was, after all, the first time in which Ireland had challenged EU legislation on this basis – the Directive was duly transposed into domestic law. Certainly, few were prepared for what happened next.

Case C-293/12 *Digital Rights Ireland* Digital Rights Ireland Ltd. (DRI) is a company limited by guarantee, which focuses on data protection and data privacy. It sought to challenge in the Irish High Court a direction issued by the Garda (Police) Commissioner instructing telecommunications providers to retain telecommunications data. DRI further challenged the constitutionality of legislation which sought to authorise retention of such data.

Much of the judgment of the High Court is devoted to the question of whether a limited company had locus standi to challenge the validity of this legislation.[94] Following a review of the Irish constitutional case law on this topic, McKechnie J. granted DRI the right to pursue an *actio popularis* in relation to interference with constitutional rights to privacy and communications, but not in respect of grounds alleging an interference with marital privacy and the right to travel. Since, however, the state sought to justify the legislation by reference to the Data Retention Directive, McKechnie J. felt that he had no alternative but to make a reference on the validity of the Directive to the CJEU.

The decision of the CJEU in respect of the Art. 267 TFEU reference was that the Directive was invalid having regard to Arts. 7 and 8 of the Charter.[95] The Court stressed the fact that the Directive permitted the storage of data on an open-ended and undifferentiated basis, and that such interference was significant:

> It must be stated that the interference caused by Directive 2006/24 with the fundamental rights laid down in Articles 7 and 8 of the Charter is … wide-ranging, and it must be considered to be particularly serious. Furthermore … the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance.

At the same time the Court observed that the essence of the rights was not affected, as under Art. 1(2) of the Directive, 'the acquisition of knowledge of the content of the electronic communications as such' is not permitted by the Directive. Nevertheless, given that the interference was significant, any interference had to be limited to that which was strictly necessary:

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[93] Case C-301/06 *Ireland v. Parliament and Council*, n. 87, paras. 68–72.

[94] *Digital Rights Ireland v. Minister for Communications* [2010] IEHC 221, [2010] 3 IR 251.

[95] Although the plaintiff was also challenging the constitutionality of the legislation in the Irish courts, there appears to have been no reference to the Irish constitutional provisions in the Art. 267 reference itself.

> Consequently, the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data … .
>
> The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data … .

So far as the proportionality of the measure was concerned, the Court noted that it applied to virtually all electronic communications, so that the measure applied to virtually the entirety of the European population. The Court also appears to have been struck by the fact that the Directive did not provide any measured exceptions:

> Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

The CJEU further found that the Directive does not require any relationship between the data of which retention is provided for and a threat to public security, e.g. by reference to a particular time period or a particular geographical zone, or a circle of particular persons likely to be involved in a serious crime. Additionally the Directive 'also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning serious offences. Furthermore, Directive 2006/24 'does not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use'. 'Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued …'. Nor did the measure lay down clear and precise rules regarding the time period during which the data is to be retained. It likewise was found not to have adequate safeguards against potential abuse. The Court further added that:

> The directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8 (3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data … .

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Given that the measure failed the proportionality test, it followed that the Directive had to be annulled. It may be significant that the Court did not address questions of retroactivity in its decision.

Schrems v. Data Protection Commissioner The third case, *Schrems v. Data Protection Commissioner*[96] arose in judicial review proceedings before the High Court in which the above-named applicant, an Austrian national, challenged a decision of the respondent Data Protection Commissioner (hereinafter Commissioner) not to investigate a particular complaint of his any further pursuant to Sect. 10(1)(b) of the Data Protection Act 1988 (hereinafter 1988 Act). All users in Europe of the major social network, Facebook, are required to sign a contract with Facebook Ireland Ltd. (Facebook Ireland). To that extent, therefore, Facebook Ireland is regulated by the Commissioner under the Irish Data Protection Acts. Facebook Ireland is a subsidiary of its US parent, Facebook Inc. (Facebook). Some or all data relating to Facebook subscribers residing within the EU/EEA is in fact transferred to and held on servers which are physically located within the United States.

The essence of Mr. Schrems' complaint of 25 June, 2013 to the Commissioner was that in the light of the revelations made from May 2013 onwards by Edward Snowden concerning the activities of the US National Security Agency (NSA), there was no meaningful protection in US law and practice in respect of data so transferred to the US so far as State surveillance was concerned.

The Commissioner rejected this complaint on two grounds. First, he considered that there was no evidence that Mr. Schrems' personal data had been accessed by the NSA (or other US security agencies) ('the *locus standi* objection'), so that the complaint was purely hypothetical and speculative. Secondly, the European Commission had determined in its decision of 26 July, 2000 (2000/520/EC) ('the Safe Harbour Decision') that the United States 'ensures an adequate level of [data] protection' in accordance with Art. 25(6) of Directive 95/46/EC (the 1995 Directive). The Commissioner noted that the Safe Harbour decision was a 'Community finding' for the purposes of Sect. 11(2)(a) of the 1988 Act, so that any question of the adequacy of data protection in that third country (in the present case, the United States) where the data is to be transferred was required by Irish law 'to be determined in accordance with that finding'. As this was the gist of the applicant's complaint – namely, that personal data was being transferred to a third country which did not in practice observe these standards – the Commissioner took the view that this question was foreclosed by the nature of the Safe Harbour Decision.

[96] [2014] IEHC 310, [2014] 2 ILRM 441 (Irish High Court), Case C-326/14 *Verein für Konsumenteninformation* [2015] ECLI:EU:C:2015:462 (pending before the CJEU). I should disclose that the author was the referring judge. Nothing in this commentary should be taken as reflecting one way or another on the merits of litigation which is currently pending before the Court of Justice.

The evidence and the findings of fact The High Court of Ireland found the following facts regarding the interception of personal data:

(a) Electronic surveillance and interception of communications in the manner provided by law serves necessary and indispensable objectives which are in the public interest, namely, the preservation of national security and the prevention of serious crime. The surveillance and interception of personal data transferred from the EU to the US by the US National Security Authority (and other similar agencies, both in the US and elsewhere) serves legitimate and necessary counter-terrorism objectives and goals.
(b) Nevertheless, the revelations made by Edward Snowden demonstrated a significant over-reach on the part of those authorities. While there is oversight on the part of the Foreign Intelligence Services Court in the US, this is done on an *ex parte* and secret basis. EU citizens have no effective right to be heard on the question of the interception and surveillance of their data and, furthermore, decisions taken to access such data are not conducted on the basis of EU law.
(c) While there may be some dispute regarding the scope and extent of some of these programmes, it was clear from the extensive exhibits contained in the affidavits filed in these proceedings that the accuracy of much of the Snowden revelations did not appear to be in dispute. The Court accordingly found that personal data transferred by companies such as Facebook Ireland to its parent company in the United States can thereafter be accessed by the National Security Authority (and other federal agencies such as the Federal Bureau of Investigation) in the course of a mass and indiscriminate surveillance and interception of such data. Indeed, in the wake of the Snowden revelations, the available evidence presently admitted of no other realistic conclusion.[97]
(d) Both Facebook and Facebook Ireland had self-certified pursuant to the Safe Harbour Decision.

National law So far as Irish national law is concerned, Sect. 11(1) of the 1988 Act precludes the transfer of personal data outside of the State, save where that foreign State 'ensures an adequate level of protection for the privacy and the fundamental rights and freedoms of data subjects in relation to the processing of personal data having regard to all the circumstances surrounding that transfer'. The Court then held that the accessing of private communications by the State authorities through interception or surveillance engages the constitutional right to privacy. Further, accessing by State authorities of private communications generated within the home – whether this involves the accessing of telephone calls, internet use or private mail – is also a clear interference with the inviolability of the dwelling as guaranteed by Art. 40.5 of the Constitution.[98]

The Court next held that the mere fact that these rights are thus engaged does not mean that the interception of communications by State authorities is necessarily or

[97] At paras. 10–13 of the judgment of the Irish High Court, [2014] 2 ILRM 441, 447–448.
[98] Paragraphs 47 and 48 of the judgment, [2014] 2 ILRM 441, 457–458.

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always unlawful. The Preamble to the Constitution of Ireland envisages a 'true social order' where the 'dignity and freedom of the individual may be assured', so that both liberty and security are valued. Provided appropriate safeguards are in place, the Court ruled that in a modern society electronic surveillance and interception of communications is indispensable to the preservation of State security. It was accordingly plain that legislation of this general kind serves important – indeed, vital and indispensable – State goals and interests, drawing by analogy on the decision of the German Constitutional Court in the *Anti-Terrorism Database* case[99] and the comments of the Court of Justice in Case C-293/12 *Digital Rights Ireland.*

It further held that the importance of these constitutional rights is nonetheless such that the interference with these privacy interests must be in a manner provided for by law, and any such interference must also be proportionate. This is especially the case in respect of the interception and surveillance of communications within the home. While the term 'inviolable' in respect of the dwelling in Art. 40.5 of the Constitution does not literally mean what it says (i.e. the right is not absolute or incapable of being interfered with), the reference to inviolability in this context nonetheless conveys that the home enjoys the highest level of protection which might reasonably be afforded in a democratic society.[100]

The High Court then held that the mass and undifferentiated accessing of personal data generated perhaps especially within the home – such as e-mails, text messages, internet usage and telephone calls – would not pass any proportionality test or could not survive constitutional scrutiny on this ground alone. The potential for abuse in such cases would be enormous and might even give rise to the possibility that no facet of private or domestic life within the home would be immune from potential State scrutiny and observation. Such a state of affairs would be totally at odds with the basic premises and fundamental values of the Constitution: respect for human dignity and freedom of the individual (as per the Preamble to the Constitution); personal autonomy (Art. 40.3.1 and Art. 40.3.2); the inviolability of the dwelling (Art. 40.5) and protection of family life (Art. 41). Drawing on earlier Irish case law,[101] the Court noted that Art. 40.5 of the Constitution presupposes that 'in a free society the dwelling is set apart as a place of repose from the cares of the world' and assures 'the citizen that his or her privacy, person and security will be protected against all comers', save in a manner provided for by a law which respects the essence of that constitutional guarantee.

The Court then held that a dwelling could not in truth be a 'place of repose from the cares of the world' if, for example, the occupants of the dwelling could not send an e-mail or write a letter or even conduct a telephone conversation if they were not protected from 'the prospect of general or casual State surveillance of such communications on a mass and undifferentiated basis'. The Court observed:

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[99] 24 April 2003 at paras. 106, 131 and 133, *passim*.

[100] At paras. 49–50 of the judgment, [2014] 2 ILRM 441, 457, 458.

[101] Such as *The People v. O'Brien* [2012] IEHC 68.

> That general protection for privacy, person and security in Article 40.5 [of the Constitution of Ireland] would thus be entirely compromised by the mass and undifferentiated surveillance by State authorities of conversations and communications which take place within the home. For such interception of communications of this nature to be constitutionally valid, it would, accordingly, be necessary to demonstrate that this interception of communications and the surveillance of individuals or groups of individuals was objectively justified in the interests of the suppression of crime and national security and, further, that any such interception was attended by appropriate and verifiable safeguards.[102]

The Court further held that if this matter were entirely governed by Irish law, then measured by these particular constitutional standards, at the very least a significant issue would arise as to whether the United States 'ensures an adequate level of protection for the privacy and the fundamental rights and freedoms' within the meaning of Sect. 11(1)(a) of the 1988 Act, such as would permit data transfers to that country. Moreover, given the (apparently) limited protection given to data subjects by contemporary US law and practice so far as State surveillance is concerned, this would indeed have been a matter which the Commissioner would have been obliged to investigate.

Accordingly, the Court found that if the matter were to be judged *solely* by reference to Irish constitutional law standards, the Commissioner could not properly have exercised his Sect. 10(1)(a) powers to conclude in a summary fashion that there was nothing further to investigate.

National law pre-empted by European Union law? The Safe Harbour Decision

The parties agreed, however, that the matter was only partially governed by Irish law and that, in reality, on this key issue of the adequacy of data protection law and practice in third countries, Irish law has been pre-empted by general EU law in this area.[103] On this point the Court stated:

> This brings us to the nub of the issue for the Commissioner. He is naturally bound by the terms of the 1995 Directive and by the 2000 Commission Decision. Furthermore, as the 2000 Decision amounts to a 'Community finding' regarding the adequacy of data protection in the country to which the data is to be transferred, s. 11(2)(a) of the 1988 Act (as amended) requires that the question of the adequacy of data protection in the country where the data is to be so transferred 'shall be determined in accordance with that finding'. In this respect, s. 11(2)(a) of the 1988 Act faithfully follows the provisions of Article 25(6) of the 1995 Directive.
>
> All of this means that the Commissioner cannot arrive at a finding inconsistent with that Community finding, so that if, for example, the Community finding is to the effect that a particular third party state has adequate and effective data protection laws, the Commissioner cannot conclude to the contrary. The Community finding in question was, as we have already seen, to the effect that the US does provide adequate data protection for

[102] Paragraph 55, [2014] 2 ILRM 441, 459.

[103] This is because Sect. 11(2)(a) of the 1988 Act (as substituted by Sect. 12 of the Data Protection (Amendment) Act 2003) effects a *renvoi* of this wider question in favour of EU law. Specifically, Sect. 11(2)(b) of the 1988 Act provides that the Commissioner must determine the question of the adequacy of protection in the third state 'in accordance' with a Community finding made by the European Commission pursuant to Art. 25(6) of the 1995 Directive.

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data subjects in respect of data handled or processed by firms (such as Facebook Ireland and Facebook) which operate the Safe Harbour regime.

It follows, therefore, that if the Commissioner cannot look beyond the European Commission's Safe Harbour Decision of July 2000, then it is clear that the present application for judicial review must fail. This is because, at the risk of repetition, the Commission has decided that the US provides an adequate level of data protection and, as we have just seen, s. 11(2)(a) of the 1998 Act (which in turn follows the provisions of Article 25(6) of the 1995 Directive) ties the Commissioner to the Commission's finding. In those circumstances, any complaint to the Commissioner concerning the transfer of personal data by Facebook Ireland (or, indeed, Facebook) to the US on the ground that US data protection was inadequate would be doomed to fail.

This finding of the Commission is doubtless still true at the level of consumer protection, but, as we have just seen, much has happened in the interval since July 2000. The developments include the enhanced threat to national and international security posed by rogue States, terrorist groupings and organised crime, disclosures regarding mass and undifferentiated surveillance of personal data by the US security authorities, the advent of social media and, not least from a legal perspective, the enhanced protection for personal data now contained in Article 8 of the Charter.

While the applicant maintains that the Commissioner has not adhered to the requirements of EU law in holding that the complaint was unsustainable in law, the opposite is in truth the case. The Commissioner has rather demonstrated scrupulous steadfastness to the letter of the 1995 Directive and the 2000 Decision.

The applicant's objection is, in reality, to the terms of the Safe Harbour Regime itself rather than to the manner in which the Commissioner has actually applied the Safe Harbour Regime. There is, perhaps, much to be said for the argument that the Safe Harbour Regime has been overtaken by events. The Snowden revelations may be thought to have exposed gaping holes in contemporary US data protection practice and the subsequent entry into force of Article 8 of the Charter suggests that a re-evaluation of how the 1995 Directive and 2000 Decision should be interpreted in practice may be necessary. It must be again stressed, however, that neither the validity of the 1995 Directive nor the validity of the Commission's Safe Harbour decision have, as such, been challenged in these proceedings.

Although the validity of the 2000 Decision has not been directly challenged, the essential question which arises for consideration is whether, *as a matter of European Union law*, the Commissioner is nonetheless absolutely bound by that finding of the European Commission as manifested in the 2000 Decision in relation to the adequacy of data protection in the law and practice of the United States having regard in particular *to the subsequent entry into force of Article 8 of the Charter*, the provisions of Article 25(6) of the 1995 Directive notwithstanding. For the reasons which I have already stated, it seems to me that unless this question is answered in a manner which enables the Commissioner either to look behind that Community finding or otherwise disregard it, the applicant's complaint both before the Commissioner and in these judicial review proceedings must accordingly fail.[104]

[104] At paras. 64–70 of the judgment, [2014] 2 ILRM 441, 462–463.

Given that the critical issue in the present case was whether US law and practice afforded sufficient data protection and that no issue was ever raised in these proceedings concerning the actions of Facebook Ireland or Facebook[105] *as such*, the Court took the view that the real question was whether the Commissioner was bound by the earlier findings to this effect by the European Commission in the Safe Harbour Decision. In other words, the Court considered that this was really a complaint concerning *the terms* of that decision, rather than the manner in which the Commissioner *had applied it*.[106] While Art. 3(b) of the Safe Harbour Decision allows the national authorities to direct an entity to suspend data flows to that third country, this is in circumstances where the complaint is directed to *the conduct of that entity*. Here the real objection was not to the conduct of Facebook as such, but rather to the fact that the Commission has already determined that the US law and practice provides adequate data protection in circumstances where it is clear from the Snowden disclosures that personal data of EU citizens so transferred to the US can be accessed by the US authorities on a mass and undifferentiated basis.

In these circumstances the High Court found that it would be appropriate to refer to the Court of Justice the question whether, having regard in particular to the earlier findings of fact regarding the Snowden disclosures and the subsequent entry into force of Art. 7 and Art. 8 of the Charter and the recent judgment of this Court in *Digital Rights Ireland*, the Commissioner was bound by the earlier determination of the European Commission in the Safe Harbour Decision as to the adequacy of the data protection offered by US law and practice. The outcome of this reference is currently pending.[107]

2.5 Unpublished or Secret Legislation

2.5.1 The rules regarding the promulgation of legislation are contained in Art. 25 of the Constitution, which provides that Bills must be presented to the President for signature.[108] The critical provisions are Art. 25.4 paras. 1 and 2:

[105] Mr. Schrems has made other separate complaints to the Commissioner concerning Facebook, but none of these complaints arose for consideration in these judicial review proceedings.

[106] Paragraph 69 of the judgment, [2014] 2 ILRM 441, 463.

[107] In its judgment in C-362/14 *Schrems,* n. 89, delivered on 6 October 2015, the Court of Justice held (i) that the Data Protection Commissioner was not so bound and (ii) the Safe Harbour Decision was itself invalid.

[108] This is not a pure formality, as the President could elect to refer the Bill to the Supreme Court to test its constitutionality, having first consulted with the Council of State. The Council of State has met on 27 occasions for this purpose, and the relevant Bills have been referred on 15 occasions.

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1. Every Bill shall become and be law as and from the day on which it is signed by the President under this Constitution, and shall, unless the contrary intention appears, come into operation on that day.
2. Every Bill signed by the President under this Constitution shall be promulgated by him as a law by the publication by his direction of a notice in the Iris Oifigiúil[109] stating that the Bill has become law.

These provisions do raise the possibility that a measure may become law before the public can access the text of the new legislation, although the difficulties thereby presented appear to be more theoretical than real. To date the Irish Supreme Court has been largely unsympathetic to arguments of this kind, citing the express language of Art. 25.4.[110] A curious variation of this problem emerged in *Cussens v. Brosnan*,[111] a VAT case where it emerged in the course of an appeal to the Supreme Court that the Irish Revenue Commissioners had withheld the text of a derogation by Ireland from the application of the VAT rules on the disposal of property and, just as remarkably, that the EU Commission had agreed to this. In the light of this admission, the Court gave the appellant leave to amend its pleading based on the emergence of this new fact.[112]

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 The question of the protection of property rights and legitimate expectations in the context of EU legislation has rarely arisen in the Irish courts. This is principally because insofar as such a measure interferes with property rights or other procedural entitlements, it will nonetheless be held to be 'necessitated' by the obligations of EU law for the purposes of Art. 29.4.6 of the Constitution and, hence, immune from constitutional review.

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[109] I.e., the Official Gazette.

[110] *Minister for Justice and Equality v. Adach* [2010] IESC 33, [2010] 3 IR 402, *Minister for Justice v. Bailey* [2012] IESC16, [2012] 4 IR 1.

[111] [2015] IESC 45.

[112] As Laffoy J. commented in her judgment:
'Further, it is difficult to understand how a State body could consider that it had the entitlement to withhold the derogation, which, in reality, is a legal instrument which regulates the charging of VAT and … can be regarded as part of the law of the land, from a taxpayer's adviser, for example, from Mr. Brennan and other partners of Deloitte. It should have been furnished when it was sought in the context of this appeal in March 2012. While the Court was told, in the course of the submissions, that its withholding was not wilful, in that neither the respondent nor the European Commission was able to find it, there was no evidence to support that. Further, as counsel for the appellants emphasised, by letter dated 12th August, 2002 from the European Commission, Mr. Brennan was informed that the "Irish authorities have informed my services that they do not agree to the release of these documents".'

This was made clear by the Supreme Court's decision in *Maher v. Minister for Agriculture and Food*.[113] In that case the plaintiff farmers, who were not at that time milk producers themselves, had leased their milk quotas to other producers from which they derived an income. They challenged the constitutionality of a ministerial order which directed them to either sell back their quotas at par value[114] or else to resume milk production and cease the leasing of the quota. The Supreme Court held that the order was 'necessitated' by the obligations of the EU milk quota system and was, accordingly, immune from constitutional review. The Court added for good measure that milk quotas were creatures of EU law and as the Court of Justice had ruled that such quotas were not in themselves a species of property rights,[115] such quotas could not be regarded as a form of property rights for the purposes of Irish constitutional law.

The courts will not, however, interpret national legislation affecting fundamental rights in a manner which is *contra legem*, even if the ultimate consequence is that the national legislation is interpreted in a manner which is contrary to the intentions of the relevant EU directive.[116]

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 Under the Treaty Establishing the European Stability Mechanism (ESM Treaty), Member States may be required to contribute funds to the ESM that in several countries amount potentially to a large proportion of the annual state budget. In Ireland, the liability of the Irish State under the ESM Treaty is 11.1454 billion EUR; the projected Irish Government expenditure for 2015 is 50 billion EUR, and thus the exposure represents some 22% of the Irish annual budget. The use of such funds is not subject to democratic control or judicial review, and the 85% majority rule means that smaller states have no say over the use of the funds. The constitutionality of the ratification of the ESM Treaty was, however, directly challenged in *Pringle v. Government of Ireland*.[117] Part of the challenge was to the validity of the ESM Treaty itself as a matter of EU law. This aspect of the proceedings ultimately resulted in a reference by the Supreme Court to the Court of Justice which, as is well known, sustained the validity of the treaty.[118] Independently of

[113] [2001] IESC 32, [2001] 2 IR 139.

[114] I.e. at a price lower than the prevailing market price.

[115] See e.g. Case 2/94 *Bostock* [1994] ECR I-00995.

[116] See e.g. *Albatross Feeds Ltd. v. Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 IR 271.

[117] [2012] IESC 47, [2013] 3 IR 1.

[118] Case C-370/12 *Pringle* [2013] ECLI:EU:C:2012:756.

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that decision, however, a majority of the Supreme Court upheld the constitutionality of the ratification of the ESM Treaty without a referendum.

The judgments of the Court are lengthy and complex and do not lend themselves to an easy summary. Both the majority judgments and the minority judgment spend much time on the implications of the earlier *Crotty* decision.[119] While the majority judges acknowledged the serious implications of the ESM Treaty, they considered that unlike Title III of the Single European Act which was at issue in *Crotty*, the ESM Treaty did not involve an abdication of or the fettering of the executive power of the State. They stressed that, on the contrary, ratification of the Treaty involved the exercise of the executive power of the State in the manner contemplated by Art. 29 of the Constitution. The dissenting judge, Hardiman J., dissented principally on the basis that the ESM Treaty

> involves a transfer of sovereignty to a degree that makes it incompatible with the Constitution when one applies the principles set out by this Court in *Crotty*, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland.[120]

2.7.2 No significant constitutional issues have been raised with regard to the Banking Union.

2.7.3 Ireland was in an EU sponsored bailout from 2010 to 2013. This bailout proved necessary after Ireland had to spend enormous sums rescuing its banks at taxpayers' expense during 2008–2010, the costs of which threatened to overwhelm the financial stability of the state. Even prior to that period, there had been a series of fiscal retrenchments from the onset of the financial crisis in the mid-summer of 2008. During this period, from 2009 onwards, there were a series of emergency measures reducing public sector pay and other disbursements from public moneys through the Financial Emergency Measures in the Public Interest Acts. The courts have, moreover, almost always consistently rejected all challenges to executive or other decisions designed to give effect to the austerity and deficit reduction programme. Thus, the constitutionality of legislation affecting the pension payments of public servants with privately funded pensions[121] or effecting significant reductions in payments to pharmacists[122] or payments to police officers[123] has been upheld, even though by definition the legislative measures in question adversely affected

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[119] *Crotty v. An Taoiseach* [1987] IR 713.

[120] In his dissent, Hardiman J. also drew attention to other potential implications of the Treaty for the budgetary process prescribed by the Constitution. For example, although Art. 17.2 provides that no money shall be appropriated save on a recommendation to the lower House, Dáil Éireann, by the Taoiseach, '[w]hat would be the position, having regard to Art. 17.2, of a future Government, Taoiseach, who did not wish to approve, or to recommend, an appropriation for payments to the ESM to Dáil Eireann?'

[121] *Unite the Union v. Minister for Finance* [2010] IEHC 354.

[122] *JJ Haire Ltd. v. Minister for Health and Children* [2009] IEHC 562, [2010] 2 IR 615.

[123] *Garda Representative Association v. Minister for Finance* [2010] IEHC 78.

contractual and other entitlements protected by the property provisions contained in Art. 40.3.2 and Art. 43 of the Constitution. The courts have likewise rejected all claims based on legitimate expectations in relation to changes to a teachers' early retirement scheme[124] or in sick pay benefits for public servants,[125] with the courts expressly citing the financial crisis as a justification.

There is, perhaps, only one case of this kind where a claimant has succeeded: *Dellway Investments Ltd. v. National Asset Management Agency*.[126] In that case the Supreme Court held that the principles of fair procedures were violated when the performing loans of the plaintiff company were transferred to the National Asset Management Agency (NAMA) without giving that company an opportunity to be heard on the matter. NAMA was the 'bad bank' established by the Oireachtas in the wake of the property and banking collapse designed to take major debtors off the books of the Irish banks, so that they could resume lending again in the ordinary way. The Court held that the transfer of these loans to NAMA in practice unambiguously signalled to the markets that there were serious solvency issues arising in respect of the company in question. It followed that the applicant company was entitled to be heard on this question prior to such transfer.

While the decision in *Dellway* was regarded as a major defeat for the Government, it is nonetheless significant that it was the first and only such reverse so far as the austerity programme was concerned. It is ever more significant perhaps that the decision was based on procedural grounds only, since there was no equivalent at all of the decision of the Portuguese Constitutional Court invalidating a budgetary measure adopted as part an austerity measure on proportionality or similar substantive grounds.

The High Court has also upheld the constitutionality of the legislation (Credit Institutions (Financial Support) Act 2008) giving effect to the banking sector guarantee in September 2008 which was at the heart of the financial crisis: see *Collins v. Minister for Finance*.[127] The Court held that the legislation contained sufficient principles and policies which enabled the courts to review decisions taken under the legislation and to ensure democratic accountability. The Court further rejected the argument that the appropriations clause in Art. 11 of the Constitution was violated by the 2008 Act because of the open-ended nature of the guarantee.[128]

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[124] *Curran v. Minister for Education* [2009] IEHC 378, [2009] 4 IR 300.

[125] *Garda Representative Association v. Minister for Public Expenditure and Reform* [2014] IEHC 457.

[126] [2011] IESC 14, [2011] 4 IR 1.

[127] [2013] IEHC 530.

[128] The Court said that it was sufficient for this purpose that:
'the appropriation must be for "*an object*, to an extent, and out of a *fund*, which the laws have prescribed." Applying that test to the present case, it can be said that the objects of the appropriation under the 2008 Act are clear and satisfy the requirements of Art. 17.2 [of the Constitution] Section 6(12) of the 2008 Act further provides that the payment comes from the Central Fund in the manner envisaged by Article 11. The *extent* of the payments are also clear. While, of course, the Oireachtas did not know precisely the sums which were at stake when enacting the 2008 Act, it

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2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 The number of Irish cases which have been the subject of Art. 267 TFEU references is not high, although the number has begun to rise steadily from a low base in recent years.[129] Since 2006, there has been only one instance where a reference has expressly sought the annulment of an EU measure, namely, *Digital Rights Ireland* (see Sect. 2.4).

2.8.2–2.8.3 So far as the domestic judicial review is concerned, the standard of review is mixed. There is vigorous judicial review of administrative decisions on grounds of fair procedures, adherence to procedural rules and vires. In this area the record of the Irish courts is very good indeed: one might almost regard it as exemplary. So far as substantive review is concerned, the record is more mixed; there is, to some extent, a culture of deference and unwillingness to intervene. This is especially true of specialist agencies such as planning bodies.[130] There is, however, some sign that this standard of review is regarded as too restrictive, so that a more elaborate review takes place in cases where the protection of fundamental rights is at stake.[131]

So far as domestic constitutional review is concerned, there have been some 94 declarations of unconstitutionality since 1937. While this is in some respects impressive, it might also be said that given the breadth and extent of the fundamental rights guarantees contained in the Constitution, the courts have too often looked away and not engaged sufficiently with major constitutional claims. Against that background, one cannot say from an Irish perspective that the standard of review performed by the Court of Justice in respect of proceedings against EU institutions in matters of economic regulation is lower than that which in practice prevails in ordinary constitutional and judicial review cases in Ireland.[132]

2.8.4 The Irish courts have not yet given any indication of a *Solange* style rebellion. This is perhaps because the question is to some degree pre-determined by the language of Art. 29.4.6 of the Constitution: if the matter is 'necessitated' by the obligations of EU law, then it is beyond the purview of constitutional review. The

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laid down principles and policies in s. 2 and s. 6 of the 2008 Act which circumscribe the extent of the Minister's discretion to provide financial support.'

Article 17.2 of the Constitution provides that the Dáil may not vote for the appropriation of public money without a message signed by the Taoiseach for this purpose.

[129] The Court of Justice of the European Union, Annual report 2013, Luxembourg 2014, p. 107, puts the figure at 72.

[130] See most notably the leading decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39.

[131] See e.g. *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, [2004] 2 IR 573; *Clinton v. An Bord Pleanála* [2007] IESC 19, [2007] 4 IR 701; *Meadows v. Minister for Justice and Equality* [2010] IESC 3, [2010] 2 IR 701 and *Efe v. Minister for Justice and Equality* [2011] IEHC 414, [2011] 2 IR 798.

[132] For relevant case law, see Chalmers et al. 2006, pp. 436–437.

Irish courts have, by and large, taken an accommodating view of what is 'necessitated'[133] by the obligations of Union law. While there remains uncertainty as to the extent to which discretionary decisions taken within the purview of EU law can be described as 'necessitated' for this purpose, Treaty obligations, decisions of the Court of Justice and the method of implementation of EU legislative measures can all be regarded as 'necessitated' obligations required by EU law.

2.9 Other Constitutional Rights and Principles

2.9.1 The other major constitutional issue which has arisen is the method of implementation of EU directives. The Irish courts have, by and large, facilitated the implementation of EU legislative measures by means of ministerial orders made under the European Communities (Amendment) Act 1973, with the Supreme Court reasoning that the practical necessity of transposing such statutory instruments in this fashion means that this method of implementation is itself 'necessitated' and, hence, immune from constitutional review by reason of Art. 29.4.6 of the Constitution.[134] Following two further decisions which invalidated statutory instruments that were found to have by-passed the prohibition on the creation of indictable offences by means of statutory instruments,[135] the European Communities Act 2007 now expressly permits a statutory instrument to give effect to EU legislative requirements and to create an indictable offence for this purpose.[136] This is further discussed in Sect. 1.4.1 above.

2.10 Common Constitutional Traditions

2.10.1 Much of the contemporary Irish historical constitutional scholarship has stressed the extent to which many of the substantive provisions have drawn not only on the US Constitution and the UK common law constitutional historical heritage,[137] but also on a variety of continental constitutions, most notably the Weimar Constitution of 1919.[138] A good example is provided by Art. 40.5 of the

[133] Most notably in cases such as *Meagher v. Minister for Agriculture and Food* [1994] 1 IR 329. See generally Barrett (2013), pp. 154–155.

[134] *Meagher v. Minister for Agriculture and Food* [1994] 1 IR 329.

[135] *Kennedy* v. *Ireland* [2005] IESC 36, [2007] 2 IR 45, *Quinn v. Ireland* [2007] IESC 16, [2007] 3 IR 395.

[136] Provided that the maximum penalty is now greater than five years imprisonment.

[137] See generally, Keane 1992, p. 25; Jaconelli 1992; O'Donnell 2014, p. 139.

[138] See generally, Kelly 1983; Hogan 2014, p. 155.

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Constitution which provides: 'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'
This has a direct counterpart in Art. 13 of the German Basic Law, which in turn had a corresponding provision in Art. 115 of the (1919) Weimar Constitution. The latter, however, also drew on earlier sources, such as Art. 3 of the French Constitution of 1848, which provided that the 'residence of every person dwelling in French territory' was 'inviolable'.

It is indeed striking that there has been little comparative analysis of similar constitutional provisions of this kind, of which many unexplored examples abound. As Besselink and others have noted, the references in the case law of the Court of Justice and, for that matter, of the European Court of Human Rights to national constitutions is often perfunctory.[139] Two reasons may be advanced for this. The first is quasi-legal in nature, since it suits the two European Courts to fashion a new homogenised European jurisprudence in matters of human rights which, while acknowledging the original national sources, seeks to carve out a new jurisprudence which is divorced from and independent of national case law and traditions. The second reason is that it is now almost forgotten that the European standards were (originally) designed to set minimum benchmarks. Thus, for example, the drafters of the ECHR deliberately rejected arguments which had been advanced by, *inter alia*, the French delegation that Art. 8(1) should protect the 'inviolability' of the dwelling and the 'natural rights deriving from marriage and paternity and those pertaining to the family'. The compromise which was arrived at was that Art. 8(1) should simply 'respect' those rights, leaving each state free to have higher domestic constitutional standards.[140]

2.10.2 There are in this context practical mechanisms for rendering the 'common constitutional traditions' a more direct and relevant source in EU law. In the *Schrems* data protection reference, the Irish High Court drew attention to the manner in which the Irish courts had protected the inviolability of the dwelling and suggested that, drafting differences notwithstanding, Art. 7(1) of the Charter might well be interpreted in a similar fashion.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 It is, perhaps, not altogether surprising that Art. 53 of the Charter was interpreted in a restrictive fashion by the Court of Justice in *Melloni*. In effect, Member States are not permitted to have higher constitutional standards where this would jeopardise the uniform application of EU law. Not, perhaps, for the first time,

[139] Besselink 2012, pp. 137–138.
[140] Hogan 2014, pp. 167.

the wording of the Charter is apt to mislead. As thus interpreted, Art. 53 of the Charter permits Member States to have their own national constitutional standards and to apply them to those cases where either the Charter or, for that matter, EU law is not engaged. It would nonetheless have to be admitted that any other interpretation of Art. 53 would potentially jeopardise the uniform application of EU law.

There has, however, been little discussion in Ireland on whether the Court of Justice should properly set the level of Charter rights at the level of the ECHR, or whether there are areas where there may be a case for increasing the standard to match that provided under the Constitution. This is mainly because it is recognised that the ECHR is the only common template among the Member States which would justify this approach.

2.12 *Democratic Debate on Constitutional Rights and Values*

2.12.1 Fair Trials International has noted that the adoption of the European Arrest Warrant Framework Decision was marked by 'the lack of public engagement in the area of defence rights and the almost total absence of political debate on the subject' (cf. the Questionnaire). This was certainly true in Ireland as much as elsewhere in the EU. The elaborate nature of the safeguards and protections contained in the 2003 Act is largely due to the fact that the Minister for Justice at the time[141] was a very prominent lawyer who was greatly interested in the entire EAW process and its implications for the administration of criminal justice. There has been even less debate on the question of the EU Data Retention Directive. Unlike in other jurisdictions – such as e.g. Germany – data protection is regarded as an exotic topic which excites few outside of a cadre of specialists.

There is little doubt but that, as the Irish *Meagher* and *Maher* case law shows, the need for the speedy and effective transposition of EU directives and the supremacy of EU law dilutes the opportunity for democratic deliberation, constitutional review and accommodation of important constitutional issues. In *Meagher* the Supreme Court upheld the constitutionality of a procedure whereby a fixed time limit contained in earlier legislation was amended by ministerial order. The Court reasoned that in the circumstances of the substantive prosecution at issue in that case,[142] it was necessary for the time limit[143] to be extended to ensure an effective

[141] Michael McDowell S.C. Mr. McDowell was a former Attorney General who later held the office of Tánaiste (Deputy Prime Minister).

[142] The applicant had been prosecuted for the possession of illegal animal growth promoting substances which Member States were required by a series of directives to make illegal.

[143] The time limit was extended from six months (in legislation) by two months (by ministerial order).

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prosecution system for these offences.[144] This system of amending legislation by ministerial order was accordingly deemed to be 'necessitated' to give effect to European Union obligations and was accordingly immune from constitutional challenge by reason of Art. 29.4.6 of the Constitution.[145]

Other examples can be given where the decisions of the Court of Justice or the European Court of Human Rights have also effectively lessened or weakened the protection of domestic fundamental rights provided for in Irish constitutional law. One example from the sphere of immigration law and family life is the 'insurmountable obstacles' line of case law from the ECtHR where that Court has held that there is, generally speaking, no objection on Art. 8 grounds to the deportation of a spouse to that spouse's country of origin where it is reasonable to expect the other spouse to join him or her.[146] This test has proved very influential with the Irish courts, even though the practical effect of this decision may be that non-national parents are in effect obliged to take their Irish citizen children back with them to their country of origin.[147] This test has been applied even though Art. 8 ECHR refers merely to 'respect' for family life, whereas Art. 41.1.1 of the Constitution guarantees the 'inalienable and imprescriptible rights' of the family. Some later judgments have dissented from the proposition that the 'insurmountable obstacles' test is the appropriate test to apply in view of the higher standard of protection contained in Irish constitutional law, 'as some weight must be given to the even more emphatic description of family rights contained in Article 41' as compared with Art. 8 ECHR.[148]

In other cases, however, the Court of Justice has shown the way. Thus, for example, the Court's own decisions in *Chen*[149] and *Ruiz-Zambrano*[150] have illustrated how the right of European citizenship contained in Art. 20 TFEU will serve to protect the (third country) parents of minor children who are citizens of the

[144] As Blayney J. put it ([1994] 1 IR 329, 360:
'The relevant directives here were binding on the State from the moment they were adopted, "as to the result to be achieved." One result to be achieved clearly was the creation of effective sanctions for the enforcement of the measures contained in the directives. So the State was bound to introduce effective measures, and if this necessitated adopting a measure which impliedly amended an existing statute, that measure would prevail over the statute because it was in substance a measure of Community law. It is really only in form that it is part of the domestic statute.'

[145] The reasoning of the Irish Supreme Court in *Meagher* has met with almost universal criticism in the academic literature. See e.g. the comments of Fahey 2010 at 50 describing the decision as 'an unfortunate case of the Irish judiciary demonstrating yet again that they are excessively pragmatic in this area of the law'.

[146] See, e.g., *Boultif v. Switzerland,* no. 54273/00, ECHR 2001-IX; *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII.

[147] See, e.g., *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, [2010] 4 IR 45.

[148] See, e.g., *AO v. Minister for Justice* [2012] IESC 79, *EA v. Minister for Justice* [2012] IEHC 371.

[149] Case C-200/02 *Chen* [2004] ECR I-09925.

[150] Case C-34/09 *Ruiz-Zambrano* [2011] ECR I-01177.

Member State in question from deportation where this would have the 'effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. A majority of the Irish Supreme Court had previously reached exactly the opposite conclusion in the context of the operation of the rights of citizenship conferred by Art. 2 and Art. 9 of the Constitution.[151] That Court has now – tacitly at least – acknowledged that its earlier decision was wrong and that it must be re-considered in the light of *Chen* and *Zambrano*.[152]

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1–3.1.4 International relations are regulated in Art. 29 of the Constitution, where the relevant sections provide as follows:

> 1 Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. …
> 3 Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. …
> 5 1° Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.
> 2° The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.
> 3° This section shall not apply to agreements or conventions of a technical and administrative character.

As we have already noted, where an international treaty involves a significant derogation from national sovereignty or materially affects the international operation of executive, legislative or judicial powers, a referendum will generally be required to effect constitutional change. This has been the basis of the various constitutional amendments dealing with EU Treaty change, but it also explains the basis for the constitutional amendment dealing with the Belfast Agreement in respect of Northern Ireland and the ratification of membership of the International Criminal Court. The relevant provisions include the following:

> 7 1° The State may consent to be bound by the British-Irish Agreement done at Belfast on the 10th day of April, 1998, hereinafter called the Agreement. …
> 9 The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.

[151] *AO and DL v. Minister for Justice* [2003] 1 IR 1.

[152] *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 IR 152.

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Where an international treaty involves a charge on public funds, it must be laid before Dáil Éireann (cf. Art. 29.5.2 above) and the courts will not give effect to any international treaty where this constitutional requirement has not been complied with. For example, a ministerial order giving effect to an Irish-US extradition treaty was found unconstitutional, as the treaty provided for a charge on public funds and it had not received the prior approval of Dáil Éireann.[153]

3.2 The Position of International Law in National Law

3.2.1–3.2.2 Article 29 of the Constitution commits Ireland to the classic position of the dualist state, since Art. 29.6 provides that an international agreement has force in domestic law only to the extent that such is provided by the Oireachtas itself:

> No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

In recent times both the Supreme Court and the Court of Appeal have stressed that the effect of this provision is that international agreements do not have, as it were, direct effect in Irish law unless the Oireachtas has clearly indicated to the contrary.[154]

Beyond the rules outlined above and in the preceding section, the Irish courts have nonetheless faithfully given priority to international treaty obligations which have been incorporated into EU legislative instruments. If, as nowadays is often the case, these treaty obligations have been subsumed into an EU legislative instrument, then this will have the effect that, by virtue of Art. 29.4.6 of the Constitution, the treaty (as thus subsumed into EU law) is beyond challenge on domestic law grounds. This can be seen in cases involving the European Arrest Warrant,[155] but perhaps a better example can be found in one aspect of the *Bosphorus Airways* litigation.

At the height of the Yugoslav wars, economic sanctions were imposed by means of Council Regulation 990/93/EEC. These sanctions in turn reflected the terms of a UN Security Council resolution to the same effect. Acting pursuant to the sanctions Regulation, the Irish authorities had impounded an airplane owned by Yugoslav Airways but which had been the subject of a dry lease to Bosphorus. The airplane in

[153] *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] IR 201.

[154] See, e.g., *McD. v. L.* [2009] IESC 81, [2010] 2 IR 199 (European Convention on Human Rights), *Sweeney v. Governor of Loughan House Open Prison* [2014] IESC 42, [2014] 2 ILRM 401 (European Convention on the Transfer of Sentenced Persons); *McCoy v. Shillelagh Quarries Ltd.* [2015] IECA 28 (Aarhus Convention outside the scope of EU law).

[155] This unhappiness is most notably visible in the judgments of McKechnie J. and MacMenamin J. in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24.

question had never returned to Yugoslavia, but had been principally utilised for the purpose of charter flights between Turkey and the rest of Europe. In the High Court Murphy J. stressed that the lease in question was *bona fide* and did not represent an attempt to circumvent the sanctions in these regulations. Accordingly, he declined to hold that the 1993 Regulation should apply to the situation presented by this case:

> As long as the position is that no citizen of Serbia or Montenegro has any use or control over the aircraft in question or the opportunity to receive any income derived from it, then it would seem to me that the regulations have achieved their purpose fully and the impounding of the aircraft would constituted a wholly unwarranted interference in the business of Bosphorus.[156]

The state appealed to the Supreme Court, which in turn made a reference under Art. 267 TFEU (then Art. 177) to the Court of Justice. That Court, however, saw no real difficulty in the manner by which the sanctions operated. It stated that all sanctions regimes might impact on innocent third parties. It continued:

> Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators….. the aim pursued by the sanctions assumes especial importance, which is, in particular, in terms of Regulation No 990/93 and more especially the eighth recital in the preamble thereto, to dissuade the Federal Republic of Yugoslavia from 'further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in this Republic.
>
> As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.[157]

While *Bosphorus Airways* may properly be regarded as a special – almost unique – case so far as Ireland is concerned, it may nonetheless be thought to illustrate how the decisions of global institutions such as the UN see justice through the prism of a global governance and are, perhaps, less sensitive to the appeals of individuals affected by such measures. No one doubted the grave and terrible humanitarian consequences of the Bosnian War, but it might be thought that the Court of Justice made undeservedly little of the argument that the operation of the sanctions regime had a disproportionate effect on what the Irish court regarded as a *bona fide* leasing arrangement.

[156] *Bosphorus Airways v. Minister for Transport* [1994] 2 ILRM 550, 560, *per* Murphy J.

[157] Case C-84/95 *Bosphorus* [1996] ECR I-03953.

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3.3–3.4 Democratic Control and Judicial Review

See Sects. 3.1 and 3.2.

3.5 IMF Bailout Programme

3.5.1–3.5.2 When the bail-out package was announced in December 2010, the issue arose as to whether the agreement with the IMF was an international agreement which involved a charge on public funds for the purposes of Art. 29.5.2 of the Constitution. If it was, Art. 29.5.2 would require that the agreement receive the prior approval of Dáil Éireann (the lower House of Parliament). Although the IMF denied that the agreement was an international agreement for this purpose on the basis that it was a simply a 'letter of intent' to enter into a conditional assistance programme, it awaited the formal approval of the Dáil[158] before the bail-out package was agreed with the Irish Government.

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The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation

Constantinos Kombos and Stéphanie Laulhé Shaelou

Abstract The Constitution of Cyprus (1960) is described in the report as unique and as a hybrid model. On the one hand, it has been seen as one of the world's most rigid and detailed constitutions; on the other hand, some parts are governed by the doctrine of necessity, given the division of the country. Special features include a strong protection of social rights and of the right to property; the protection granted to these and some other rights goes beyond the protection afforded by the ECHR. Cyprus has a mixed model of constitutional review. Fundamental rights based review is strong, with provisions interpreted in favour of the individual in cases of doubt. Resorting to constitutional amendments has become a tool for addressing issues related with the idiosyncrasies of the Cypriot Constitution. The use of this approach has become more frequent in the last two decades, whereas there had been a persistent refusal to amend the Constitution in the previous years. With regard to EU law, the Constitution has been amended to remove conflicts, including by virtue of Art. 1A, modelled loosely on the blanket EU clause of the Irish Constitution. At times, the amendments have even proved to be excessive, e.g. as regards an amendment pertaining to the EU Data Retention Directive that was subsequently annulled. The Constitution has also been amended to remove barriers to the European Arrest Warrant, alas in an incomplete way, at least initially; in parallel,

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the initially rights-protective approach of Cypriot courts has gradually been watered down. The cases regarding EU sugar stocks measures raised issues regarding the principles of legitimate expectations and non-retroactivity of charges. The report raises the issue of a lack of debate about constitutional limits to EU law. It highlights the merits of a dissenting judicial opinion in the so-called 'bail-in' case that cautioned against elimination of the rule of law and judicial protection.

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Data Retention Directive and excessive constitutional amendment
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1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1 The Cypriot constitutional paradigm is unique in content and atypical in character, and it can be argued that as such it has no comparative parallel at the international level. That is manifested in two main ways.

First, there is the peculiarity of the constitutional setting whereby there is a stark and material difference between the provisions of the Constitution of 1960 and their actual application since 1964, when the doctrine of necessity was introduced by the Supreme Court in the landmark judgment *Ibrahim*.[1] The doctrine of necessity has redefined constitutional law and created two parallel constitutional worlds. On the one hand, there are the constitutional provisions that remain in full formal force; they provide for a bi-communal structure that assumes the presence and participation of both Turkish and Greek Cypriots and for a constitutional system with organs of the state that are reflective of bi-communalism and with a plethora of strict checks and balances on the same basis. This can be called 'the silent Constitution'. On the other hand, there is the *ad hoc* suspension of the invalidity rule that attributes hierarchical supremacy to the Constitution of 1960 in those instances that can be justified under the doctrine of necessity. This can be called 'the pragmatic Constitution'.

Therefore, the primary peculiarity of the Cypriot constitutional system is that both 'Constitutions' coexist to the point where a constitutional provision and

[1] *The Attorney General of the Republic v. Mustafa Ibrahim* [1964] CLR 195. For analysis see Kombos 2015a, b; Polyviou 2013, pp. 26–64; Polyviou 2015a, pp. 32–124; 2015b.

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constitutional reality are two completely different things. For example, Art. 1 provides for a Turkish-Cypriot Vice-President, but no such official has assumed duties since 1963. Moreover, the Constitution in Art. 133(1) provides for a Supreme Constitutional Court composed of three members (a Turkish-Cypriot, a Greek-Cypriot and a presiding non-Cypriot). Since 1964, there is instead a Supreme Court that was founded on the basis of Law 33/64, which included provisions that were in direct contradiction with Art. 133. Nonetheless, the Supreme Court continues to function regardless of the rule in Art. 179 of the Constitution that attributes hierarchical supremacy to the constitutional provisions.

At this point, it is useful to elaborate on the doctrine of necessity, which was introduced on the basis of the founding premise that the Constitution exists for the state and when the state is in grave danger of collapse, constitutional provisions have to give way. In response to this dilemma, the Supreme Court enabled the suspension of the application of certain fundamental constitutional provisions yet without in any way altering any of those provisions in the formal sense. The doctrine of necessity is an atypical response to an atypical constitutional situation and is now in its fifth decade in Cyprus.[2] Therefore, the constitutional provisions remain fully effective in theory but where the doctrine of necessity is applied, their content and effectiveness is numbed, neutralised and non-applicable. The preceding approach can be explained by reference to the German theoretical perception that distinguishes between the concept of hierarchical supremacy leading to invalidity (*Geltungsvorrang*) and the concept of priority in application (*Anwendungsvorrang*). Where the doctrine of necessity applies, the constitutional norm is rendered non-applicable in an exceptional and extraordinary manner, thus removing the invalidity (*Geltungsvorrang*) function and, as a corollary, the contested legal norm acquires a *de facto* priority in application (*Anwendungsvorrang*).[3]

Therefore, the classic perception that emphasises the distinction between 'Constitution' and 'constitutional law' is especially relevant to the Cypriot context, given the fact that the Constitution of 1960 must be read in the light of the doctrine of necessity that, since 1964, offers the pillar on which the Constitution relies for its preservation. In this vein, 'Constitution' refers to the constitutional provisions of the Constitution of 1960, while 'constitutional law' refers to the application of those provisions through the filter of the doctrine of necessity. Through the *Ibrahim* judgment, the doctrine of necessity in effect redefined the scope, content, structure and philosophy of the Constitution, yet without formally amending any of its provisions.[4]

The second distinctive character of the Cypriot constitutional context relates to the judicial approach that is characterised by cosmopolitanism and by a traditional reliance on the comparative methodology.[5] It can be argued that the national system

[2] Loizou 2001, pp. 12–31; Nicolaou 2000, pp. 105–34; Evriviades 1975; Tornaritis 1980, pp. 54–77.

[3] Kombos 2015a, Chap. 2.

[4] Kombos 2015a.

[5] Kombos 2015b, Chap. 3; Hatzimihail 2013.

was developed with direct references to foreign jurisdictions. The nexus with comparative law as a special feature of the Cypriot legal order has been explained with reference to historical factors.[6] These relate to the organic evolution of the legal system, thus classifying Cyprus as part of 'the mixed-jurisdictions sub-genre'.[7] This argument is supported with reference to the areas of family law and contract law[8] where there is a considerable body of evidence pointing to a strong presence of common law principles. For example, Hatzimihail argues that the three main Codes of the Cypriot legal system are directly derived from common law and especially from the Nigerian Criminal Code, the Indian Contract Code and also the Indian Civil Wrongs Code.

In the field of public law, the creation and evolution of administrative law has been marked by the strong influence of the Greek *droit administratif*.[9] This is evident in the form of frequent reliance on Greek academic works and on the case law of the Greek *Conseil d'Etat*, to the point where it is reasonable to argue that it is rare to find a decision in the area of administrative law where reference is not made either directly or indirectly to Greek academic works and/or Greek jurisprudence. It must be noted that the codification of administrative law took place in 1999, and thus until that point the evolution of administrative law by the Supreme Court took place on a case-by-case basis.

The Cypriot legal system has also more generally used the comparative method either as an independent source of law or as an auxiliary tool for supplementing existing constitutional provisions. Reference to foreign jurisdictions extends beyond the Greek context.[10]

The use of the comparative method – strong in intensity and dense in frequency – is indicative of a willingness of the Supreme Court to be open to external sources of influence. This characteristic of the judicial approach represents a benchmark for analysing the degree and form of receptiveness that the Supreme Court has illustrated in relation to EU law. The peculiarity relates to the scale and intensity of the use of the comparative method on the one hand, and to the unjustified entrenchment of EU law concepts and principles on the other.

As a corollary, the rather bold opening statement about the uniqueness of the Cypriot constitutional system is not an exaggerated claim influenced by an inherent 'need' to give priority and importance to the national constitutional idiosyncrasies and peculiarities. Moreover, the preceding statement is not an expression of constitutional patriotism dictated by an anachronistic inward approach to public law

[6] Hatzimihail 2013.

[7] Ibid., p. 39.

[8] Ibid.

[9] Hatzimihail 2013, p. 79.

[10] Kombos 2015b, Chap. 3; Hatzimihail 2013.

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that is dictated by a pre-existing familiarity with national legal doctrines and thought.[11]

Overall, the Cypriot constitutional culture reflects the normative and conceptual modifications that have affected the system after the application of the above-mentioned doctrine of necessity that has redefined constitutional law in pragmatic terms.[12] Accordingly, the Cypriot example can be classified in a hybrid category that falls between classical and evolutionary constitutions.[13] The former tend to have a strict and pure legal character that is founded on rigidity, normative hierarchy and effective judicial protection, while the latter tend to be more evolutionary, historic and political in nature.[14] In the case of Cyprus, the Constitution of 1960 is founded on strict adherence to the hierarchical supremacy of the constitutional provisions (Art. 179), combined with a permanency of the system that is reflected in the long list of unamendable provisions (Art. 182 and Annex III) whereby 48 out of the 199 constitutional provisions have perpetual status. It must be noted that in that list, only one article relates to fundamental human rights (Art. 23 on the right to property). To that effect, De Smith has argued that the Constitution of 1960 is 'the most rigid, detailed and complicated constitution in the world',[15] and has also stated that

> [t]he Constitution of Cyprus is … weighted down by checks and balances, procedural and substantive safeguards, guarantees and prohibitions. Constitutionalism has run riot in harness with Communalism. The Government of the Republic must be carried on, but never have the chosen representatives of a political majority been set so daunting an obstacle course by the constitution makers.[16]

Therefore, the Cypriot constitutional system is inherently a classical Constitution yet with certain important and influential special features. First, the Constitution is the outcome of international law applied in an unusual form. Specifically, the nature of the process of decolonisation and the actual method for the transfer of power to a newly formed independent state in 1960 were decided in principle and also in detail in Zurich, by Greece and Turkey, in the physical absence of the legally responsible entity that was the colonial power (Great Britain). That paradox is significant, as Great Britain within days of the conclusion of the international agreement between Greece and Turkey stated its acceptance of all the terms with just one single addition in relation to the status of the military bases that it was to retain on the island. The Zurich agreement had 17 points that would form the organisational core of the new state, and those were to create the framework and the content of the new Constitution. Thus, the right of self-determination and, more importantly, the right to exercise primary constitutive power found no expression in the case of Cyprus.

[11] Legrand 2002, pp. 246 and 255.

[12] Soulioti 2006.

[13] Birkinshaw and Kombos 2009; Kombos 2010a.

[14] Besselink 2006, p. 113 et seq.; Albi 2005, p. 22 et seq.

[15] De Smith 1964, p. 285.

[16] Ibid.

No referendum was called and no constituent assembly was formed. Secondly, the Cypriot example is also characterised by the attribution of the role of guardian to Great Britain, Greece and Turkey through the Treaty of Guarantee. Their role included the safeguard of the constitutional status quo, thus creating an impasse in the event of the need to modify the Constitution and its philosophy because of functionality problems. Thus the Cypriot Constitution is simultaneously a classical constitution and also deviates from that blueprint due to the restriction of the exercise of constitutive power at the moment of inception and at any later stage.

At the same time, the Cypriot constitutional system is undoubtedly also an evolutionary constitution because the application of the doctrine of necessity after *Ibrahim* has created a parallel constitutional world, as explained above. Nonetheless, the maintenance at a formal and normative level of the original Constitution, even after the application of the doctrine of necessity, has the effect of excluding the characterisation of the system as purely evolutionary.

By way of summary, the Cypriot paradigm thus represents a hybrid model that does not fall in either of the two categories in a mutually exclusive manner, but rather belongs to both categories.

1.1.2 The position of the Constitution in such an open and evolving constitutional system that has been redefined in a fundamental way by the doctrine of necessity remains central with regard to the rationale of the judiciary. The rationale and the role of the Constitution remain paramount in the sense of ensuring full effective judicial protection, the rule of law, separation of powers and the principle of legality. The concept of sovereignty and the organisation of the state take a subsidiary role in the approach of the Court for different reasons. As regards the organisation of the state, the doctrine of necessity has an important impact, since it enables the restructuring of state organs in order to ensure functionality. In terms of the concept of sovereignty, the Supreme Court has in the past placed emphasis on the need to preserve the formal status of constitutional provisions by restricting the possibility of amendments as a way to ensure the preservation of the Republic at the level of public international law (see Sect. 1.2). Overall, the emphasis is on the rule of law and effective judicial protection, and these can be considered to be the foundations for the judicial approach towards the Constitution.

The Courts have to strike a delicate balance between the actual constitutional provisions and the application of the doctrine of necessity; in general, two categories of cases can be identified. First, there are the cases where the full application of a constitutional provision is not possible due to the withdrawal of the Turkish-Cypriot Community, thus triggering the application of the doctrine of necessity. Secondly, there are the cases where a constitutional provision has remained unaffected by the withdrawal of the Turkish-Cypriots and, in those instances, the Constitution remains the paramount guiding source. One such area is the protection of fundamental rights that the Constitution fully provides for in Part II.[17] In such cases the doctrine of necessity has remained non-applicable almost

[17] Kombos and Pantazi 2012; Kombos et al. 2015.

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entirely[18] because the Court places the centre of gravity on the protection of fundamental rights (see Sect. 2.2).

One special feature of the Cypriot Constitution in relation to fundamental rights that can be seen as part of the national constitutional identity is the protection of social rights. The Constitution by a series of articles guarantees the individual certain social and economic rights, which are to be exercised within the framework of the public interest and common good (see Sects. 2.1–2.2).

1.2 The Amendment of Constitution in Relation to the European Union

1.2.1–1.2.4 Prior to EU accession, the Constitution was amended in relation to the EU only as regards the independence of the Central Bank. The Fourth Constitutional Amendment, introduced by Law 104 (I)/2002, amended Arts. 147, 118 and 119 of the Constitution to ensure the independence of the Central Bank in terms of restricting the dismissal of the Governor and also to exclude any political supervision of the Bank.

After EU accession, the Constitution was amended in 2006 by the Fifth Amendment of the Constitution Law[19] in order to accommodate the introduction and application of the basic principles of EU law.

By way of the history of its introduction, during the lengthy process of implementation of the *acquis communautaire*, the need to amend the Constitution was considered, and a formal recommendation was made to extensively amend the Constitution in order to facilitate accession to the European Union.[20] However, at first the decision was taken that such a course of action was not necessary for three main reasons that are related to the external recognition of the Republic, to the limits of the doctrine of necessity and to the complexity of the provision governing constitutional amendments. In particular, the Supreme Court initially,[21] in the 1980s, rejected attempts to amend the Constitution on the basis that the votes of the Turkish-Cypriot Members of Parliament were required under Art. 182(3) of the Constitution. This could have been remedied through the doctrine of necessity. Nonetheless, the approach of the Supreme Court was to reject the use of the doctrine, which is deemed an exceptional measure to be used in the most extreme situations where the existence of the state is endangered. As such, its application

[18] For the rare examples where the opposite applied see Kombos 2015a, Chap. 6.

[19] Law No. 127(I)/2006, Official Gazette No. 4090, 28.7.2006, Annex I(I), p. 1372, available in English at http://www.olc.gov.cy/olc/olc.nsf/all/EC240D2A9413ABBB4225793A00403484/$file/The%20Fifth%20Amendment%20of%20the%20Constitution%20Law%20of%202006.pdf?openelement.

[20] Lycourgos 2010, pp. 102–03.

[21] *President of the Republic v. House of Representatives* [1985] 3 CLR 2224; *President of the Republic v. House of Representatives* [1986] 3 CLR 1439.

must have a temporary effect. A constitutional amendment would have a permanent effect, and hence the doctrine of necessity cannot be used to enable the enactment of a constitutional amendment.[22] Although that approach was subsequently reversed, the crucial point is that the rationale against constitutional amendments remained relatively strong and influential.

In relation to EU accession, it was thought that a solution would be found through a judicial method whereby the provisions of the Constitution would be interpreted in the light of Art. 169 of the Constitution that refers to the status of international treaties and also in the light of the doctrine of necessity. As a result, it was hoped that the courts would enable the effective and efficient participation of the Republic in the EU by harmoniously construing the obligations arising from EU membership with national constitutional law.

The key in the preferred approach was Art. 169(3) of the Constitution that grants superior force against any conflicting municipal law to ratified Treaties (see Sects. 3.1–3.2). This basic rule was supplemented by the adoption of Law No. 35(III)/2003, with which the House of Representatives approved the ratification of the Accession Treaty. The Law contained the important Art. 4, which stated in clear terms that '[t]he rights and obligations deriving from the Treaty [of Accession] are directly applicable in the Republic and take precedence over any contrary legal or regulatory provision'. The formula used secured the primacy of EU law against all conflicting acts originating from national law, yet it fell short from regulating the relationship between national constitutional law and EU law.

This obvious shortcoming emerged in *Attorney General of the Republic v. Costas Constantinou*.[23] The case concerned the implementation of the European Arrest Warrant (EAW) Framework Decision (FD)[24] by Law 133(1)/2004, and the issuing of an order to surrender Mr. Constantinou to the United Kingdom, which will be discussed in greater detail in Sect. 2.3. The Supreme Court held that the Framework Decision could not prevail over Art. 11 of the Constitution that expressly prohibits the extradition of Cypriot nationals,[25] despite the fact that the Supreme Court acknowledged the case law of the Court of Justice of the European Union (CJEU) on the principle of primacy of EU law. Accordingly, the Supreme Court declared the incompatibility of the national implementing law with the Constitution, which according to Art. 179 of the Constitution renders the law invalid. Moreover, the Supreme Court in effect indirectly dictated the need for a constitutional amendment without stating so, thus giving the impression that the solution remains within the exclusive powers of the other branches of the state. This approach is in line with the principle of separation of powers, but it also creates an understanding that the subsequent normative accommodation of the primacy of EU

[22] Kombos 2015a, Chap. 6.

[23] [2005] 1 CLR 1356.

[24] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

[25] *Attorney General v. Afamis* 1 R.S.C.C 121.

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law with regard to the Constitution must be full in order to ensure future compliance with the yardstick that the Court applied in *Constantinou*. It is in this light that one must read the subsequent Fifth Constitutional Amendment that, as will be explained below, had an unnecessarily extensive scope.

The Court on first sight safeguarded the hierarchy of the Constitution, but at the same time it opened the door for the redefinition of that hierarchical position. This was perhaps a clear outcome dictated by express constitutional provisions that limited the room for harmonious interpretation, but at the same time the open-ended invitation to amend the Constitution without defining the limits of what could be acceptable represents a serious shortcoming. Such an approach contradicts the traditional vigilance that the Supreme Court has shown with regard to constitutional amendments. In addition, the decision could be contrasted with that of the German *Bundesverfassungsgericht* in the *Lisbon Judgment*,[26] which provides an interesting example of the 'proactive approach', representing a judicial pronouncement – at the earliest possible opportunity – on what would interfere with the Constitution and the separation of powers.

In terms of the content and character of the Fifth Constitutional Amendment, which, as noted earlier, was introduced (two years) after EU accession in 2006, the original idea was to ensure the primacy of EU law in one single article of the Constitution that would then function as the point of reference for any incompatibility arising between EU law and national constitutional law. This is now Art. 1A of the Constitution. Nonetheless, it must be noted that despite the fact that introduction of an umbrella provision was the selected model, the provisions of the Fifth Constitutional Amendment took a completely different form in terms of methodology and approach. There were instead a nexus of constitutional provisions that were amended in addition to the introduction of the single umbrella provision: in addition to Art. 1A, a paragraph was added to Arts. 140 and 169, and alterations were made to Arts. 11(2) and 179 of the Constitution.

Specifically, Art. 1A states:

> No provision of this Constitution shall be considered as invalidating laws enacted, acts done or measures adopted by the Republic necessitated by its obligations as a Member State of the European Union or shall prevent Regulations, Directives or other acts or binding measures of a legislative character adopted by the European Union or by the European Communities or by their institutions or by their competent bodies under the provisions of the treaties founding the European Communities or the European Union, from having legal effect in the Republic.

It is submitted that there is a crucial problem with Art. 1A, and that problem has both formal and substantial aspects. Formally, as explained above, Art. 182(1) of the Constitution, read in combination with Annex III of the Constitution, creates a long list of non-amendable articles of the Constitution, which includes Art. 1. The addition of para. A to Art. 1 is only indirectly justified in the Preamble of the Fifth Constitutional Amendment Law as not amounting to a constitutional amendment of

[26] BVerfG, Judgment of 30 June 2009 - 2 BvE 2/08 - Rn. (1-421).

a basic constitutional provision. It is submitted that this approach is not correct and is at best playing with formalism, because an addition to any article of the Constitution cannot be construed as anything other than a constitutional amendment. At the same time, the insertion in Art. 1 was deliberate in order to pre-empt any future constitutional amendment. Moreover, it is submitted that the issue is made clear by Art. 182 of the Constitution:

> 1. The Articles or parts of Articles of this Constitution set out in Annex III hereto which have been incorporated from the Zurich Agreement dated 11th February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal.
>
> 2. Subject to para. 1 of this Article any provision of this Constitution may be amended, whether by way of variation, addition or repeal, as provided in para. 3 of this Article.
>
> 3. Such amendment shall be made by a law passed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.

Accordingly, there is a clear question about the constitutionality of the Law introducing the Fifth Constitutional Amendment. There has never before or since been any amendment of a basic constitutional provision.

Moreover, besides Art. 1A, further amendments were introduced to other parts of the Constitution – Arts. 11(2), 140, 169 and 179.

Lastly, it would have been expected that the Supreme Court would have at least examined even as *obiter* the nature and even validity of the introduction of Art. 1A; this has never happened so far. Yet, it is imperative that the Supreme Court take a position on the matter, as the issue exceeds by far the matter of primacy of EU law.

Furthermore, it would have been preferable to implement the choice of introducing an umbrella clause by amending Art. 179, which guarantees the supremacy of the Constitution and, in terms of structural coherency, it would have represented the obvious place for such a clause. As to the possible argument that Art. 179 could be further amended in the future and thus it would not present a permanent solution, the answer has three parts. First, it is not axiomatic that the Republic should make the acceptance of the principle of primacy of EU law perpetually permanent, as it can theoretically decide to exit the Union. Secondly, the introduction of the principle of primacy of EU law in Art. 179 would have the same permanency as that of Art. 1A, since nothing would restrict the House of Representatives from repealing that paragraph. Thirdly, one must balance the importance of accommodating the principle of primacy of EU law in a permanent way with the need to safeguard the non-amendable nature of the fundamental constitutional provisions, which is by far and without question the most important consideration.

The next step in the normative solution was to complement Art. 1A with the amendment of the non-basic provisions to be found in Arts. 169, 179, 140 and 11 of the Constitution. Article 179, in its amended form, reads as follows:

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> 1. Without prejudice to the provisions of Art. 1A, the Constitution shall be the supreme law of the Republic.
>
> 2. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as a Member State in the European Union.

In terms of the effect of the preceding provision, Lycourgos correctly observes that:

> [t]he combined effect of the new Art. 1A and of Art. 179 as amended, is that not only Community law but also EU law has been recognized as taking precedence over the Constitution. In that respect, the principle enshrined in the Constitution of the Republic of Cyprus preceded even the case law of the ECJ, which never expressly held that the acts adopted under the Union's third pillar – as it was at the time the fifth constitutional amendment – had precedence over national constitutional provisions.[27]

However, from the preceding approach arises a serious substantive problem: it had, at the time, the effect that *the Republic of Cyprus gave a more extensive scope and effect to the principle of primacy of EU law than what the jurisprudence of the ECJ required*. Although the issue has lost its relevance since the entry into force of the Lisbon Treaty, before that, the EU and the EC dimension had clearly been distinguished under Union law, with the ECJ jurisdiction having been limited in relation to the Second and Third Pillars. This in a comparative perspective is perhaps unprecedented. The Supreme Court remained silent on the issue.

The remaining amendments concerned Art. 11(2) in relation to extradition under the European Arrest Warrant, which will be explored in Sect. 2.3, and Arts. 140 and 169, which will subsequently be explored here.

Under Art. 140, as applied after 1964, the President of the Republic may, prior to the promulgation of any law or decision of the House of Representatives, refer to the Supreme Court for its opinion as to whether such act is inconsistent with the Constitution. With the Fifth Constitutional Amendment, this power was extended to the compatibility of a law or decision of the House of Representatives with the 'law of the European Communities or of the European Union'.

The difficulty arises from the way in which the power of the President is exercised in practice. Traditionally, the Art. 140 power was exercised in instances of a clear difference of opinion between the President and the Parliament and on matters having a non-negligible political dimension and/or affecting the balance of powers and/or impacting on the proper interpretation of the Constitution. In addition, the Attorney General advises the President on the propriety of making use of Art. 140 and in practice, the view of the Attorney General is crucial. Compliance with the often technical requirements of the obligations arising from EU law creates a different setting, where the advisory role of the Attorney General is expected to be

[27] Lycourgos 2010, p. 105.

broadened; it marks a considerable shift towards a stronger advisory role of the Attorney General.

As regards the extension of this jurisdiction to compatibility with EU obligations, it must be stressed that the point of reference for the exercise of the jurisdiction by the Supreme Court changes. The issue could very likely become one of interpretation of what the EU obligations entail, thus opening the way for a preliminary reference to the CJEU. In the event of a preliminary reference, the status of the law will remain pending until the CJEU responds, thus creating, as Lycourgos correctly argues, an issue of propriety and compliance with the principle of separation of powers.[28] The alternative for the Supreme Court would be to deliberately avoid making a preliminary reference, thus distancing the Court from the correct application of Art. 267 TFEU. Therefore, the amendment of Art. 140 of the Constitution seems to be creating more problems than it solves.

One such notable example was evident in *President of the Republic v. House of Representatives,*[29] which concerned non-compliance with Directive 2000/13/EC on the approximation relating to the labelling, presentation and advertising of foodstuffs,[30] which required that all national implementing measures relating to the sale of genetically modified foodstuffs in supermarkets had to be notified to the European Commission and the other Member States. Moreover, only after three months following that notification and only if the Commission did not issue a negative opinion could the national measures be introduced. An amendment to the Foodstuffs (Control and Sale) Law came within the scope of the Directive, but the notification procedure had not been followed. As a result and on the advice of the Attorney General, the President proceeded to refer the Law via the amended Art. 140 of the Constitution. The Supreme Court found that there was an apparent procedural error that resulted in non-compliance with the EU obligations. The finding in this case was relatively straightforward, as the issue was one of apparent procedural infringement; however the same cannot be said in relation to more complex situations.

One such complex situation arose in *Reference 2/2013, President of the Republic v. House of Representatives*.[31] The case concerned a conflict between a Law adopted in 2012 on the protection of the seaside and the Services Directive.[32] The national Law, in which priority was given to the owner or operator of a seaside hotel or recreational business in relation to the tender procedure for leasing the relevant part of the beach, went against the Directive's requirement that the licensing system should not be discriminatory and disproportionate. In this case, which will be explored in greater detail in Sect. 2.2, the President referred the

[28] Ibid., p. 107–08.

[29] [2008] 3 CLR 118.

[30] [2000] OJ L 109/29.

[31] 9 May 2014.

[32] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376/36.

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incompatibility to the Supreme Court under Art. 140 of the Constitution. The decision of the Supreme Court made note of the CJEU case law that the Attorney General cited in his argumentation, but at the same time the Court did not make any specific reference to those cases. Moreover, the issue concerned the application of the principle of proportionality, which by nature has an element of subjectivity and creates room for different approaches. However, the Supreme Court was unanimous in deciding that there was an apparent incompatibility between the Law and the Directive. The matter in this case was one of substance rather than procedure, and the Court made the correct assessment. Nevertheless, the assessment was much more complex than that necessitated in the earlier case, which gives rise to concerns relating to the selection of instances where Art. 140 is used and the manner of deciding such cases in the context of a preliminary reference.

Finally, there is also a technical issue regarding a gap that has emerged in relation to secondary legislation (i.e. regulations, etc., introduced by the executive but the approval of which is to be decided by the legislature) that is often the means used for completing the implementation of directives. Such measures cannot be the subject of a reference under Art. 140, since under Arts. 51 and 140 of the Constitution, the President is not required to sign them. The issue came to the surface in the aftermath of the Supreme Court decision in the same case, *Reference 2/2013*. The House of Representatives had modified regulations submitted by the executive that were intended to comply with the provisions of the Services Directive in the context of the licensing system that would apply for seaside establishments wishing to take commercial advantage of the seaside (sunbeds, water sports, etc.). The relevant regulations that the House of Representatives had adopted introduced a discriminatory scheme whereby it was considered an advantage if an applicant for a license had experience (5 years) in providing services in the specific area. Therefore, despite the earlier ruling of the Supreme Court and the clear provision of the Directive, the adopted regulations reintroduced a discriminatory system. According to Cypriot constitutional law, secondary legislation cannot be the subject of a reference under Art. 140. Consequently, the problem of incompatibility arose and resulted in the Ministry of Interior asking the local authorities to not comply with the regulations on the basis of the ECJ decision in *Fratelli Costanzo*.[33] There the ECJ held that 'administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of… [a] Directive and to refrain from applying provisions of national law which conflict with them',[34] provided that the relevant provision has direct effect.[35] According to related case law of the ECJ, the scope of application must be construed in the light of the principles of national procedural autonomy and national institutional autonomy. Therefore, an interesting gap in relation to Art. 140 of the Constitution exists that creates further doubts as to its effectiveness,

[33] Case C-103/88 *Fratelli Costanzo v. Commune di Milano* [1989] ECR 01839.

[34] Ibid., para. 33.

[35] Ibid., paras. 29–32.

given its non-applicability to secondary legislation. Moreover, attempts are made to fill the gap in by relying on the *Fratelli Costanzo* rule which has, as its basic precondition, the direct effect of the EU law provision. But the issue then arises as to who has the authority to make such a complicated determination, since the obligation to apply such secondary legislation often rests on administrative authorities. This creates issues of legal certainty, expertise and separation of powers. All of these matters surfaced in the example in question and, at the time of writing, the outcome is uncertain.

To summarise, it must be questioned whether the constitutional amendment of Art. 140 of the Constitution was necessary given the problems arising from its application and the rarity of its use.

The Fifth Constitutional Amendment additionally added a new para. 4 to Art. 169 to the Constitution, which reads as follows:

> 4. The Republic may exercise every choice and discretion provided for in the Treaties establishing the European Communities and the Treaty on European Union and in any Treaties which amend or replace the above and which are concluded by the Republic.

This provision and its rationale are once again forward-thinking. The provision shields the national act related with the exercise of the option from scrutiny as to its constitutionality. The question is whether it should, given that there is a clear distinction between obligation and option. The ECJ founded the creation of primacy of EU law on the basis of a paramount need for the effectiveness, uniformity and structural coherence of the legal system of the Union. The justifying rationale for the principle of primacy of EU law, however, does not apply to the exercise of options by Member States before they decide to make use of their discretion. Therefore, the amendment of Art. 169 cannot be justified with reference to the need to comply with the principle of primacy of EU law.

The Constitution was subsequently further amended in 2010 (Sixth Amendment, of Art. 17 of the Constitution) with regard to the Data Retention Directive[36] in the aftermath of the Supreme Court judgment in *Alexandrou*; the details will be provided in Sect. 2.4.

Finally, Art. 11 of the Constitution was amended on a further occasion in 2013 by introducing the Seventh Amendment of the Constitution via Law 68(I)/2003, in order to allow the extradition of Cypriot citizens in connection to events that took place at any time even before accession to the EU; the details will be provided in Sect. 2.3.

In general, the opinions of legal scholars were not requested during the process of introducing the above amendments, with the exception of the Fifth Constitutional amendment for which consultation took place, at an earlier stage of the discussion, about the need for a full revision of the Constitution. At the time of writing, no

[36] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

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other constitutional amendments relating to EU law are being discussed; however there are areas where such discussion could be useful. For instance, the whole logic of the Fifth Constitutional Amendment, as explained previously, needs to be re-examined since it is problematic and overly expansive. In addition, the Sixth Constitutional Amendment is now equally problematic given that the Data Retention Directive has been annulled by the CJEU.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 The provisions on supremacy of EU law were provided in Sect. 1.2.

1.3.2 The issue of the transfer or delegation of powers to the EU has not been at the epicentre of the debate in Cyprus because the prevailing view sees participation in the EU as a matter of political determination that was expressed through accession to the Union. Therefore, any delegation or transfer of competences is understood as an expression of the will of the sovereign state and as a matter of choice that attracts the full accommodation of the international obligations of the Republic. If such membership requires the effective transfer or delegation of powers and if that in practice commands the amendment of the Constitution, then any such adjustment is perceived as being nothing more than the expression of the Republic's will. On this basis, the Fifth Constitutional Amendment and the previous decision of the Supreme Court in *Constantinou* can both be explained as an expression of the intention to participate in the EU system and as a voluntary limitation of powers.

1.3.3 Nonetheless, the extensive scope of the Fifth Constitutional Amendment, as explained in detail above, is so open-ended that it significantly constrains any room for disagreement. This is problematic because the Supreme Court has so far failed to develop a reservation formula that would set limits as to what is constitutionally acceptable. Moreover, this approach places Cyprus in the minority of Member States that have accepted the principle of primacy of EU law without serious reservations. Put differently, the Cypriot approach is purely national in nature and founded on what the Constitution provides in the aftermath of the amendment. There is no judicial elaboration as to the limitations that apply to the scope of the relevant constitutional amendment.

There has only been one notable attempt to discuss the limits of the principle of primacy of EU law and of the transfer of powers to the EU, the dissenting opinion of Judge Erotokritou in the 'bail in' case. The case concerned the imposition of a levy amounting to partial confiscation of all unsecured deposits, i.e. below 100,000 EUR, in the two systemic Cypriot banks. The dissenting judge underlined the significance of ensuring, through judicial review, that any European and national mechanism forming the foundation for the imposition of a bail-in, respects fundamental rights and the rule of law. The case and the dissenting opinion will be

explored in greater detail in Sect. 2.7.3, drawing parallels with the German Constitutional Court's *Honeywell* judgment.

1.3.4 As seen in Sect. 1.2, the amended Art. 179(1) provides that '[w]ithout prejudice to the provisions of Art. 1A, the Constitution shall be the supreme law of the Republic'. The Constitution has to give way in case of a conflict with EU law, and that would logically trigger a constitutional amendment. As seen with the EAW saga, the rectification of the incompatibility took years.

1.4 Democratic Control

1.4.1–1.4.2 In relation to applicable rules that govern the participation of the national parliament in the EU decision-making processes, in the case of Cyprus, no such rules exist. Moreover, no referendum has ever taken place in relation to the EU nor has there being any discussion about one.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1 As explained in greater detail in Sect. 1.2, on the one hand, the guiding background premise has been the traditional reluctance of the judiciary to approve constitutional amendments; on the other hand, the Supreme Court through its ruling in *Constantinou* in effect required the introduction of a constitutional amendment that would govern the relationship between EU law and the national constitutional order. The outcome was the introduction of the Fifth Constitutional Amendment that has an overly expansive scope and leaves little, if any, room for the subsequent establishment of specific boundaries for the relationship between EU law and Cypriot constitutional law. By way of an additional point of background information, the approach behind the amendment was modelled on the method of Art. 29(4)(3) of the Irish Constitution (now Art. 29(3)(10)).[37] The original idea was to ensure the primacy of EU law in one single article of the Constitution that would then function as the point of reference for any incompatibility of EU law with national constitutional law. That is now Art. 1A. Nonetheless, it must be noted that despite the fact that the introduction of an umbrella provision was based on the Irish model, the provisions of the Fifth Constitutional Amendment eventually took a completely different form in terms of methodology and approach. There is instead a

[37] Lycourgos 2010, pp. 104–106.

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nexus of constitutional provisions that were amended in addition to the introduction of the single umbrella provision inserted in the Constitution (Arts. 11, 140, 169, 179).

1.5.2 The Cypriot example has two distinct phases in relation to EU-related constitutional amendments. The first phase, which lasted until 2006, was characterised by the conscious decision not to introduce a constitutional amendment in relation to EU law. The rationale related to the pre-existing caution towards constitutional amendments for reasons having to do with the doctrine of necessity, the protection of the international status of the Republic, political reasons and the complexity of the procedure for constitutional amendments. The second phase is characterised by the introduction of the Fifth Constitutional Amendment that has been extremely open and accommodating for EU law.

In relation to the issue of 'waning constitutionalism' raised in the Questionnaire, such argumentation has not appeared in the Cypriot context as a factor that could influence the decisions during either the first or the second phase. The rationale for both periods has been pragmatic and has reflected the approach that the Supreme Court had adopted at different stages. The shift in the judicial approach in the second phase was influenced by the clear clash between competing supremacies, namely the primacy of EU law and the supremacy of the Constitution. As a result, the judicial reasoning was founded on formal and substantive hierarchy and mirrored considerations relating to functionality and pragmatism.

1.5.3 The symbiosis of the national constitutional order with supranational legal orders that have dense constitutional characteristics is becoming more difficult as the areas of coexistence start to include fields traditionally associated with the state. The need to define and regulate the boundaries between the legal orders is becoming pressing, and the introduction of constitutional amendments represents the most preferable option for two reasons. First, the regulation of the relationship thus stems from the expression of the will of the state that is reflected in the Constitution. This is significant for symbolic and substantive reasons, as it justifies the transfer of powers from the national level to the supranational level by direct reference to the national Constitution. In addition, any amendment would be introduced on the basis of the usually enhanced procedures that require a higher threshold of democratic approval, thus attributing a much-needed element of legitimacy to the relationship between the national and the supranational legal orders. Secondly, the solution of introducing a constitutional amendment is the most functional way to delimit the boundaries, reinforce legal certainty and provide the opportunity to express any reservations that the state decides to apply as to those limits. Such considerations are specifically relevant in relation to the primacy of EU law, fundamental rights and the allocation of competences.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 The position of fundamental rights in the Cypriot constitutional system is central both in terms of their provision and effective protection. The 1960 Constitution contains an extensive bill of rights in Part II ('Fundamental Rights and Liberties'), which in terms of content is similar[38] to that of the European Convention on Human Rights (ECHR) and, as Kyriacou[39] and Pikis[40] rightly observe, the provisions of which in 'certain instances are wider in scope and substance compared to their counterparts found in the [Convention]'.[41] Moreover, the Constitution by a series of articles guarantees certain social and economic rights[42] to the individual which are to be exercised within the framework of the public interest and common good.[43] The relevant provisions are detailed and comprehensive, and the judiciary has been extremely active in ensuring the full protection of these rights.

It can be argued that the level and content of the judicial protection of fundamental rights has been developed in direct connection with the ECHR system, in which Cyprus participated as part of the colony regime even before independence in 1960. The ECHR has been used as a guiding factor for establishing the level of protection and it has become particularly relevant where there has been ambiguity either in the constitutional text[44] or in the facts of a specific case. Moreover, the Cypriot system has exceeded the standard that the European Court of Human Rights (ECtHR) requires in numerous cases, with the Supreme Court making direct reference to the need to adopt a higher standard of protection.[45]

In relation to general principles of law, this concept is present and active in the Cypriot system of public law, either as an independent source of law or as an auxiliary tool used for supplementing existing constitutional provisions. Such general principles can be directly derived from the common law that provides the early foundation for the Cypriot legal system (due process, *audi alteram partem)*;

[38] Kombos and Pantazi 2012.

[39] Kyriacou 2010, p. 2.

[40] Pikis 2006, p. 43.

[41] Kyriacou 2010, p. 2.

[42] Tornaritis 1968, clarifies that Professor Bridel, who assisted in the drafting of the Constitution, recommended the incorporation of the liberty to work, trade and industry, liberty of contract and the right to strike.

[43] Tornaritis 1968, p. 2.

[44] For example, *Attorney General v. Afamis,* n. 25.

[45] *Charalambous and others v. Republic*, Joined cases 1480/2011, 11 June 2014; *Police v. Ekdotiki Eteria* [1982] 2 CLR 63; *David Scattergood v. Attorney General* [2005] 1 CLR 142 (see Sect. 2.3 below).

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they are primarily procedural in nature yet with a substantive effect on the essence of the basic right to fair trial. Nonetheless, the influence of such principles has remained limited due to the fact that the Constitution exhaustively covers the rights to fair trial and personal liberty in a combined manner through Arts. 11, 12 and 30.

In terms of general principles not resulting directly from the Constitution, the most notable example is the principle of proportionality. Proportionality has been given an elevated status through the codification of the general principles of administrative law in Art. 52 of Law 158(I)/99. Nonetheless, proportionality already had a constitutional position as an unwritten principle of law and has been referred to by the Supreme Court in the landmark judgment *Ibrahim* (see Sect. 1.1) as an essential criterion to be met in order for the constitutionally crucial doctrine of necessity to be applicable. The overall effect is that the principle of proportionality is not just a general principle of law with constitutional status, but it also constitutes an integral criterion for the assessment of the foundation of the Constitution post 1964, that is, the doctrine of necessity.

2.1.2 The Constitution in Art. 33 provides for the conditions under which restrictions can be imposed on rights:

> 1. Subject to the provisions of this Constitution relating to a state of emergency, the fundamental rights and liberties guaranteed by this Part shall not be subjected to any other limitations or restrictions than those in this Part provided.
>
> 2. The provisions of this Part relating to such limitations or restrictions shall be interpreted strictly and shall not be applied for any purpose other than those for which they have been prescribed.

Further considerations pertaining to Art. 33 will be explored in Sect. 2.2.

2.1.3 The Cypriot Constitution makes no express reference to the concept of the rule of law, but this has not stopped the judiciary from positioning the concept at the epicentre of our constitutional law.

The clearest example of the general approach towards the rule of law can be found in the above-mentioned landmark judgment *Ibrahim* where the Supreme Court introduced the doctrine of necessity. The foundation for the decision was that after the withdrawal of the Turkish-Cypriots and the resignation of the two foreign judges, the administration of justice could not function, which thus directly affected the rights of the individual in a negative way. The consequence of this was to nullify the meaning of the rule of law that was defined as being inherently interlinked with judicial supervision and effective judicial protection, fundamental rights and the principle of legality. This approach, which led to the introduction of the doctrine of necessity, has since permeated the Cypriot legal system.

In terms of justiciability, both parties to legal proceedings and the national courts frequently use the principle of the rule of law, but the principle is not independently justiciable. Rather, the invocation of the rule of law is combined with other legal principles that are content-specific in a manner that is constitutionally precise. The general perception as to the rule of law is that it represents the fundamental

principle for the legal system and it forms part of all other constitutional principles that are to be construed with the principle of the rule of law in mind.

One such manifestation of the rule of law is access to courts, especially in relation to judicial review proceedings. Article 146 of the Constitution guarantees access to the jurisdiction of the Supreme Court as an administrative court in a liberal and generous way.[46] Specifically, Art. 146(2) states that '[s]uch a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission'.

Furthermore, the principle of the rule of law is present in the constitutional provisions that prohibit retroactivity (Art. 24(3) in relation to tax law and Art. 12(1) in relation to criminal law, see Sect. 2.3.2) and that guarantee legal certainty. Articles 3 and 104 require the publication of all laws as an essential requirement for their validity.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 In Cyprus, the balancing exercise pertaining to the protection of classic constitutional and/or fundamental rights must initially be considered with respect to the application of the doctrine of necessity (as developed in more detail in Sect. 1.1). In *Alloupas v. National bank of Greece*,[47] it was held by the majority of the Supreme Court of Cyprus that constitutional rights may only be restricted on the *express* basis of the Constitution and by applying the 'strictest possible' criteria of necessity (does a state of necessity exist) and of proportionality (are such restrictions proportionate to the necessity).[48] As seen in Sect. 2.1.1, the principle of proportionality has been granted constitutional status as an 'unwritten principle of law', and it was referred to by the Supreme Court as an 'essential criterion' in the application of the doctrine of necessity. If the Supreme Court initially gave a rather wide interpretation to the principle of proportionality, starting with the *Ibrahim* case, it did so when the application of the doctrine of necessity 'did not concern the exercise of legislative powers by the executive, or the restriction of fundamental individual rights'.[49] The Court also gave a narrow interpretation to the principle of proportionality and refused to consider administrative acts of a final nature, decided by an administrative organ out of its own discretion (not deriving from a law) as

[46] See Kombos 2010b.

[47] [1983] 1 CLR 55.

[48] Emilianides 2013, p. 47.

[49] Ibid., pp. 42–4.

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justified on the basis of the doctrine of necessity,[50] for the reason that administrative acts are not general in nature and are therefore more likely to be arbitrary. As a result, '[a]dministrative acts of a final nature could not themselves be justified on the grounds of the doctrine of necessity; however, administrative acts of a final nature which were based on a law, which was justified on the grounds of the doctrine of necessity, would also be justified'.[51] Thus, it appears that the protection of constitutionally safeguarded fundamental rights in Cyprus has remained largely outside of the scope of the doctrine of necessity, as also noted in Sect. 1.1.2 of the Report.

It was seen in Sect. 2.1 that the Constitution contains a detailed and extensive list of rights, which at times are more extensive than comparable rights under the ECHR, and that in the case of doubt, the interpretation favours the individual over the state. According to Emilianides, the protection of the rule of law is a 'cardinal principle' of the Constitution.[52] This, combined with the supremacy of the Constitution, means that 'the courts have the power to examine the constitutionality of both laws and action of the administration and that no law, regulation or administrative act may be inconsistent with the Constitution'.[53] This means that a trial court (i.e. any court other than the Supreme Court) has the power to declare unconstitutional any law which is contrary to the provisions safeguarding individual human rights as set out in the Constitution. This is the result of the mixed character that applies to the system of review of constitutionality in Cyprus after 1964 whereby the examination of claims of unconstitutionality is diffused and decentralised. This also entails that constitutionally safeguarded fundamental rights must be interpreted in favour of the individual protected rather than the state in case of doubt.[54]

As far as restrictions or limitations to constitutionally safeguarded fundamental rights are concerned, it is stated in Art. 33(1) of the Constitution that these can only be contained in express provisions of the Constitution (see Sect. 2.1.2). A careful review of Part II of the Constitution reveals that such restrictions or limitations can also be contained in legislation within the limits of the Constitution itself,[55] as introduced by the House of Representatives or 'deemed to be part of Cypriot law under Art. 188 of the Constitution'[56] or deriving from EU law,[57] subject to the

[50] See *Mesaritou v. The Cyprus Broadcasting Corporation* [1972] 3 CLR 100; *Theodorides v. Plousiou* [1976] 3 CLR 319.

[51] Emilianides 2013, p. 44.

[52] Ibid., p. 53. See Sect. 1.1.2 of this Report. See also Loizou (2001) (in Greek).

[53] Emilianides 2013, p. 53.

[54] *Fina (Cyprus) Ltd v. The Republic* [1962] 3 RSCC 26; see Emilianides 2013, p. 146.

[55] E.g. more recently *President of the Republic v. House of Representatives* [2000] 3 CLR 238 (in Greek).

[56] *Police v. Hondrou and Another* [1962] 3 RSCC 82.

[57] See Emilianides 2013, p. 146.

general principles *inter alia* of reasonableness and proportionality. Article 33(2) of the Constitution expressly provides that such restrictions or limitations must be interpreted strictly and cannot be applied 'for any purpose other than those for which they have been prescribed', thereby providing a general framework of necessity and/or proportionality to the restriction/limitation to constitutionally safeguarded fundamental rights. This provision of the Constitution must be read in conjunction with Art. 35 of the Constitution, which casts a vertical duty on the state and its various branches of government (within the limits of their respective competence) to ensure the efficient application of Part II of the Constitution vis-à-vis the beneficiaries of these fundamental rights.

Additionally, it should be noted that the fundamental rights safeguarded under the Constitution are minimum rights. Rights may be further protected or new rights may be established through legislation, in which case these are not protected as constitutional rights but as ordinary rights.[58] This last point may have direct implications for the protection afforded to rights deriving from EU law and their implementation in the national legal order.

While EU law (all provisions) should take precedence over conflicting constitutional provisions as a result of Art. 1A of the Constitution, the use of the EU Charter by the Supreme Court in its case law is far less developed than the (much older) use of the ECHR. This could perhaps also be explained by looking at the overall practice of the supremacy of EU law by the courts in Cyprus, especially by the Supreme Court. It could be said that despite the reference to Art. 1A in Art. 179 of the Constitution and because the Constitution in Cyprus still provides expressly for its own supremacy, considerations of EU law and the exercise of judicial review arising as a result of the application of EU law in Cyprus appear *prima facie* to be encompassed within the fabric of the Constitution. This may be the subject of some academic debate in Cyprus,[59] but in judicial and/or practical terms, the overall approach of the Supreme Court can be described as inconsistent and as sometimes ignoring EU law (or even the ECHR) to concentrate merely on the protection of fundamental rights in accordance with express constitutional provisions.[60]

[58] Emilianides 2013, p. 146.

[59] Emilianides argues that EU and EC law are considered an integral part of the Constitution, Emilianides 2013, p. 54; *contra* Kombos & Pantazi 2012, p. 309: 'the hierarchical rule resulting from Art. 179 does not apply to EU law'; see also Lycourgos 2010, p. 101. For a detailed analysis, see also Laulhé Shaelou 2010a, pp. 133–40 who concludes: 'The legislative objective of removing the potential conflict between EC/EU law and the Constitution appears *a priori* achieved; it will however no doubt face the judicial scrutiny of the Cypriot courts through cases on the enforcement of Community law rights in Cyprus', p. 139.

[60] Interview with Dr. Demetrios Hadjihambis, former President of the Supreme Court of Cyprus (June 2013–July 2014) and judge at the Supreme Court (1999–2013), 9 January 2015.

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Some of the wide-ranging areas where the Ombudsman of Cyprus and equality bodies in Cyprus have pointed out that national law needs to better ensure fundamental freedoms and the principle of non-discrimination arising from EU law include e.g. the right of entry and residence for same-sex partners and/or the third country national spouse of an EU citizen, the free movement of workers, social assistance, and detention or expulsion orders of EU nationals.[61] The courts in particular would need to revise their role and adopt a more teleological or holistic approach, as legal actions brought before them normally fall within the (narrow) ambit of the judicial control of administrative acts under Art. 146 of the Constitution and do not entail any balancing exercise established within the fabric of the Constitution for the protection of constitutionally safeguarded fundamental rights.[62]

In general, the protection of constitutionally safeguarded fundamental rights in the Cypriot legal order, whether 'classic' fundamental rights, economic or social rights, has always been at the core of the case law of the Cypriot courts, independently of the supremacy of EU law. As such, the balancing of fundamental rights with economic rights can be said to amount to a 'routine' exercise for the Cypriot courts within the fabric of the Constitution, to which EU law 'merely' added one more – albeit fundamental in nature – dimension, thereby increasing the likelihood of constitutional issues arising. Whereas a full and comprehensive review of the balancing exercise between these rights within the fabric of the Constitution would be beyond the scope of this Report and has been explored elsewhere,[63] drawing general trends could prove useful. The balancing exercise usually involves a strict (but careful and delicate) construction of the restrictions/limitations to such rights on the basis of Arts. 33 and 35 of the Constitution and/or in accordance with the case law of the ECHR (in the case of a collision of classic rights).[64] It is also useful to mention that the collision between social rights '*per se*', especially within the framework of the freedom of movement that is so central to the case law of the CJEU, and the right to strike, have not arisen as such in the Cypriot legal order.[65] This could however be an area of potential conflict between the Cypriot and the EU legal orders given the attachment to social rights of the

[61] See in particular Trimikliniotis 2013 for a review of recent domestic case law related to these issues, pp. 121–140.

[62] Administrative recourses under Art. 146 fall under the exclusive revisional jurisdiction of the Supreme Court, both first instance and appellate, are strictly limited to the review of the legality of an administrative act, decision or omission, and exclude any review of the case on the merits. See Emilianides 2013, p. 197.

[63] For a detailed review of the collision between classic rights and/or socio-economic and cultural rights, including within these sub-categories of rights, see Kombos and Pantazi 2012, pp. 338–46. For a thorough consideration of the balancing exercise between economic freedoms and fundamental rights in the European public order with an emphasis on Cyprus, see Laulhé Shaelou 2011.

[64] Kombos and Pantazi 2012, p. 344.

[65] Kombos and Pantazi 2012, p. 343.

former[66] and to free movement of the latter.[67] It has been suggested that the overall balancing exercise currently taking place in the Cypriot legal order, whereby the Supreme Court 'advances its own perception' in the event that the standard of protection granted under the ECHR is lower, usually in the absence of any meaningful consideration of the case law of the CJEU, may have to change in the future, especially with respect to potential clashes between social rights and free movement. This could result in the 'lowering' or at least 'alteration' of the standard of protection offered to social rights in the Cypriot Constitution, with a special reference to the right to strike.[68] In the meantime and until such a conflict arises, what could be said is that the test to be satisfied for the protection of social rights 'within the framework of the public interest and common good' could end up in effect being higher than for other constitutionally protected fundamental rights. This would seem to be confirmed by the recent case law of the Supreme Court of Cyprus related to austerity measures put in place in response to the sovereign debt crisis.

For example, the case of *Georgos Charalambos and others v. Republic of Cyprus*[69] concerned a number of recourses brought before the Supreme Court by a number of civil servants against the Republic, the Ministry of Finance and the General Auditor, with respect to the law for the special levy on the pensions and gross salaries of officers and employees in the public sector as well as the pensions of retired persons (Law 112(I)/2011 as amended). The case was brought on the basis of Arts. 23, 24, 26, 28 and 146, but not Art. 9 of the Constitution (right to a decent existence and social security) which can be considered as requiring on a case-by-case basis a higher burden of proof to rebut the presumption of constitutionality afforded to legislation (on the basis of proportionality), including apparently in times of economic crisis. With respect to the combined principles of equal treatment and equality in taxation (Arts. 28 and 24 respectively), the Supreme Court confirmed its previous case law by stating that the principle of equality must be balanced with the economic situation and fiscal policy in place at the time, and that the state has the discretion in 'times of extreme economic crisis' to take measures targeting specific groups of the population 'without necessarily violating the principle of equal treatment'.[70] Adopting a comparative approach and after examining the legal framework put in place in Cyprus with respect to the special levy (including for the private sector), the Supreme Court subsequently ruled that there had been no breach

[66] In *Apostolides Georghios & Others v. the Republic of Cyprus through the Ministry of Labour and Social Insurance & Others* [1982] 3 CLR 928, the Supreme Court ruled that social rights are on an equal footing with political rights but that the economic situation and capacity of the country must be taken into account when assessing compliance of a measure with Art. 9 of the Constitution (right to a decent existence and social security); see Kombos and Pantazi 2012, pp. 314–315.

[67] Ibid. See also the analysis of the dissenting opinion of Judge Erotokritou in the case of *Myrto Christodoulou* in Sect. 2.7.3 of this Report.

[68] Kombos and Pantazi 2012, p. 345.

[69] Cases No. 1480-4/2011, 1591/2011 and 1625/2011, 11 June 2014 (majority decision) (in Greek).

[70] Translation by the author.

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of the principle of equal treatment and that the measures put in place ('in coordination with the competent organs of the EU') could not be deemed 'extreme' and thus disproportionate (proportionality was raised with respect to the right to property), given the economic situation in which Cyprus found itself.

This judgment should be contrasted with the case of *Maria Koutselini-Ioannidou and others v. The Republic*,[71] with respect to the reduction of pensions of retired civil servants and public officers who have been re-employed in the public sector based on Law 88(I)/2011, which was deemed unconstitutional on the basis of Art. 23 of the Constitution, independently of the current economic climate and/or any obligations as may arise under EU membership and/or the ECHR. In this majority decision, the Supreme Court distinguished this case from the previous one on the basis that pensions are a property right which cannot be limited in the name of the public interest on the basis of Art. 23. In the second judgment in the case, however, Judge Michaelidou referred to the expression of the general concept of public interest, included in Art. 23 under the form of public benefit, and to the need to justify it.[72]

In a wider framework, it should be briefly noted that the right to free movement and residence on the territory of the Republic of Cyprus[73] arguably holds a strategic place in the Constitution, between the right of the accused and the 'no-exile' rule. It should therefore be regarded as a basic fundamental right in the Cypriot legal order and any restriction/limitation to this right should be interpreted strictly (the grounds are contained in the provision itself). To this consideration could be added the case law on shopping hours within the framework of Art. 25 of the Constitution (the right to work) where there has been an uneasy relationship between working conditions and open and fair competition in the name of the general public interest,[74] including post-EU accession.[75] It is undeniable, however, that there have been overall some gradual adjustments in the balancing of fundamental rights with economic free movement rights or associated/flanking policies, in the name of EU law and/or in favour of economic freedoms falling within the scope of EU law.[76] An example of this would be the (unanimous) decision in a reference to the Supreme Court[77] in relation to the law amending the law on the protection of beaches and transposing the Services Directive, analysed earlier in Sect. 2.1. As

[71] Joined Cases No. 740/2011-587/2012, 7 October 2014 (majority decision) (in Greek).

[72] In this respect, see speech by Judge Myron M. Nicolatos.

[73] Article 13 of the Constitution.

[74] See *Georgoulla Georgiou et al v. the Police* [1999] 2 CLR 616 (in Greek) and *Andronikos Vasiliadies Ltd et al v. the Police* (2001) 2 CLR 715 (in Greek).

[75] A power struggle involving the various branches of government of the Republic of Cyprus has been ongoing for the past few years, with no ultimate outcome yet, as to who has the power to regulate shopping days/hours and related working conditions, and on what constitutional basis/principle. Overall it would appear that the economic situation of the island prevails over any consideration of EU law.

[76] Dr. Hadjihambis, interview 9 January 2015.

[77] *President of the Republic v. House of Representatives, Reference 2/2013*, 9 May 2014 (in Greek).

seen, the national Law gave priority to the owners or operators of a seaside hotel or recreational business in relation to the tender procedure for leasing the relevant part of the beach. The lawyers of the House of Representatives justified this policy by the general public interest as an exception to the selection process, including under Art. 12(3) of the Directive (applicable 'where the number of authorisations available for an activity is limited because of scarcity of natural resources or technical capacity') and on the basis of Art. 25 of the Constitution. These arguments were rejected by the Supreme Court not only on the basis of the Directive's requirement that the licensing system should not be discriminatory and disproportionate, but also on the basis that the principles of free competition, as set out in EU law and in the Directive, should prevail.[78]

On a further point, the Court noted that there was no breach of the principle of legitimate expectations since the House of Representatives, in addition to not meeting the deadline for transposition of the Directive at the end of 2012, had through the amending law extended the existing situation until the end of October 2014, thereby giving ample time to all concerned to comply.[79]

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

Introduction and constitutional amendments The European Arrest Warrant (EAW) Framework Decision (FD) was implemented in Cyprus by Law No. 133(I)/2004 on the European Arrest Warrant and the Surrender Procedures of Requested Persons, which has since been amended three times.[80] There were initial difficulties in some Member States with the very idea of surrendering their own nationals based on the principle of mutual recognition, including in Cyprus where 'expelling or extraditing' procedures were interpreted as being expressly limited to aliens under Art. 11(2)(f) of the Constitution.[81] This difficulty persisted following EU accession and the matter was brought before the full bench of the Supreme Court of Cyprus in November 2005.[82] The Court had to consider the

[78] Ibid., p. 12.

[79] Ibid., p. 14.

[80] Consolidated version available at http://www.cylaw.org/nomoi/enop/non-ind/2004_1_133/full.html (in Greek).

[81] See *Attorney General v. Afamis,* n. 25. An unofficial translation of Art. 11(2)(f) in force until the 2006 amendment is available in English at http://www.law.uj.edu.pl/~kpk/eaw/other/220_EAW.pdf, p. 170. See also case note by Tsadiras 2007, p. 1516.

[82] *Attorney General v. Constantinou* [2005] 1 CLR 1356, [2007] 3 CMLR 42; see Tsadiras 2007 and Laulhé Shaelou 2010a, pp. 134–137. See also http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/1F76458C67091E86C2257348004BC6B6?OpenDocument and http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Cyprus_Constitutional_Court.pdf.

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implementation of the FD in the national legal order and the compatibility of the implementing law with the Constitution.[83] The Court took the view that Art. 11 of the Constitution provided an exhaustive list of the reasons why a person could be arrested and it did not provide for the execution of an EAW.[84] It then reiterated its jurisprudence on the prohibition of the extradition of Cypriot nationals,[85] referred to the *Pupino* case[86] and to the lack of direct effect of the FD, and ruled as a result that it was left to its own discretion to interpret national law in this field in accordance with the FD. On this point, it decided that the implementing law was contrary to Art. 11 of the Constitution, as no provision in the implementing law could be interpreted 'in such a way so as to prevail and to be applied as regards the nationals of the Republic'.[87] This judicial decision triggered (indirectly) a legislative reaction and provided the necessary impetus to proceed with long-awaited amendments to the Constitution to reflect EU membership obligations, including with respect to Art. 11.[88] Following the 2006 amendment to the Constitution (the Fifth Amendment, see Sect. 1.2), the arrest and detention of a Cypriot national for the purpose of extradition to another EU Member State was made possible, provided that it related to offences committed after Cyprus became an EU Member State on 1 May 2004 (Art. 11(2)(f), sub-para. 1) and that such request was not motivated by grounds such as race, religion, ethnic origin or political opinion (sub-para. 3).[89]

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[83] For the constitutional implications of this case in the Cypriot legal order, see Sect. 1.2.

[84] Laulhé Shaelou 2010a, p. 136.

[85] *Georgiou v. Director of Central Prisons* [1991] 1 CLR 814.

[86] Case C-105/03 *Pupino* [2005] ECR I-05285.

[87] *Constantinou*, para. 24. Translation by the author.

[88] See Sect. 1.2. See also Laulhé Shaelou 2010a, pp. 137–138, and Gorski & Hofmanski 2008.

[89] Sub-paragraph (f) of Art. 11(2) was substituted with the following:

> '(f) the arrest or detention of a person … or of an alien against whom action is being taken with a view to deportation or extradition or of a national of the Republic with a view to extraditing or surrendering him, subject to the following provisions:
>
> (i) the arrest or detention of a national of the Republic for the purpose of surrendering him under a European arrest warrant is possible solely in relation to events that occurred or acts done subsequent to the date of accession of the Republic to the European Union.
>
> (ii) the arrest or detention of a national of the Republic for the purpose of extraditing or surrendering him pursuant to an international agreement binding the Republic is possible solely in relation to events that occurred or acts done subsequent to the publication of the Fifth Amendment of the Constitution Law of 2006.
>
> (iii) the arrest or detention of any person for the purpose of extraditing or surrendering him pursuant to an international agreement is not possible if the competent body or authority under the law, has substantial grounds for believing that a request for extradition or surrender has been made for the purpose of prosecuting or punishing a person on grounds of his race, religion, ethnic or ethnotic origin, political opinion, or of any legal claims of collective or individual rights in accordance with international law.'

At the same time, Art. 7 of Law 133(I)/2004 was also amended to provide that a request for the issuing of an EAW for the purpose of criminal prosecution must be accompanied by the written approval of the Attorney General of the Republic of Cyprus (who is responsible for criminal proceedings in the territory of the Republic in accordance with Art. 113(2) of the Constitution).[90] Following these amendments, the legal framework of the EAW in Cyprus remained *prime facie* incompatible with the FD, to the extent that it set out additional requirements/limitations to the issuing and execution of an EAW, provided for additional protection of fundamental human rights not expressly provided in the FD and, as such, potentially affected the principle of mutual recognition and/or the rights of suspects and defendants.[91]

In 2013 Cyprus proceeded with a further amendment to its Constitution, allegedly to 'fully comply' with its obligations arising from the EAW FD.[92] The amendment was related to the pending extradition proceedings that were examined by the Supreme Court in *Dinos Michailides v. Attorney General.*[93] This case was an appeal and concerned a Cypriot citizen against whom a first EAW had been issued in 2013 by the Greek authorities who requested the surrender for purposes of criminal prosecution for money laundering. It should be noted that the prosecution related to events that took place between 1997 and 2001, and that Art. 11 of the Constitution as amended by the Fifth Constitutional Amendment allowed the extradition of Cypriot citizens only for events that took place after accession to the EU in 2004. Article 11(2)(f) was thus further amended in order to allow the extradition of Cypriot citizens in connection to events that took place at any time, even before accession to the EU.[94] All

[90] Amending law 112(I) of 2006, available at http://www.cylaw.org/nomoi/arith/2006_1_112.pdf (in Greek).

[91] See DG Internal Policies of the Union, Citizens' Rights and Constitutional Affairs (2009) 'Implementation of the European Arrest Warrant and joint investigation teams at EU and national level' available at http://www.eipa.eu/files/EUROPEANARRESTWARRANT.pdf 3, pp. 11–12, p. 14 and pp. 18–19; see also Kapardis 2008, pp. 12–23 and http://www.law.uj.edu.pl/~kpk/eaw/data/cyprus.html.

[92] Seventh Amendment to the Constitution Law 68(I)/2013, available in English at: http://www.olc.gov.cy/olc/olc.nsf/all/DA5878C1FB78D167C2257C16002284F7/$file/The%20Seventh%20Amendment%20of%20the%20Constitution%20Law%20of%202013.pdf?openelement.pdf.

[93] *Dinos Michailides v. Attorney General,* Case 221/13, 2 September 2013.

[94] The sub-paragraph (f) in Art. 11 was replaced as follows:

> '(f) … the arrest or detention of an alien against whom action is being taken with a view to deportation or extradition or the detention of a national of the Republic with a view to extraditing or surrendering him pursuant to a European arrest warrant or pursuant to an international treaty binding on the Republic, on condition that such treaty is applied by the other party thereto. However, the arrest or detention of any person for the purpose of extraditing or surrendering him is not possible if the competent body or authority under the law has substantial grounds for believing that a request for extradition or surrender has been made for the purpose of prosecuting or punishing a person on the grounds of his race, religion, nationality, ethnic origin, political opinion, or of any legal claims of collective or individual rights in accordance with international law.'

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sub-paragraphs were deleted and time limitations were removed.[95] The guarantee of non-discrimination on grounds of race, religion and other grounds was clearly reiterated and now applies to all persons subject to extradition or surrender procedures, whether nationals of the Republic or not, and whether the subjects of a European or an international arrest warrant. This Seventh Amendment to the Constitution with respect to the surrender of Cypriot nationals was welcomed by the Supreme Court of Cyprus in its recent case law as necessary for the Republic to fully abide by its obligations under the FD.[96]

2.3.1 The Presumption of Innocence

2.3.1.1 The legal maxim of *nullum crimen nulla poena sine lege* is a fundamental principle of Cypriot criminal law embodied in Art. 12(1) of the Constitution, which provides that

> [n]o person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed.

It was on the basis of the principle of the non-retroactivity of criminal law deriving from this provision that the Republic had sought *inter alia* to limit the scope of application of the EAW in Cyprus to suspected offences committed post EU accession (in the Fifth Amendment). This concern, however, appeared unfounded for procedural law and was accordingly removed with the Seventh Amendment to the Constitution. Article 12(2) of the Constitution also sets out the rule against double penalty (*ne bis in idem*): 'a person who has been acquitted or convicted of an offence shall not be tried again for the same offence. No person shall be punished twice for the same act or omission except where death ensues from such act or omission'. This is a constitutional right that even precedes the birth of the Republic, without deviations, even in the name of public security.[97] There is also a guarantee in the Constitution against arbitrary punishment (Art. 12(3)) as well as against general confiscation of property (Art. 12(6)).[98]

The presumption of innocence also features in Art. 12(4) of the Constitution. It provides that 'every person charged with an offence shall be presumed innocent

[95] Cyprus had been criticised for having introduced such time restraints. See Christou 2012, p. 63 and fn. 31 in particular.

[96] See *Dinos Michailides v. Attorney General of the Republic*, Civil Appeal 221/13, 2/9/2013.

[97] Paraskeva 2015, p. 185. In the context of the EAW, see District Court of Larnaka, Case *No. 2/06*, based on Law 133(I)/2004 and concerning the execution of an EAW against Vakhtang Obolashvili, 4 May 2005, where the District Judge refused to execute the EAW against the requested person based on the principle of double jeopardy (developed below).

[98] For a general consideration of the rights of the accused, with respect in particular to Arts. 11 and 12 of the Constitution, see Emilianides 2013, pp. 157–159; see also Paraskeva 2015, pp. 176–220. On the rights of suspects of criminal offences, see also Stefanou 2011.

until proved guilty according to law'. This is a constitutional right without qualification, constitutes a human right and, in the context of procedural law, applies all throughout the process – before, during and until the final conviction of the accused. It is important to note that this right is afforded to all, whether nationals or aliens. It lies entirely in the hands of the judiciary to determine whether a criminal offence has been committed by a person, provided the prosecution can prove so beyond all reasonable doubt.[99] This means in particular that no public authority can speculate on the guilt of a person before he/she has been convicted by a competent court. Thus, it was held that administrative decisions attributing criminal acts to a person were in violation of the constitutional presumption of innocence and, as such, unconstitutional.[100] It should also be noted that the presumption of innocence in Cypriot constitutional law also implies that the accused has a right to silence and against self-incrimination.[101] Exercising these rights, which are ancillary to the presumption of innocence, does not mean admitting guilt.[102]

The absolute protection afforded to the presumption of innocence by the Constitution raises interesting questions in the context of the EAW and mutual recognition, with respect in particular to the authorities involved, the procedure and the nature of the arrest warrant. Following the Seventh Amendment to the Constitution, Art. 11(3) now provides that 'save when and as provided by law in case of a flagrant offence punishable with death or imprisonment', a person can only be arrested under the authority of a reasoned judicial warrant issued according to the formalities prescribed by the law or pursuant to an EAW (the latter reference to the EAW having been added by the Seventh Amendment). The police cannot therefore proceed with the arrest of a person without the issue of a judicial warrant/EAW and its communication to the relevant authorities of the Republic. The central authority for the issue and execution of EAWs in Cyprus is the Ministry of Justice and Public Order, i.e. an executive organ of the state, although other key actors such as the police force, the Law Office of the Republic and District Judges are also involved in the process.[103] The competence of the central authorities in other Member States was challenged before the courts in Cyprus in relation to the execution of EAWs, but in vain. The case of *Igor Ovakimyan v. Attorney General of the Republic* concerned the execution in Cyprus of an EAW issued by the Dutch Central Authority. The Supreme Court upheld the decision of the Limassol District Court to execute the EAW against the appellant and ruled that the Central Authority

[99] *Rex v. Mentesh* 14 CLR 233; *Police v. Chrysanthou* 15 CLR 50 and *Costis Panayi Kefalos v. The Queen* 19 CLR 121. For the reversal of the burden of proof in Cyprus law in specific instances, see Paraskeva 2015, pp. 197–198 and in particular fn. 790 and 792.

[100] *Kyriakides v. The Republic* [1997] 3 CLR 485 (in Greek). See Emilianides 2013, pp. 158–159.

[101] *President of the Republic v. House of Representatives* [1994] 3 CLR 1 (in Greek). See Emilianides 2013, p. 158; see also Paraskeva 2015, pp. 201–202.

[102] *Charalambous v. The Republic* [1985] 2 CLR 40; Emilianides 2013, p. 158.

[103] See http://www.police.gov.cy/police/police.nsf/All/367B2EB11E7D96B9C2257A1E002E2E17?OpenDocument.

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can also be a public prosecutor or other judicial body as determined by the legal system of each state. In the Netherlands, as the Cypriot Supreme Court noted, despite being assigned to the Ministry of Justice, the public prosecution service belonged to the judiciary branch of government.[104] This was repeated in *Eva Karina Andersson v. Attorney General of the Republic* in the context of the execution of an EAW from Sweden.[105] It appears to be in line with the jurisprudence of the ECtHR on the nature of the 'court' as an independent organ from the executive power.[106] Thus, the essence of the matter seems to be that the EAW must remain *in effect* a 'judicial decision',[107] independent from the executive. This does not seem to be exactly the case in Cyprus[108] or at least was arguably not the case until 2014.

In Cyprus, once a request is transmitted to the Central Authority, it is communicated to the Attorney General who is also not a judicial authority, but an independent officer of the Republic (Arts. 112–114 of the Constitution). The latter is said to perform a 'double-check' to the extent that the police first 'presents the case' and subsequently a draft of the EAW for approval by the Attorney General. This administrative/technical process, prior to the judicial decision being taken, has been criticised in evaluation reports as being at the very least unnecessary and perhaps more seriously in violation of the principle of mutual recognition and/or the spirit of the FD, to the extent in particular that it could constitute an obstacle to a request reaching the District Court in Cyprus.[109] Furthermore, it should be noted that while the Attorney General performed its double check, the Central Authority would until 2014 scrutinise the EAW in terms of formalities but also substance, with the possibility to request further information or a re-issue of the EAW by the issuing state. It was only following this screening procedure that the Central Authority would proceed with issuing a certificate under Sect. 16(1) of the implementing law and transmit it to the judge who would decide under Sect. 16(2) on the issue of an arrest warrant under the implementing law. As ably noted by Christou, this certificate constituted no guarantee that the EAW would not be 'challenged before the courts', since the Central Authority is not a judicial authority either, thereby begging the question of the *real* judicial nature of the EAW and of the scope of the principle of mutual recognition in Cyprus.

The role of the Ministry and the Attorney General in the issue/execution of EAWs recently led for the first time to legal issues raised in the case of Mr. Louka in the context of an international arrest warrant from South Africa; the details will be provided in Sect. 3.6. This case entitles one to wonder whether considerations regarding extradition decisions based on political discretion could arise in the

[104] [2005] 1 CLR 1119.

[105] [2008] 1 CLR 1092. See Christou 2012, p. 64 and fn. 50.

[106] *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 64, ECHR 2003-IV.

[107] See Art. 7(2) of the FD.

[108] See http://www.eipa.eu/files/EUROPEANARRESTWARRANT.pdf, p. 11.

[109] Christou 2012, pp. 64–65.

European context and what safeguards are available in the law to avoid potentially arbitrary results.[110]

It should be said from the outset that the legal framework surrounding international arrest warrants and EAWs certainly differs with respect to their spirit, scope, powers and processes.[111] With respect to the legal basis of an arrest warrant, the Supreme Court in *Scattergood* had clarified the judicial character of an arrest warrant issued under the law implementing the EAW FD (as opposed to an arrest warrant issued in other extradition procedures) and that the basis for such arrest warrant was the law implementing the FD (Sects. 3 and 18) and not domestic law.[112] The Court subsequently stated that a warrant issued on the basis of Art. 16 of the implementing law was a 'preliminary measure' which aimed at ensuring the arrest of the suspected offender, in order to then decide during the course of the procedure 'whether the execution of the EAW should be allowed'.[113] This was quite an ambiguous statement which appears to reveal that the execution of an EAW did not occur 'as if it were issued by the issuing state's own authorities',[114] as requested by the principle of mutual recognition. More recently, however, and within the context of the amendments to the law implementing the EAW FD in Cyprus,[115] the Supreme Court, referring to the case law of the ECJ,[116] clearly stated that there is an 'express obligation' to execute 'every' EAW in accordance with Art. 1(2) of the FD and this obligation is without exception outside of the framework provided in the FD (Arts. 3 and 4) and in the implementing law (Sects. 13 and 14) (see below).[117]

It therefore appeared that, at least until 2014, there were some weaknesses (i.e. extra scrutiny even where it may have favoured the defendant's rights) in the law implementing the EAW FD in Cyprus, with some of them also identified with respect to international arrest warrants. The House of Representatives passed two amending laws to the implementing law in 2014, one in early 2014 where

[110] For equivalent considerations arising (indirectly) from unsuccessful pleas by the lawyers of Dinos Michailides subject to an EAW issued by the Greek authorities, see *Dinos Michailides v. Attorney General of the Republic*, Civil Appeal 221/13, 2/9/2013.

[111] As noted by the Supreme Court itself in *Scattergood v. Attorney General* [2005] 1 CLR 142 (in Greek), the EAW procedure is a 'relative' of the extradition procedure under the relevant domestic law but as such, 'does not stop being different, based on another law enacted within the framework of the EU accession' (translation by the author).

[112] Ibid.

[113] Ibid.

[114] Christou 2012, p. 65.

[115] Amending Law 30(I)/2014 was published in the Official Gazette of the Republic on 7 March 2014 and Amending Law 183(I)/2014 on 12 December 2014.

[116] Case C-388/08 PPU *Laymann and Pustovarov* [2008] ECR I-08993, para. 51; Case C-261/09 *Mantello* [2010] ECR I-11477, para. 36.

[117] Civil Appeal No 184/2014, *Hadwen James v. Attorney General*, 17 July 2014; for a more flexible approach, see Civil Appeal No. 41/14, *Attorney General v. Mrukwa*, 5 March 2014; see also n. 127 below.

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significant amendments were made to a number of provisions of the law,[118] and again in late 2014 where one additional amendment was made to the rights of the person subject to the EAW.[119] Through the first amending law, the power given to the Central Authority (CA) to scrutinise the EAW and issue a certificate of compliance under Art. 16 para. 1 was revoked, and the CA was merely left with the obligation to ensure the arrest of the person subject to the EAW; there is only mention of the power of the judge to proceed with the issue of a temporary arrest warrant in the case of an emergency and on the basis of an EAW *or before* the issue or the transmission of an EAW, following receipt of such a request through EUROPOL or otherwise (new para. 2). The detention time under the temporary arrest warrant was also extended from three to eight days (Art. 16(3)). Amending Law 30(I)/2014 also removed the reference to 'criminal proceedings' in Sect. 3 of the implementing law, thereby arguably enhancing judicial pre-trial and procedural powers.

The above changes appear to reconcile the implementing law with the spirit and provisions of the FD as well as the principle of mutual recognition. It remains, however, to be seen what the impact of the amendments to Sect. 16 of the implementing law will mean in terms of safeguards, including for the respect of the rights of suspects, the protection of the presumption of innocence and of other fundamental human rights/principles embodied in procedural guarantees. In addition to constitutional safeguards in each country, the protection of fundamental rights is also part of the principle of mutual recognition itself,[120] thereby arguably implying the exercise of a certain level of control by the competent authorities.[121] It should not mean, however, that the protection of fundamental rights can constitute an *autonomous* ground of refusal to execute an EAW. This was confirmed recently by the Supreme Court of Cyprus with respect to the EU Charter, in the case of *James Hadwen*,[122] with the Court noting that such arguments do not 'fit' within the 'specific procedure' of the execution of EAWs by District Courts (which the Court classified as *sui generis*).[123]

2.3.1.2 Until at least 2014, however, the authorities in Cyprus, and in particular the District Judges, would not 'automatically authorise extradition with minimum formality and no consideration of evidence' (cf. the Questionnaire). The courts

[118] Law 30(I)/2014, 7.3.2014.

[119] Law 183(I)/2014, 12.12.2014.

[120] For Cyprus, see Sect. 2(2) of the implementing law: 'The application of the provisions of the present Law cannot result in the violation of the obligation of respect of the fundamental rights and principles, in accordance with Art. 6 TEU. In any case, the requested person shall not be transferred to a country where he/she would be at serious risk of being subjected to the death penalty or subjected to torture or other inhuman or humiliating or treatment' (translation by the author).

[121] Christou et al. 2009, p. 113.

[122] See n. 117 above.

[123] Ibid.; see also *Dinos. Michailides v. Attorney General*, Civil Appeal No. 221/13, 2 September 2013.

proceeded with the review of pre-trial evidence to determine in particular the seriousness of the offence,[124] the time frame and the situation of the person, *inter alia* whether the person subject to the EAW was more 'at risk' if extradited to the issuing country rather than remaining under arrest and/or in detention in Cyprus. Overall, the courts proceeded on the assumption that there was 'reasonable suspicion' against the suspected person as evidenced by the EAW, which, however, had to be investigated and determined by the District Judge, with a view to arresting and/or detaining the person subject to the EAW. This is quite clearly expressed in the implementing law where it transpires that even after a suspected person is brought before the District Judge, extradition is still only a 'possibility' (Sect. 17 (1)) whereas his/her detention needs to be decided by the judge (Sect. 18(1)). Most of the time, however, an EAW is issued and/or executed,[125] with one commentator noting with respect to the role of the judge that judges need to 'be moved' by the parties, which is a characteristic of the common law tradition, as opposed to the civil law system where the role of the judge is more inquisitorial.[126] The Supreme Court of Cyprus has, however, recently expressed in rather strict terms the obligation on the District Courts to proceed with the execution of EAWs and appears to have framed the protection of fundamental rights (exclusively) within procedural guarantees as provided in the FD and the implementing law subject to a proportionality test, thereby potentially adopting a stricter reading than some District Judges on a case-by-case basis.[127]

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[124] See e.g. Civil Appeal, *Panayiotis Philippou* (no. 2) [2009] 1 CLR 693.

[125] The latest public statistics available date back from 2010 when 34 EAWs were issued to Cyprus. The statistics of the Ministry of Justice do not specify how many EAWs were actually executed. The annual report only mentions that these EAWs were transmitted to the judicial authorities of the Republic for execution. It then states under the title 'transfer of sentenced persons' that 13 requests were received by the Ministry, out of which 11 culminated in extradition from or to Cyprus; see http://www.mjpo.gov.cy/mjpo/MJPO.nsf/All/88FC4FA80EAFB52AC22579BC003005DE/$file/etisia%202010%20-%20final.pdf, p. 37.

[126] Christou 2012, p. 66.

[127] This does or does not benefit the person subject to the EAW. In *James Hadwen* (see n. 117 above), the Supreme Court acting as an appeal court, upheld the findings of the trial court to the extent that it had allowed a request for adjournment in order to call an expert witness from Malta to testify that the offence for which he was arrested was time-barred but refused to grant a second adjournment, noting that the execution of an EAW must occur within a strict time frame. The fact that in the application of Sect. 15(2) of the implementing law, the trial court omitted to hear the appellant was not sufficient to render the decision of the District Court to execute the EAW invalid. In *Mrukwa* (see n. 117 above), the District Judge had refused to execute an EAW issued by the Polish authorities on the basis of delays in justice both in Poland and in Cyprus, and lack of justification, and referred to Sects. 2(2) and 4(1)(f) and/or (g) of the implementing law. In the appeal case, the Supreme Court upheld the decision of the trial court and confirmed that even though the implementing law does not provide for the refusal to execute an EAW on the basis of the timely administration of justice, account should be taken of Sect. 2(2) of the implementing law (and not of the Constitution, as stated by the District Court) which, in conjunction with Art. 6 TEU and the principle of mutual recognition, should ensure the protection of fundamental rights by the authorities of the issuing Member State.

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2.3.2 *Nullum crimen, nulla poena sine lege*

2.3.2.1 The legal maxim of *nullum crimen nulla poena sine lege* was already discussed in Sect. 2.3.1.1 above in the context of constitutional rights.[128] It was also said that there is an express human right ground to reject requests for surrender of suspects in the implementing law, the scope of which, however, remains unclear. In line with the FD, the implementing law also includes a list of 32 offences in Sect. 12 (2) which do not require the double criminality principle to be satisfied, provided that the offences are punishable by a custodial sentence or detention order of a maximum period of at least three years in the law of the issuing state (verbatim transposition of Art. 2(2) of the FD). This list remains unamended to date and the section has been described as helping to serve 'substantial justice' by preventing suspects from escaping from justice on procedural grounds.[129] Despite controversies deriving from the abolition of double criminality, it has been seen as creating a 'better balance between private individuals and national interest in enforcing the law'.[130]

The above provision must be read in conjunction with Sect. 13 of the implementing law where the grounds for mandatory non-execution of an EAW are set out, including some not expressly provided in Art. 3 of the FD (amnesty, *ne bis in idem*, and lack of criminal responsibility due to age).[131] It is worth noting that Sect.13 of the implementing law was amended in 2014, but only with respect to the phrasing of sub-para. (d) which reflects Art. 11(2)(f) of the Constitution sub-para. 3, as amended. The two other grounds remain unaffected, namely that the Republic will refuse to execute the EAW in two situations. First, if a person subject to an EAW for the execution of a custodial sentence or detention order is a Cypriot citizen, the Republic will execute the sentence or detention order according to its own criminal laws. Secondly, if a person subject to an EAW for his/her prosecution is a Cypriot citizen, the Republic will not execute the request unless it is assured that after being heard, the person will be transferred to the Republic to serve his/her custodial sentence or execution order passed against him/her in the issuing Member State. These two additional grounds for the mandatory non-execution of an EAW appear to defeat the very purpose of the FD and of mutual recognition and sit rather uneasily with the amended version of Art. 11(2)(f) of the Constitution.

Mention should also be made of the optional grounds for non-execution of an EAW as set out in Art. 4 of the Framework Decision. The implementing law in Cyprus does not reproduce Art. 4(1) of the FD, which provides for the possibility to lift the requirement of double criminality for acts falling outside the list set in Art. 2(2) and within the ambit of Art. 2(4) of the FD. All other optional grounds have been implemented in the Cypriot law (Sect. 14). Given the human rights guarantees present in the implementing law, the perhaps intentional omission of Art. 4(1) FD may appear

[128] See also Christou et al. 2009, p. 114.

[129] Dr. Demetrios Hadjihambis, 9 January 2015.

[130] Ibid.

[131] Stefanou and Kapardis 2006, p. 264.

regrettable in terms of substantive justice and mutual recognition. It actually appears that even if an act falls within the ambit of Sect. 12(2) of the implementing law, for which the requirement of double criminality is lifted, the execution of the EAW can still fail on the basis of mandatory (or not) grounds for non-execution,[132] which provide specific procedural guarantees and/or, as a last resort, on the basis of the general clause for the protection of fundamental human rights in Sect. 2(2) of the implementing law.[133] In this respect, it should also be noted that in 2014, Sect. 14 of the implementing law was amended by Law 30(I)/2014 to the effect that sub-sections 2, 3 and 4 were added, thereby reinforcing the discretion of the judicial authorities to refuse the execution of an EAW in several additional instances involving the protection of human rights embodied in procedural guarantees.[134]

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Article 30(1) of the Constitution provides that '[n]o person shall be denied access to the court assigned to him by or under this Constitution'. The right of access to the courts is however not an absolute right and is subject to reasonable restrictions, such as time limitations.[135] Article 30(2) then provides that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law'. Again, this can be subject to restrictions.[136] Finally, Art. 30(3) combined with Art. 12(5) of the Constitution set out the minimum rights of litigants, including in criminal proceedings and in line with Art. 6(3) ECHR. Thus, every person has the right to (i) be informed of the reasons why he/she is required to appear before the court; (ii) to present his/her case before the court and to have sufficient time necessary for its preparation; (iii) to adduce or cause to be adduced his/her evidence and to examine witnesses according to law; (iv) to have a lawyer of his/her own choice and to have free legal assistance where the interests of justice so require and as provided by law; and (v) to have the free assistance of an interpreter if he/she cannot understand or

[132] Such grounds seem to be used within reason; see e.g. Civil Appeal, *Panayiotis Philippou* (no. 2) [2009] 1 CLR 693.

[133] In *Obolashvili*, the District Judge, after refusing to execute an EAW on the grounds of the principle of double jeopardy (Sect. 13(b) of the implementing law), also clearly stated that in any case, a person would not be surrendered if his/her human rights were violated as protected under Sect. 2(2) of the same law. In this case, the length of time since the alleged offence was found by the District Judge to be unacceptable and sufficient in itself to refuse the execution of the EAW. See also Christou 2012, p. 68. Trial court decisions should however be contrasted with judgments delivered by the Supreme Court in its appeal capacity (see Sect. 2.3.1 and n. 97 above).

[134] For a pre-2014 review of procedural guarantees, see Christou 2012, pp. 71–77.

[135] See Emilianides 2013, p. 171.

[136] Ibid., p. 172.

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speak the language used in court. These minimum requirements are deemed to constitute 'fundamental elements of a fair trial' and any deviation therefrom would be in violation of the latter principle and invalidate the proceedings.[137]

Article 12(5)(c) of the Constitution provides in particular that every person charged with an offence has the right to 'to defend himself in person or through a lawyer …'. If it is possible in civil proceedings to have a judgment *in absentia* provided all minimum rights to a fair trial have been allegedly duly respected,[138] this does not appear to be the case in criminal proceedings.[139] For serious offences in particular, the presence of the accused at the trial is required, given the nature of the burden of proof in criminal proceedings and the right to self-representation and participation in the proceedings guaranteed in the Constitution.[140] As a matter of public order, the presence of the lawyer of the person charged does not discharge the authorities from their obligation to ensure that the accused is present at the trial, at least at first instance, unless that person has fled the country or has waived the relevant rights.[141]

Despite the exceptional nature of judgments *in absentia* in the Cypriot legal order, legislation was enacted in 2014 in Cyprus to implement the relevant provisions of the EAW FD, as amended by the FD 2009/299/JHA of 26 February 2009, reproducing verbatim the amendments, thereby enhancing the procedural rights of

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[137] Ibid., pp. 173–174.

[138] See *Apostolides v. Orams*, Case No. 9968/04, 9 November 2004, where Mr. Apostolides obtained a judgment by default of appearance in the Nicosia District Court against Mr. and Mrs. Orams, British citizens who had purchased his property in the area not under the effective control of the Republic of Cyprus. On 19 April 2005, a second judgment was delivered by the District Court refusing to set aside the earlier judgment on the ground that there was no valid defence to the claim (the court set aside appearance) – a judgment later upheld by the Supreme Court (*Apostolides v. Orams* [2006] 1 CLR 1402). Those judgments were then registered in, and declared enforceable by, the Queen's Bench Division of the High Court of England pursuant to the Brussels Regulation (Orders made by Master Eyre, 21 October 2005) and successfully challenged by the Orams before the High Court Judge pursuant to Art. 43 of the Brussels Regulation (*Orams v. Apostolides* (QB) [2007] 1 WLR 241). Mr. Apostolides appealed under Art. 44 of the Brussels Regulation before the Court of Appeal of England and Wales, which decided to stay the proceedings and refer five questions pertaining also to the right of the defence, service of documents and public order as grounds for refusal of enforcement of judgments to the ECJ (Case C-420/07 *Apostolides* [2009] ECR I-03571). For a detailed analysis of the judgment of the ECJ in this case, see S. Laulhé Shaelou 2011, pp. 342–356.

[139] See Report by the European Committee on Crime Problems (CDPC), Council of Europe, writing about judgments *in absentia* in Cyprus that 'it is not possible except in the case of specified very minor offences for which the accused requests to be permitted to be represented only by his counsel (section 45 of the Criminal Procedure Code) or if summons is proved to have been served on him and he fails to appear in which case the Court may hear the case in his absence (section 89 of the Criminal Procedure Code)', available at http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/Documents%202013/PC-OC%20(2013)%201%20Summary%20and%20Compilation%20of%20Replies%20Quest%20judgements%20in%20absentia%20and%20the%20possibility%20of%20retrial.pdf.

[140] See also Sect. 63 of the Criminal Procedure Code, Chapter 155 of the laws of Cyprus.

[141] Paraskeva 2015, p. 212.

persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial. The courts are now under an obligation (as opposed to this being within their discretion before) to fill in Annex A reproduced from the amending FD. The new legal framework has been perceived positively by the Cypriot courts as giving them additional discretionary grounds to refuse the execution of an EAW (even if no judgments seem to have been issued *in absentia* so far).[142]

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1–2.3.4.2 As previously noted, judges in Cyprus try to ensure that EAWs are executed.[143] Beyond the legal framework as developed above, no further information is available on the assistance which Cyprus extends to its own nationals in extradition procedures. Generally and in terms of issuing EAWs, there have been cases where persons requested under an EAW issued by the Cypriot authorities and executed in another Member State have been subsequently cleared of charges by the courts in Cyprus.[144] There have also been cases where EU nationals extradited to Cyprus under an EAW have been found guilty by the Cypriot courts and transferred back to their country to serve their sentence.[145] Cyprus, however, remains a place for fugitives to hide in the areas not under the effective control of its government, where the application of EU law is suspended, thereby avoiding EAWs issued by Cypriot or other Member States' authorities.[146] There are, however, some (rare) examples of surrender of a requested persons under an EAW in connection with the illegal purchase of property in the occupied areas of the Republic of Cyprus, which falls under the category of 'fraud',[147] forming part of the 32 offences for which the requirement of double criminality has been lifted. On this basis, the UK surrendered a requested person under an EAW to the Cypriot authorities in accordance with the principle of mutual recognition and despite not having an equivalent offence under UK law.[148]

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[142] See e.g. *John Constandinides v. Attorney General*, Civil Appeal No. 347/2014, 5 March 2015 (in Greek).

[143] See Christou et al. 2009, p. 113.

[144] See also http://gmadvocates.com/cases/cypriot-businessman-brought-cyprus-under-european-arrest-warrant-found-be-innocent-charges.

[145] http://www.fairtrials.org/cases/michael-binnington-and-luke-atkinson/.

[146] http://www.bbc.com/news/uk-19485421. For a detailed legal analysis of the application of EU law in Cyprus, including in relation to the areas not under the effective control of the government, see Laulhé Shaelou 2010a.

[147] See http://www.mfa.gov.cy/mfa/embassies/embassy_stockholm.nsf/ecsw19_en/ecsw19_en?OpenDocument.

[148] See http://www.chroniclelive.co.uk/news/local-news/former-north-east-nightclub-owner-1363996; see also Christou 2012, pp. 61–62.

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2.3.5 The Right to Effective Judicial Protection

2.3.5.1–2.3.5.4 There are mechanisms available in the Cypriot legal order that guarantee access to justice for individuals, such as the principle that time does not start running until full knowledge of the facts has been obtained. In administrative cases, if the Supreme Court has to decide on a matter of facts, it hears evidence first, including from other jurisdictions if necessary. The principle of mutual recognition is based on the mutual recognition of foreign law/judgments; this principle existed in Cyprus before it was applied in an EU context to civil and criminal matters, as Cyprus is a mixed legal system.[149] As such, the conception of the role of the courts in Cyprus has not really changed and remains, in the context of mutual recognition, mainly concerned with a review of coercive actions by the executive and the justification by the state for its actions.[150] In a wider framework, the courts in Cyprus may be criticised for privileging formalities over substance. The *Apostolides v. Orams* case is probably an example of extreme formalism through a literal interpretation of the meaning of losing a case 'by default' (lack of appearance) rather than on the merits, thereby taking the right to appear to the extreme.[151]

2.4 The EU Data Retention Directive

2.4.1 The implementation of the Data Retention Directive raised serious constitutional problems in Cyprus and resulted in the Sixth Constitutional Amendment (Law 51 (I)/2010 of 4 June 2010) after a decision of the Supreme Court in *Alexandrou* (see below). The effect was the amendment of Art. 17(2) of the Constitution that provided for the limitations available for Art. 17(1). Article 17(1) states that '[e]very person has the right to respect for, and to the secrecy of, his correspondence and other communication if such other communication is made through means not prohibited by law'. The new provision of Art. 17(2) allows interference with the aforementioned right through data retention on the basis of a judicial order that relates to the investigation of serious crimes carrying a prison sentence of five years or more. That amendment remains in full force today despite the decision of the CJEU in *Digital Rights Ireland and Seitlinger and Others*.[152]

Originally, the Republic implemented the Directive with the Law 183(I)/2007 (as amended) that introduced a system for data retention along the lines the Directive requires. However, in terms of scope, the Law applied for any crime that is defined in Sect. 2(1) as 'a felony' either by the Criminal Code or any other

[149] See Hatzimihail 2013.

[150] Interview with Dr. Demetrios Hadjihambis, 9 January 2015.

[151] Ibid.

[152] Joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

legislation and/or which carries a maximum prison sentence of five years. Therefore, the Cypriot approach opted for the widest possible definition of serious crime, in order to resolve long-lasting problems relating to the law of evidence and to the empowerment of the police to effectively combat crime in general.

The constitutionality of Law 183(I)/2007 was examined by the Supreme Court in the case of *Alexandrou*[153] that concerned the criminal investigation and prosecution of an individual. The Supreme Court assessed whether to grant leave for *certiorari* in relation to an *ex parte* order of a first instance court that permitted the use of the data retention system. The reasoning of the Supreme Court needs to be examined carefully because the decision in *Alexandrou* is often wrongly cited as an example of national reaction to the Directive's approach.

In reality, the Court disassociated the implementation of the Directive from Law 183(I)/2007 despite the fact that the preamble of the legislation expressly stated implementation of the Directive as its intention. The consequence of that disassociation was that the relevant Law was a national measure that had no connection with EU law, and thus could not benefit from the protective scope of Art. 1A of the Constitution. This reasoning of the Supreme Court was formed by relying on the ECJ ruling in *Ireland v. Parliament and Council*,[154] from which it deduced that since the Directive was adopted on the correct legal basis (Art. 95 EC that provides for harmonising measures for the common market), then as a corollary the Directive has *as its only purpose* exactly that. Therefore, the Supreme Court construed the ECJ ruling as limiting the scope of application of the Directive only to matters relating to the legal basis upon which the adoption of the Directive was based. Criminal law and the effective combating of crime were outside the scope of the Directive and therefore the relevant national legislation was disconnected from the Directive. Moreover, it must be noted that the Supreme Court did not examine the provisions of the Directive *per se*, as that was held to be unnecessary since the ECJ had already examined the purpose of the Directive. In addition, the Supreme Court did not consider whether it was necessary to submit a preliminary reference. The outcome of the preceding reasoning was to approach the relevant law as purely domestic in content and, as such, as unconstitutional and in conflict with Art. 17 (1) of the Constitution.

The judgment paved the way for the Sixth Constitutional Amendment. It must be noted that the constitutional amendment cannot on its own regulate the area in full and hence a legislative act was required in order to specify the scope and manner of application of what the amendment permitted. The only legislation in force that practically enables access to electronic data remains Law 183(I)/2007 that has as its stated aim the implementation of the Directive. Therefore, the retention of data became a domestic issue and policy engraved in the Constitution, but its application is governed by legislation intended to implement the Directive. Moreover, that legislation was held by the Supreme Court to be going beyond the proper scope of

[153] *Alexandrou* [2010] 1 CLR 17.

[154] Case C-301/06 *Ireland v. Parliament and Council* [2009] ECR I-00593.

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the Directive that was identified as relating only to market harmonisation. This creates a constitutional paradox since the matter of data retention in its criminal law context seems to have been regulated in Cyprus as a matter of national law and not EU law. This poses the question whether in the absence of the Directive such a course of action would have been followed, and the answer can only be negative.

Before the entry into force of the Constitutional Amendment, a case came before the Supreme Court that touched upon similar matters. In *Demetris Siamishis*,[155] the Supreme Court had to examine the constitutionality of the execution of a data retention order that chronologically took place prior the introduction of the Sixth Amendment. The case concerned an appeal from a criminal conviction, and since the appeal could only take into account the law as it stood at the time of the conviction, that conviction was held by the Supreme Court to be unstable as it had taken into account evidence obtained via infringement of the right to privacy. The Court emphasised the connection between the Directive and Law 183(I)/2007, which was considered to be an act implementing the Directive and as such enjoyed the protective status under Art. 1A of the Constitution. It therefore becomes puzzling to compare the preceding statement with the rationale of the decision in *Alexandrou,* and there is clearly inconsistency as to whether Art. 1A could apply to Law 183(I)/2007. If *Demetris Siamishis* is good law, then there was no need for amending the Constitution. If *Alexandrou* is good law, then there should not be any substantially different approach in *Demetris Siamishis*.

The next important decision that followed the Constitutional Amendment was that in *Christos Matsia.*[156] The details of the case are crucial since the case was decided after the aforementioned amendment, but the relevant orders instructing the telecommunications company to make the data retained available to the police were issued prior to the amendment. The Supreme Court in a much lengthier judgment approached the issue of the relation of Law 183(I)/2007 and the proper implementation of the Directive, and reached the same conclusion as in *Alexandrou*. It was held that the Law exceeded what was required for the implementation of the Directive and was therefore beyond the scope of Art. 1A of the Constitution and, by implication, beyond the relevant supremacy clause that would have shielded Law 183(I)/2007 from a finding of unconstitutionality. The new element in the reasoning of the Supreme Court was that the Court expressly stated that '[t]he Law in question exceeds the necessary and proportionate of what the obligations of the Republic entail under EU law'.[157] That conclusion was solely justified by full citation of paras. 80–85 of the CJEU's decision in *Ireland v. Parliament and Council.*

The new element in *Christos Matsia* was the analysis of the importance of the right to privacy and the detailed citation of its development through the case law, with specific reference to the jurisprudence of the ECtHR. However, at no point was there a comparison of the standards applied under pre-existing national

[155] [2011] 2 CLR 308.

[156] [2011] 1 CLR 152.

[157] Paragraph 170 of the Judgment (translation by the author).

jurisprudence and under the ECHR with the EU standard, hence no criticism of the Directive was in any way attempted. The key point is that the right to privacy provided the benchmark, and that right did not form part of the argumentation that the ECJ had adopted in *Ireland v. Parliament and Council*. This was a clear example of a situation in which a preliminary reference should have been submitted to the CJEU with the same content as the subsequent references in *Digital Rights Ireland and Seitlinger and Others*.

After the entry into force of the Sixth Constitutional Amendment, the Supreme Court consistently held that the data retention system was constitutionally permissible as a matter of national law. From that case law, reference can be made to two judgments that were chronologically subsequent to the ECJ judgment in *Digital Rights Ireland and Seitlinger and Others.* In the case of *Attorney General v. Isaia*[158] and in the case of *Sikifantou*,[159] the important issue was the impact of the ECJ decision in *Digital Rights Ireland and Seitlinger and Others* on the system of data retention that Law 183(I)/2007 introduced. Surprisingly, the Supreme Court in both cases stated that 'the impact of the CJEU's ruling is apparent' since 'Law 183 (I)/2007, according to its preamble, was adopted for the purpose of implementing the Directive on Data Retention'. Nonetheless, the 'apparent' is problematic given the earlier finding in *Alexandrou;* however, in the case of *Attorney General v. Isaia,* the Court, by a majority, relied on exactly that statement.

In that case the majority of the Supreme Court held that the annulment of the Directive does not impact on the case before it because Law 183(I)/2007 remains in force as a national measure. The majority decision was extremely brief on the matter and made no mention of the Directive or the ECJ judgment that annulled it. The Court insisted on the existence of a clear distinction between the Directive and Law 183(I)/2007, thus following the rationale and approach of the earlier case law on the matter. It is submitted that such a distinction is formalistic and distorts the legislative intent that was clearly stated in the preamble of Law 183(I)/2007.

The minority judgment (Nathanael and Nicolatos JJ) adopted a rather different approach on the matter. The emphasis was placed on the ECJ decision in *Digital Rights Ireland and Seitlinger and Others* and on the argumentation that the ECJ applied especially in relation to the principle of proportionality. The conclusion reached stated that Law 183(I)/2007 was founded on the Directive, and that becomes evident from the preamble of the Law. As a result of the annulment of the Directive, the 'legitimising foundation' of the Law disappears and takes with it the totality of the system that enables the police to have access to the retained data. Therefore, the issue arises whether the minority considers Law 183(I)/2007 as being invalid and, if yes, on what basis, given the existence of the Sixth Constitutional Amendment.

To summarise, the approach of the Supreme Court in the area of data retention, either as a matter of EU law or as a matter of national constitutional law, is

[158] Case 402/2012, 07 July 2014.

[159] Case 213/2014, 18 December 2014.

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inconsistent and inherently problematic. The Supreme Court has in effect necessitated a Constitutional Amendment that altered the balance of the content of the right to privacy. The consequence is that the implementation of the Directive has become a matter of national law, irrespective of the stated intention in the preamble of the relevant Law. Therefore, the subsequent annulment of the Directive by the CJEU becomes irrelevant, whereas the whole issue arose out of the need to implement the Directive. This is clearly conceptually cyclical, structurally unsound and constitutionally heretical.

2.5 Unpublished or Secret Legislation

2.5.1 Articles 3 and 104 of the Constitution require the publication of all laws as an essential requirement for their validity. There is no case law nor academic comment on this point. The principle of due publication is implicitly also embodied in the principle of good administration.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 As a background to this important part of the Report for Cyprus, the reader should be reminded of the fact that Art. 41 of the 2003 Act of Accession provided that the European Commission had the power to 'adopt measures to facilitate the transition' of the new Member States to the regime of the Common Agricultural Policy.[160] The European Commission therefore adopted Regulation (EC) No 1972/2003[161] (for agricultural products) and Regulation (EC) 60/2004[162] (for the sugar market) on this basis, mainly in order to avoid the risk of speculation. Both Regulations required the new Member States to levy charges on holders of surplus stocks on 1 May 2004 for products in free circulation. With respect to the sugar market more specifically,[163] Art. 6(1) of Regulation No 60/2004 required the European Commission to determine by 31 October 2004 at the latest, for each

[160] See Laulhé Shaelou 2010b, pp. 496–497.

[161] Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2004] OJ 2003 L 293/3.

[162] Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2004] OJ L 9/8.

[163] For litigation regarding other agricultural products, see Laulhé Shaelou 2010b pp. 498–500.

Member State, the quantity of sugar as such or in processed products exceeding 'the quantity considered as being normal carry-over stock at 1 May 2004', which needed to be eliminated from the market 'at the expense of the new Member States'. Article 6(2) also provided that Member States had to eliminate such quantities in excess by 30 April 2005, as determined by the Commission. For this purpose, Art. 6(3) of the Regulation required the new Member States to dispose on 1 May 2004 of a system for the identification of traded or produced surplus quantities and to use the system to compel the operators concerned to eliminate quantities at their own expense. The burden of proof was on the operators and, if not satisfied by 30 April 2005, the new Member States were entitled to charge an amount to the operators concerned. With Commission Regulation (EC) No 832/2005,[164] the European Commission fixed the surplus quantities to be eliminated for each new Member State, taking into consideration activities in the sugar sector of each new Member State before accession (period 1 May 2003–30 April 2004 compared to the average of quantities in the same period for the three previous years). The figure for Cyprus was 40,213 tonnes. The Commission subsequently extended the deadlines with Commission Regulation (EC) No 651/2005.[165]

At the national level, Law 40(1)/2005 was passed to implement the Commission Regulations on the transitional measures in the sector of agricultural goods. The Ministry of Commerce, Industry and Tourism, appointed as the competent authority, had informed the operators of Regulation 60/2004 prior to accession and, upon accession, had requested the relevant information from the operators. In 2005, it set out the surplus quantity for each operator and, in 2006, it proceeded with issuing penalties against the operators concerned on the basis of Art. 5(1) of Law 40(1)/2005.[166] Two administrative actions were therefore taken by the Ministry of Commerce on the basis of Law 40(1)/2005: (i) a decision dated 2 August 2005, requesting the addressees to eliminate the surplus quantities allocated to them by 30 November 2005; and (ii) a decision dated 21 August 2006, imposing a penalty on the operators who did not comply (or only partly complied) with the first decision. As a result, 33 recourses were introduced before the Supreme Court of Cyprus against the 2005 decision, as well as 18 recourses against the 2006 decision, totalling 51 actions which were joined and brought before the Full Chamber of the Supreme Court. In fact, there were actually 52 actions in total, but one of them was judged on the merits on 16 July 2007 by a single judge chamber.[167] Judge Hadjihambis ruled in this case

[164] Commission Regulation (EC) No 832/2005 of 31 May 2005 on the determination of surplus quantities of sugar, isoglucose and fructose for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2005] OJ L 138/3.

[165] Commission Regulation (EC) No 651/2005 of 28 April 2005 amending Regulation (EC) No 60/2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2005] OJ L 108/3.

[166] Laulhé Shaelou 2010b, pp. 496–497.

[167] *Morphis Morphy & Associates Ltd v. RoC through Ministry of Commerce*, Case No. 121/2007, 16 July 2007.

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that the system put in place for calculating the surplus quantities fell within the scope of Commission Regulation No 60/2004, due to the margin of discretion left to the new Member States to determine the method for such calculation.[168] The case was appealed[169] but the Supreme Court decided that this appeal would not be heard until a decision had been issued in the 51 other actions.

During the process of judicial review of administrative actions under Art.146 of the Constitution, an act must be deemed both administrative and executory in order to be reviewed. An act is deemed executory if it is 'determinative in itself of the rights and obligations of a person under the authority of the administration', and the Supreme Court examines whether an act is executory *ex proprio motu*.[170] On 13 July 2011, the Supreme Court (Full Chamber) considered the 33 joined actions challenging the 2005 decision[171] and ruled that the 2005 decision was not executory in view of the 2006 decision which imposed the penalties. It therefore rejected the 33 actions based on preliminary objections. On 21 March 2013, the Supreme Court (Full Chamber) reconvened to consider the 18 recourses for judicial review of the 2006 decision. The Court found (preliminary objections) that the 2005 and 2006 decisions constituted a series of two administrative actions and could be reviewed by the Court in accordance with the *Chrikar* jurisprudence. It then considered the following grounds for review: (i) retroactivity of taxation prohibited by Art. 24 of the Constitution; (ii) lack of reasonable and due inquiry; (iii) lack of due reasoning; and (iv) lack of competence. The Court ruled that the consideration of the retroactivity of the charge, at the constitutional level, was not 'necessary' in order to establish the *ratio* of the case and gave no further explanation as to why this was so. The Court then found several reasons why there was a lack of due inquiry on the part of the Republic of Cyprus. For instance, it noted that there was no system specified by law as of 1 May 2004, but on 15 April 2005 (Art. 6 Law 40(I)/105 provided for the retroactive ratification of acts taken during this period). It noted the absence of a legal system duly notifying natural and legal persons of their rights and obligations. Since the surplus quantities had not been established with certainty, the Court found that there was no need to refer to the ECJ and distinguished the facts of the present case from the ones arising in the *Balbiino* case referred to the ECJ by the Tallinn Administrative Court (Estonia) in the 'sugar saga'.[172] The Court further ruled that there was a lack of justification in the methods of assessment and identification of surpluses and, finally, that there was lack of competence, since the Minister himself had not authorised the actions.

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[168] Laulhé Shaelou 2010b, p. 499.

[169] The Appeal, scheduled for 12 September 2014 for procedural considerations, was withdrawn. The action was initially based on its compatibility with EU law, the violation of constitutional rights – no retroactivity of taxation, right to trade and non-discrimination, and finally on a review of administrative actions.

[170] Emilianides 2013, p. 197.

[171] *Chrikar Trading* and others [2011] 3 CLR 541.

[172] Case C-560/07 *Balbiino* [2009] ECR I-04447. For a review of the relevant litigation in the new Member States, see Albi 2009 and Lazowski 2010.

The Court's decision in the above case was based on the principles of sound administration as established in Law 158(I)/1999 on the General Principles of Administrative Law. As seen in Sect. 2.1, this law is a source of constitutional law as it refers to matters of public law. Some principles like retroactivity and non-discrimination are protected both under the Constitution and this law. But since an Art. 146 recourse is limited by nature to considerations of administrative law and does not extend to a review of constitutionality, it would appear that only the constitutional principles expressly mentioned among the general principles of administrative law are *implicit* in a review of administrative actions under Art. 146 (namely the protection of legitimate expectations and the principle of proportionality). Even so, it would appear that they will only be considered by the Court when *necessary* for the establishment of the *ratio* of the case. This is also true of rights protected expressly under the Constitution, but the Court will not raise constitutional issues out of its own motion.[173]

Thus, contrary to constitutional courts in other new Member States such as Hungary, Estonia and the Czech Republic,[174] the Supreme Court in Cyprus did not consider any constitutional issues raised in the sugar cases. It restrained itself to a mere control of administrative actions. There is no reference to the EU legal framework either, even if the supremacy of EU law appears to be implicit. To the extent that this decision of the Supreme Court relieves operators from penalties, it could be said to participate in the protection of individual (economic) rights. It is also a clear signal to the public administration in Cyprus that despite EU accession, legal certainty in administrative procedures must prevail and no lowering of national standards is permitted by the Court.[175] It is argued that this finding could be of utmost significance, especially in the context of the financial crisis (on concerns about the protection of property rights in a dissenting opinion in the 'bail-in' case, see Sect. 2.7.3).

In the meantime, Cyprus requested the annulment of Regulation 651/2005 before the General Court of the EU because it argued that it changed its legal situation under Regulation 60/2004.[176] The General Court found on the contrary that the amendments with respect to Cyprus were purely procedural and that the act (as amended) had become final vis-à-vis Cyprus since it had not been challenged within the deadline.[177] The action was therefore found inadmissible. However, this was based on the findings of the General Court that there was no need to be a Member State to challenge generally applicable acts under (then) Art. 230 EC, and that it was sufficient to be a legal person.[178] The General Court had concluded that there was no violation of the principle of effective judicial protection towards

[173] Interview with Dr. Demetrios Hadjihambis, 20 August 2014.

[174] See Albi 2009, Lazowski 2010 and Laulhé Shaelou 2010b.

[175] Interview with Dr. Demetrios Hadjihambis, 20 August 2014.

[176] Joined Cases T-300/05 and T-316/05 *Republic of Cyprus v. Commission* [2009] ECR II-00192.

[177] Ibid., paras. 258–260.

[178] Ibid., paras. 241, 245.

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Cyprus in this case.[179] The ECJ however overruled the specific finding of the General Court on the *locus standi* of new Member States in the Polish case seeking the annulment of Regulation 1972/2003, finding that the General Court had erred in law.[180] Cyprus did not appeal the decision of the General Court although its arguments with respect to Regulation 651/2005 had not been heard, contrary to Poland for whom Regulation 735/2004 was found to make substantial changes to Regulation 1972/2003 and whose action was deemed admissible, thereby raising the question of effective judicial protection vis-à-vis Cyprus.

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1–2.7.2 The constitutionality of the Treaty Establishing the European Stability Mechanism (ESM Treaty) has not been directly raised in Cyprus despite the fact that the Supreme Court had to examine the legality of the 'bail-in' that was imposed on Cyprus. Specifically, issues relating to the structure of the financial stability mechanism and its actual funding were not discussed in connection with budget autonomy and responsibility. Moreover, no constitutional amendment was introduced in relation to those matters or Eurobonds and the Banking Union.

2.7.3 Some of the case law regarding the impact of austerity measures on constitutional rights was provided in Sect. 2.2.

A further central case regarding the judicial protection of property rights and judicial review concerned the 'bail-in' measures in 2013. As is explained in Sect. 3.5, the bail-in decision resulted from a political agreement at the Eurogroup level and had the effect of imposing a levy amounting to partial confiscation of all unsecured deposits, that is below 100,000 EUR, in the two systemic Cypriot banks.

The legality of the measures adopted to impose the 'bail-in' were contested in *Myrto Christodoulou*,[181] or what is referred to in the rest of the Report as the 'bail in' case. The majority decision, taking an unsatisfactory position, classified the matter as one belonging to the sphere of private law, and therefore the proper course of action was to initiate actions for damage for breach of contract and tort law. Therefore, the issue was not one of administrative law, as it concerned the relationship between depositors and the banks, and the recourse filed under Art. 146 of the Constitution was dismissed. In terms of the civil actions, the criterion to be applied was whether the loss suffered would have been greater if the 'bail-in' had not taken place. This criterion was mentioned eight times in the judgment of the majority. The majority judgment did not examine the EU aspect of the matter nor consider the possibility of sending a preliminary reference.

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[179] Ibid., paras. 242–247.

[180] Case C–335/09 P *Poland v. Commission* [2012] ECLI:EU:C:2012:385.

[181] *Myrto Christodoulou* [2013] 3 CLR 427.

In contrast to that formalistic approach, the dissenting judgment by Judge Erotokritou takes a different and much more preferable approach that is perhaps the most complete attempt in Cyprus to discuss the nature of the principle of primacy of EU law and its relationship with national constitutional law. Judge Erotokritou stated that the matter is one that relates to human rights, as it affects the right to property as protected under Art. 17 of the EU Charter and under Protocol 1 ECHR, as well as under Art. 23 of the Constitution. The adopted approach is so important that it necessitates fuller citations:

> Recent events in Europe due to the financial crisis and the measures taken, give the impression that not only international law, but also the European and national law seems to be rewritten. It is therefore imperative in order to safeguard the rights of the parties arising from the TEU, to give the chance to national administrative courts to control not only the legality of the contested acts, but also the compatibility of the various national laws which led to the contested measures with EU law.

In this part, the dissenting judgment raises the point that the situation that is emerging is one that deviates from pre-existing EU law and creates a new set of factors that are different from those upon which the relationship between national law and EU law has been based so far. Therefore, the 'bail-in issue' is rightly approached as an issue exceeding the consensus that pre-existed, thus necessitating the scrutiny of the compatibility of the new EU/international law measures with the rights arising from EU law. Judge Erotokritou continued:

> Where conflict is found and there is no ambiguity, Union law is to be applied, as it takes precedence and is directly applicable. Where conflict is found, but the requisite clarity as to the content and validity of the provisions of Union law is not present, then the national court has the power under Art. 267 TFEU to apply with a preliminary question to the CJEU calling either for the interpretation of certain provisions of EU law, e.g. free movement of capital (Art. 63 TEU), or for a ruling on the validity of specific legal instruments of the EU institutions. With this assistance, the national court may now proceed to examine the compatibility of national law with EU law.

In this part of the approach, Judge Erotokritou focused on the use of the preliminary reference procedure as a useful tool for exercising the national judicial power of scrutiny. In addition, Judge Erotokritou stated:

> National sovereignty undoubtedly gives way to the supremacy of European law and rightly so I would say. But it seems that the further erosion of that national sovereignty and the parallel erosion of fundamental rights, often through informal procedures should at some stage be scrutinised by the CJEU, albeit indirectly through Article 267, as to whether it is compatible with the primary law of the European Union.

This is perhaps the centre of gravity of the approach of Judge Erotokritou. The judge adopts a pragmatic approach that accepts the limitation of national sovereignty as a logical consequence of the need to apply the principle of primacy of EU law. This indirectly refers to the nature of the EU system as being founded on the principle of conferred powers that the Member States have voluntarily transferred to the Union. It is respectfully submitted that if this point would have been specifically included in the dissenting opinion, then it would have acquired a more holistic

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theoretical and substantial character in relation to the way that the national constitutional system sees the Union. This would therefore have formed an opportunity for starting to express the inherent reservations as regards the principle of primacy of EU law and for starting to set the limits to the acceptance of the principle.

The next argument is also very interesting, as it identifies the problem that is created by any further unilateral alteration of the equilibrium that relates to the transfer of sovereignty to the EU and to the corresponding application of the principle of primacy of EU law. This becomes especially relevant if the impact of the alteration is directed towards the protection of fundamental rights and has as a result a unilateral and substantial shift in competences. However, this point could have been further explained as having the meaning that any expansion of EU competences at the expense of national sovereignty in a way that structurally affects the constitutional identity cannot be accepted by the national legal order and even by the ECJ.

One cannot avoid making the comparison of the dissenting decision with the decision and the reasoning of the *Bundesverfassungsgericht* in the *Honeywell* case.[182] There it was held that the *ultra vires* review by the Federal Constitutional Court, namely the striking down of an EU act, can only be considered by the national court if a breach of competences on the part of the European bodies is manifestly in breach of competences and the impugned act led to a structurally significant shift in the structure of competences that is to the detriment of the Member States. A reference to this judgment would have given an essential element of justification to the argument that Judge Erotokritou was making. This would have been useful also because the Judge impliedly followed the reasoning of the German Court by requiring the CJEU to scrutinise the potential erosion of competences, thus placing the responsibility on the CJEU and not solely on the national court. This reflects exactly the inherent idea that the relationship between national constitutional law and EU law is one that both parties have an obligation to safeguard in order for the relationship to remain one of partnership. Judge Erotokritou continued to reinforce exactly the preceding point by stating that:

> In the EU legal system, the supremacy of the rule of law and of legal protection, which form a fundamental principle of the European Union and which are inextricably intertwined with the Republic, can not be eliminated through the creation of exemptions from judicial administrative control, each time for various reasons national governments are in trouble and take decisions which violate basic human rights that are derived from the legal order of the European Union and generally from the European *acquis communautaire.* The legal restrictions imposed by the Constitution on the exercise of state power must be maintained even in critical and difficult conditions such as those that exist today, in order to ensure the supremacy of the rule of law and of the principle of legality.

To summarise, the approach is the best and only example of real discussion about the nature of the relationship between national constitutional law and the principle of primacy of EU law in Cyprus. The approach by Judge Erotokritou

[182] BVerfG, Order of 06 July 2010 - 2 BvR 2661/06 - Rn. (1-116).

contains many important structural and substantive points that reflect the theoretical perspective about the principle of primacy of EU law and which has two dimensions: that of the CJEU and that of the national Constitution. Moreover, Judge Erotokritou places both parties under an obligation to safeguard the delicate equilibrium in order to prevent any unilateral alterations that could create a clash. In doing so, Judge Erotokritou removes the possibility of tensions arising by requiring the national court to first submit a preliminary reference. This is the same approach inherent in *Honeywell*. The identification of the delicate issue of fundamental rights and the indirect reference to competences through the connection with the erosion of national sovereignty is also in line with the rich jurisprudence of other national constitutional courts.

Nonetheless, the approach of Judge Erotokritou also does not go far enough and does not fully elaborate on all the crucial points that it raised. The lack of any reference to the jurisprudence of other national constitutional courts, including *Honeywell*, is one such step short of full elaboration.

The last point to be made is that the dissenting opinion was unfortunately not endorsed by the majority. Nonetheless, it is submitted that the fact that views expressed were not endorsed by the majority does not pre-empt the subsequent adoption of the reasoning of Judge Erotokritou as the formula that the Supreme Court can apply to the primacy of EU law. The dissenting judgment exists and can always be used to supplement the already incomplete approach of the Supreme Court on this issue, regardless of the different views of the majority on one specific matter, i.e. bail-in.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1–2.8.6 The characteristics of judicial review in the Cypriot legal order have already been addressed elsewhere in this Report.[183] Overall, standing requirements have been said to be construed broadly by the Supreme Court, thereby 'guaranteeing the procedural access to effective judicial protection'.[184] As a manifestation of the doctrine of separation of powers, the Supreme Court in Cyprus seems to be responsible for keeping the balance between access to judicial review and the good administration of justice.[185] This duty appears to extend also to indirect judicial review in the context of preliminary references to the CJEU.

[183] See e.g. Sects. 2.1.3, 2.2 and 2.6 above. No statistical data regarding annulment and relevant grounds is available.

[184] Kombos 2010b, pp. 329 and 350.

[185] Ibid., p. 338.

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It should be noted in this respect that the Courts Law of 1960, as amended,[186] used to provide for a right of appeal against decisions of lower courts to refer or not to refer a matter to the CJEU, limited initially (in 2007) to instances where the court ruled on the basis of an application made by one of the parties to the case, and subsequently extended (in 2008) to cases where the courts would decide to refer on their own motion. The authors of the present Report respectively provided at the time an extensive critical analysis of the right to refer or not to refer a matter to the CJEU.[187] Suffice to note here that following the *Cartesio* case,[188] the Law since 2009 provides that no such appeal is possible.

Following the removal of the right to appeal decisions of lower courts to refer or not to refer to the CJEU, it can be said that lower courts are quite free to use the preliminary reference mechanism, including in matters of interpretation and validity of EU legal acts. However, the first preliminary reference to the CJEU from a court other than the Supreme Court only came in 2013 and did not concern matters of validity of EU legal acts.[189] In the meantime, the lower courts have gradually developed their legal reasoning in terms of dealing with requests from applicants to refer questions of interpretation of EU law to the CJEU, but still too often reject such requests with little justification, resulting in a very low number of preliminary references to the CJEU from such courts (three in total).[190] As far as the Supreme Court is concerned, only four preliminary references have been made to date.[191] These four references appear to indicate a steady trend towards the progressive awareness and 'mastering' of the preliminary reference mechanism by the Court.[192] Suffice to note here that none of these references appears to raise issues of validity of EU legal acts.

Regarding concerns about a gap in judicial review, in the context of the financial crisis measures, it might be worth briefly recalling the concern in the dissenting opinion of Judge Erotokritou (Sect. 2.7.3) that in the intertwined EU legal order 'the rule of law and legal protection can not be eliminated through the creation of exemptions from judicial administrative control, each time for various reasons national governments are in trouble and take decisions which violate basic human rights'.

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[186] Law 14 of 1960, Sect. 25, new sub-sect. 2A, as amended in 2007, 2008 and 2009.

[187] Laulhé Shaelou 2010b; Kombos 2010b. For a comprehensive, unpublished study see Lycourgos 2014.

[188] Case C-210/06 *Cartesio* [2008] ECR I-09641.

[189] *Sotiris (Akis) Papasavvas v. O Philelftheros Dimosia Eteria ltd and others*, Nicosia District Court, Case No. 9493/10, 27 March 2013 (in Greek).

[190] Court of Justice of the European Union, Annual report 2013, Luxembourg 2014, pp. 118.

[191] Ibid.

[192] Especially *Cypra Ltd v. the Republic*, Administrative Appeal 78/2009, 5 June 2013 and *Alpha Bank Cyprus Ltd v. Si Senh Dau and others*, Joined Civil Appeals E23/2013-E29/2013, 13 September 2013 (in Greek). See Laulhé Shaelou 2010b.

2.9 Other Constitutional Rights and Principles

2.9.1 There have been no further notable developments in Cyprus.

2.10 Common Constitutional Traditions

2.10.1–2.10.2 The influence and impact of the common constitutional traditions on the definition and interpretation of concepts of EU law has been minimal. From the Cypriot perspective, the matter has not been examined by the Supreme Court, but it can be argued that the opportunity to do so was missed in the 'bail-in' case and in relation to social rights that form a distinct and important part of the national Constitution. Reference can be made to the rather unique passage in Art. 9 of the Constitution that states '[e]very person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance.'

Nonetheless, the content and scope of the preceding provision is rather idiosyncratic and specifically relevant to the Cypriot context, even if a parallel can perhaps be found in the German Basic Law and the fundamental principle of the 'social state'. It would however be difficult to establish the universality of the principle to the required extent that would qualify it as forming part of the common constitutional traditions. The same could apply in relation to various other national constitutional principles to be found in other jurisdictions. The issue can also be assessed through the perspective and the experience of the ECHR on margin of appreciation and European common ground. The key factor is the progression of time and the maturing of a legal principle that is reflected in the growing acceptance and adoption by the majority of the participating legal orders. In practical terms, the highlighting of the centrality of a legal system in the national constitutional order can be useful especially in the context of the preliminary reference procedure.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 The Cypriot constitutional system places considerable emphasis on the protection of fundamental rights and on the continuation of a fruitful relationship between the national Constitution and the ECHR. This relationship has been very close and can be characterised as an example of harmonious coexistence. The EU dimension of the matter creates *de facto* and *de jure* a legal triangle that governs the applicable standard of protection, but in the Cypriot context the issue has never been discussed fully. The prevailing approach, as can be seen in relation to the Data Retention Directive in Sect. 2.4, tends to isolate the EU aspect at least to the point

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where it resolves any clash with the national standards of protection in favour of the EU standard. Methodologically this is achieved by 'nationalising' the issue and by subsequently modifying the national standard; this is an unfortunate and problematic approach and outcome. Some cases where the Cypriot Constitution and the Supreme Court provide a higher standard of protection than the ECHR were noted in Sects. 1.1.2 and 2.1. Additionally, it will be recalled from Sect. 2.7.3 that Judge Erotokritou in a dissenting opinion has expressed concern about the 'erosion of fundamental rights' 'often through informal procedures'.

At the general level, the constitutional triangle of protection must be 'isosceles'. That would reflect the equality of the legal orders, which is a fundamental prerequisite for the symbiosis of legal orders. This argument is reinforced by two considerations. First, the respect for the constitutional identity of each system and secondly, because of the forthcoming accession of the EU to the ECHR system. As a result, the upwards modification of the EU standard that would favour the protection afforded to a fundamental right must be encouraged, as it will be constructive for both the right in question and for the relationship with national courts. The concept of deference is therefore to be reinforced, and the CJEU has shown such willingness in the *Omega* case.[193]

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 In relation to the democratic element as expressed through the participation in open discussions about EU measures bound to have a substantial impact on national constitutional values, it can be safely argued that in Cyprus no such deliberations took place at any stage in relation to the EAW or the Data Retention Directive. Moreover, when problems arose in those areas, the Supreme Court indirectly facilitated the opening of a democratic dialogue by requiring the introduction of constitutional amendments. This had the effect of creating a new opportunity for the legislature to discuss in full such matters before proceeding with the constitutional amendments, but the character of that discussion has remained the responsibility of the legislature and the executive. Normally in such situations the legislature invites professional bodies and experts to express their opinions, but such discussion is not conducted at the national level and the public remains largely disassociated. The matter is indeed important given the standing restrictions in relation to an action for annulment of an EU act and it also touches upon the legitimacy of the EU system. However, the fact that Member States through their elective representatives participate in the adoption and implementation of such EU acts cannot be ignored. The responsibility remains at the national level, and the creation of a specific procedure could be beneficial in terms of legitimacy, but it is

[193] Case C-36/02 *Omega* [2004] ECR I-09609. For analysis, see Kombos 2006.

questionable whether it could be effective and efficient. One such procedural route could be the assessment of legality prior to the entry into force of the EU act, at both the national and EU level. This, however, has to be assessed in relation to the privileged standing status of Member States and to the efficiency of the EU system. Moreover, issues of national procedural autonomy also arise and there is the potential of national constitutional courts engaging in the review of validity of EU acts in the making that would trigger the preliminary reference obligation for national courts of last resort. The other suggested option, recognising the fact that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality as a defence for the Member State in an infringement proceeding, is problematic. This would occur at a later stage of the entry into force of the EU measure and would create differing levels of compliance for Member States, thus affecting the effectiveness of EU law.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1–2.13.2 The symbiosis of the different standards of protection is proving problematic, but it is submitted that this has been the situation for decades, as the experience with the *Solange* jurisprudence[194] clearly indicates. The matter is nonetheless bound to come to the forefront of the discussion with the accession of the EU to the ECHR system, and it is perhaps crucial to assess the method and rules of accession especially after the recent approach of the CJEU in *Opinion 2/2013*.[195] This author acted as co-agent for Cyprus in those proceedings, and it can be argued that the concerns of the CJEU about the relationship between the two systems and the two Courts were evident in both the questionnaire sent to the intervening parties and in the questions that the CJEU raised during the oral stage of the proceedings.

To summarise, the concerns about the different standards of protection are legitimate but are not new; they form part of the history of the constitutional coexistence.

2.13.3 As regards the quality of the reasoning of the CJEU in cases concerning constitutional sensitivities, it is submitted that unfortunately the Cypriot Supreme Court has so far not raised such concerns or issues for that matter. The limited number of preliminary references submitted by Cypriot courts have concerned specific issues that did not relate to deep constitutional concerns.

In terms of the broader issue, it can be argued that the key is in the formulation of the preliminary reference by the national courts. The detailed statement of the national perception and of the relevant applicable jurisprudence can hopefully steer the approach of the CJEU towards a more detailed reasoning. Such examples, albeit

[194] *Internationale Handelsgesellschaft mbH v Einfurh- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540; *Wünsche Handelsgesellschaft* (Solange II) [1987] 3 CMLR 225.
[195] Opinion 2/13 *Opinion pursuant to Art. 218(11) TFEU* [2014] ECLI:EU:C:2014:2454.

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with varying success, can be found in the preliminary references in *Digital Rights Ireland and Seitlinger and Others* and in *Outright Monetary Transactions (OMT)*.[196] Moreover, the introduction of dissenting judgments would be beneficial for the clarity and completeness of the stated judicial reasoning, but there are strong informal signs that the CJEU is firmly against any such reform.

2.13.4 In the Cypriot context there is an urgent need to re-establish the boundaries between national constitutional law and EU law because the Fifth Constitutional Amendment and the approach of the Supreme Court have created a tight and restricted topos for airing national concerns about the shaping and upholding of constitutional rights and principles.

3 Constitutional Issues in Global Governance

3.1–3.2 Constitutional Rules on International Organisations and the Ratification and Application of Treaties

The ratification of treaties in Cyprus[197] and the transfer of powers to international organisations need to be considered within the framework of the status of the Republic of Cyprus in public international law and the rigid nature of its Constitution, as already analysed in detail in Sect. 1.1. One of the peculiar implications for the Republic of Cyprus deriving from its unique constitutional setting relates to its membership in international organisations. It should be noted that almost from the date of its creation up to its accession to the EU (1961–2004), the Republic of Cyprus was a member of the non-aligned movement. Cyprus is also the only EU Member State that is not a member of NATO or of the Partnership for Peace Programme.[198] The relationship the Republic maintains with international organisations must of course be examined in the light of the *de facto* division of its territory and in view of the several attempts (including currently ongoing) to find a solution to the Cyprus problem.

The Council of Ministers has the power to conclude any international agreement by virtue of Arts. 50 and 54 of the Constitution. There is a difference between international agreements concluded with a foreign state or an international organisation falling under the scope of Art. 169(1) of the Constitution and relating to 'commercial matters, economic co-operation and *motus vivendi*', which are concluded under a decision of the Council of Ministers, and any other treaty,

[196] See respectively Joined cases C-293/12 and 594/12, n. 152; Case C-62/14 *Gauweiler and Others* [2015] ECLI:EU:C:2015:400.

[197] For a legal analysis of the reception of international legal agreements in the Cypriot national legal order, see Laulhé Shaelou 2010b, pp. 471–484; see also Laulhé Shaelou 2010a, pp. 130–140.

[198] Emilianides reports that 'a decision of the House of Representatives that the Republic should apply for membership in the Partnership for Peace programme was vetoed by the President of the Republic Demetris Christofias on 2 March 2011', Emilianides 2013, p. 20.

convention or international agreement falling under Art. 169(2) of the Constitution which requires such international agreements to be 'negotiated and signed under a decision of the Council of Ministers' but will 'only be operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it shall be concluded'. In accordance with Art. 169(3) of the Constitution, all such treaties, conventions and agreements have, 'as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto'.[199] Article 170(1) of the Constitution further provides that the Republic of Cyprus 'shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be'. The Treaty of Guarantee also provides in its Art. I that the

> Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution and undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.

These provisions of the constitutional framework of the Republic of Cyprus were at the centre of legal debates prior to Cyprus joining the EU. A group of international legal experts concluded that none of these provisions were an obstacle to Cyprus' EU membership.[200]

3.3–3.5 Democratic Control, Judicial Review and the Social Welfare Dimension

As for democratic control by the House of Representatives, it was already noted that most of the time democratic deliberations are non-existent or limited. The Constitution of Cyprus is, however, based on the principle of representative democracy.[201] Democratic debates within the House of Representatives take place on a regular basis but not systematically (referendums can take place upon a decision of the House of Representatives following a proposal from the Council of Ministers as per the Referendum Law No 286/1989, but are kept for issues of special importance and of public interest).[202] It was noted for example in the context of the run-up towards Cyprus' EU accession that there was very little or no

[199] The role of the Supreme Court with respect in particular to the ECHR has already been developed in this Report.

[200] Emilianides 2013, p. 212. For a pre-accession consideration of other debates surrounding the impact of Cyprus' EU membership on the Constitution, including with respect to conflict of powers and transfer of powers, see Laulhé Shaelou 2010a, pp. 133–134.

[201] For a detailed description and analysis of the system of government in Cyprus including political parties and their role in the House of Representatives as interpreted recently by the Supreme Court, see Emilianides 2013, pp. 65–75.

[202] For a review of the Referendum Law, see Emilianides 2013, pp. 75–76.

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democratic debate taking place in the Parliament, as Cyprus's strategy was mainly based on external considerations and concerns.[203]

More recently, however, mention should be made of the more active role currently played by the House of Representatives in the context of the EU/IMF macro-economic adjustment programme for Cyprus[204] and of its pivotal role during the negotiations leading to the programme.[205]

The lack of judicial activism in respect of the same matter has been noted elsewhere in this Report.[206]

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

3.6.1 The constitutional amendment regarding extradition under international/European arrangements was discussed in the introduction to Sect. 2.3.

The question of what safeguards are available to avoid potentially arbitrary results in the context of an international arrest warrant arose in the case against Mr. Louka, requested by South Africa, signatory to the European Convention on Extradition since 2003, in *George Louka v. Minister of Justice and Public Order*.[207] In the first decision, the Supreme Court had to review the (alleged) administrative decision of the Minister to sign the international arrest warrant issued against Mr. Louka. The lower court had considered the discretionary powers of the Minister to sign the said warrant as an '*acte de gouvernement*', which meant that it fell beyond the scope of the Court's powers of review of administrative acts under Art. 146 of the Constitution. The recourse before the Supreme Court was therefore rejected. In the second decision, the Supreme Court ruled in final instance on the request for the issue of an order in the form of *habeas corpus*, as part of the prerogative orders under Art. 155(4) of the Constitution whereby the Court has the exclusive jurisdiction to review the action of a lower court, in order to determine the lawfulness of

[203] Laulhé Shaelou 2010a, p. 42.

[204] With respect for example to the legal framework regarding non-performing loans and the protection of the dwelling house.

[205] See Sect. 2.7.3 and Laulhé Shaelou 2013.

[206] See Sect. 2.7.3 for case law related to the bail-in and Sect. 2.2 for the austerity measures put in place in Cyprus as a result of the financial crisis. On 16 March 2013, a first political agreement was reached between the Eurogroup, IMF and the Cypriot authorities which included a one-off stability levy for all resident and non-resident depositors, both insured and uninsured. This political agreement was rejected by the House of Representatives on 19 March 2013. On 25 March 2013, a second political agreement was reached between the Eurogroup and the Cypriot authorities, supported by all euro area Member States and the international lenders on the policy Programme and the loan package associated with it (10bn EUR in total). The political agreement included *inter alia* bail-in measures for unsecured deposits in the two main Cypriot commercial banks and a resolution programme. The Memorandum of Understanding was signed between the Cypriot authorities, IMF and the European Commission on 26 April 2013. On 30 April 2013, the Programme was endorsed by the House of Representatives.

[207] Case 5965/2013, 16 October 2013 and Case 124/2013, 8 January 2014.

the authority to detain a person–in this case Mr. Louka.[208] Not surprisingly, the Court decided that in the case of international arrest warrants to be executed under the relevant law in Cyprus,[209] the *ultimate* decision remains with the Minister who can exercise his discretion to sign the warrant. The Court characterised this discretionary power as 'political' and 'executive' in nature, intimately linked to the country's international obligations, thereby falling beyond the scope of judicial control which it found had been effectively exhausted in this case, including with respect to the protection of fundamental human rights and in terms of access to justice. Finally, the Court noted that both the courts and the Minister examine the same criteria and therefore the scope of the examination ought to be different, taking a 'political dimension' in the case of the examination by the latter. It is hardly of any comfort to know that the judicial decision on the extradition of a person may ultimately be subject to political considerations independently of the judicial process accompanying the execution of the warrant. Given the role of the Ministry and the Attorney General in the issue/execution of arrest warrants, one is entitled to wonder what safeguards are available in the law to avoid potentially arbitrary results.

In general, in view of the characteristics of the Constitution as developed in this Report, many of them unique, and the lack of prospects for constitutional improvements pending a solution to the Cyprus problem,[210] it is debatable to what extent Cyprus is equipped to face a process of globalised constitutional governance.

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[208] For prerogative orders, see Emilianides 2013, p. 124.

[209] For the applicable legal framework, see http://www.coe.int/t/dghl/standardsetting/pc-oc/Country_information1_en_files/CYPRUS%20%20national%20procedures%20for%20extradition.pdf.

[210] For an attempt to submit a group of international agreements to a referendum in Cyprus (under the auspices of the UN and not within the framework of the Constitution of the Republic of Cyprus), mention should be made of the so-called Annan Plan put to a referendum in 2004 on both sides of the divide, allegedly promoting a comprehensive settlement to the Cyprus problem and creating a new constitutional framework for the country. See http://www.hri.org/docs/annan/. This Plan was rejected by the Greek Cypriot community and endorsed by the Turkish Cypriot community. For a legal analysis of the Plan from the point of view of EU law, see Laulhé Shaelou 2010a, Chap. 6.

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Part VI
Specific Constitutional Developments

Introductory Editorial Note to the Hungarian Report: The Pre-2010 Rule of Law Achievements and the Post-2010 Illiberal Turn

Anneli Albi

In the case of Hungary, from the perspective of constitutional law it is important to draw the attention of the reader to two distinct periods in the development of Hungarian constitutionalism: the period from the beginning of the post-communist constitutional reforms up to 2010, and the subsequent change of direction that was marked by the preparation and adoption of the new Fundamental Law in 2011. The post-2010 period has been described as one of 'illiberal constitutionalism',[1] and has caused widespread concern amongst EU and Council of Europe institutions as well as other Member States. The Hungarian report to this volume focuses on the post-2010 period.

From the point of view of constitutional history, comparative European constitutional heritage and the questions explored in the project, it may be of interest for the readers to bear in mind that in the aftermath of the post-communist constitutional reforms, the Hungarian constitutional system was widely acclaimed in Europe for the particularly extensive safeguards for the rule of law and human dignity established by the Constitutional Court, as part of the concept of the 'invisible constitution'. As the former Chief Justice of the Hungarian Constitutional Court put it, constitutional review became 'a kind of symbol of the rule of law'.[2] For example, in its early years, the Hungarian Constitutional Court struck down as unconstitutional roughly one out of three challenged laws, although a quieter tone was taken after 1998.[3] In particular, the Constitutional Court championed a robust and rigid approach to the principle of legal certainty and non-retroactivity as part of the doctrine of the rule of law and democracy.[4] By way of what came to be widely

[1] Uitz 2014.
[2] Sólyom 2002, p. 25, as cited in Prochazka 2002, p. 25.
[3] Scheppele 1999.
[4] Sadurski 2006, p. 14; Dupré 2003, p. 31.

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regarded as a classic example, the so-called 'Bokros package' of statutes, which modified the benefits system as part of a vigorous economic rationalisation plan, was declared unconstitutional on the ground of breach of the principle of legal certainty: the very short time (two weeks) between the adoption of the statutes and their implementation did not leave individuals sufficient time to adjust to the new situation.[5] In another landmark decision, a law aimed at lifting the statutes of limitations for politically motivated crimes committed under Communism was invalidated on the ground of non-retroactivity: it was found that such an *ex post facto* restoration of criminal liability would have amounted to an improper retroactivity of the law.[6] Regarding judgments on human dignity, an extensive study of the relevant Hungarian judgments by Catherine Dupré revealed that whilst there was a general tendency for the judges to closely follow the German constitutional case law and reasoning, the Hungarian Constitutional Court selected those elements from the German doctrine that emphasised the individuality and autonomy of individuals, without importing the corresponding restrictions.[7]

This earlier case law was also at the origins of some of the questions in the Questionnaire of the present research project, and is taken into account in the identification of comparative European constitutional achievements in the protection of fundamental rights and rule of law safeguards in the Comparative Study that accompanies the national reports (as explained in the Introduction to this book). Thus this pre-2010 case law is worth bearing in mind, in addition to the material in the report that focuses on the post-2010 climate.

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[5] Dupré 2003, p. 31.

[6] Sadurski 2006, p. 14.

[7] Dupré 2003, pp. 120 et seq., 122, 125–126.

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Hungary: Constitutional (R)evolution or Regression?

Nóra Chronowski, Márton Varju, Petra Bárd and Gábor Sulyok

Abstract Since 2010, Hungarian constitutionalism has turned in a direction that has widely been regarded as illiberal and has attracted criticism from European and international organisations and other Member States. Central to the change was the adoption of the new Fundamental Law in 2011. The Hungarian report explores the post-2010 period in the context of EU and international law. Whilst the Hungarian

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Nóra Chronowski wrote Sects. 1, 2.1, 2.4 and 2.12; Márton Varju wrote Sects. 2.2, 2.3.5.2–2.3.5.4, 2.5–2.11, 2.13 and 3.5; Petra Bárd wrote Sects. 2.3.1–2.3.5.1; and Gábor Sulyok wrote Sects. 3.1–3.4.

All websites accessed 20 May 2015. Text submitted 15 June 2015 with an updated constitutional amendment in Sect. 1.3.1.

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Constitutional Court in 2012 affirmed the 'constitutional continuity', in that the interpretations that had been used prior to the new Fundamental Law would be applied, this was overruled by a subsequent constitutional amendment, which has reinforced concern that the governing majority is ignoring the constitutional traditions of the last two decades. Since this amendment, the Constitutional Court adds reasoning if it refers to the former case law. In the rulings related to international law and EU law, the constitutional practice did not change significantly, although it became somewhat ambiguous until 2015. An Editorial Note has been added to the country chapter to explain that before the illiberal turn in 2010 and in the aftermath of the post-communist constitutional reforms, the Hungarian constitutional system had in fact been widely acclaimed in Europe for the particularly extensive safeguards for the rule of law and human dignity established by the Constitutional Court. For instance, the Hungarian Constitutional Court during that period represented a robust approach to the principles of legal certainty and non-retroactivity as part of the doctrine of the rule of law, which was invoked frequently as the basis for annulment of legislation.

Keywords The Hungarian Fundamental Law 2012 · The Hungarian Constitutional Court · Illiberal constitutionalism · Decline in the rule of law · Venice Commission Constitutional amendments regarding EU and international co-operation European Arrest Warrant · Data Retention Directive · Privatisation of public services

1 Constitutional Amendments Regarding EU Membership

1.1 Constitutional Culture

1.1.1–1.1.2 In Hungary, no new constitution was formally approved during the change of regime (1989–1990). The Constitution of the Republic of Hungary was a derivative of Act XX of 1949, which was comprehensively revised by Act No. XXXI of 1989 (in force until 31 December 2011; hereinafter 1989

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Constitution).[1] With regard to content, new acts emerged not through revolution, but via a parliamentary process of constitution-making that accompanied the regime change in 1989–1990. These proposed and approved amendments were fully compatible with the requirements of democracy and the rule of law. From then until 2011, the Constitution was under continuous revision, with several acts amending it. The most comprehensive amendment was carried out in December 2002 in connection with the anticipated accession of the country to the EU. In 2010, the parliamentary elections resulted in a two-thirds majority, which enabled the right-wing governing party alliance to write a new constitution (however, this ambition was not articulated during the campaign). The new constitution – the Fundamental Law of Hungary (FL) – was adopted in April 2011 and came into force on 1 January, 2012.[2]

In 2010, in parallel with the constant – altogether more than 10 – amendments of the 1989 Constitution reflecting ad hoc political interests, the governing parties announced the creation of a new constitution. The constitution-making procedure was criticised by the European Parliament and Venice Commission for the absence of pluralistic social debate.[3] While the FL contains the basic principles and institutional system that had become crystallised through democratic constitution-making (like the principles of rule of law, democracy, division of powers, protection of human rights), they do not fully prevail, primarily because of the rules of interpretation referring to the 'historic constitution' of the ancient Hungarian kingdom and the restriction of constitutional jurisdiction. This is particularly true in cases where the FL itself grants exemptions from the implementation of fundamental principles. Although the catalogue of fundamental rights in the FL is more modern in some parts than that of the 1989 Constitution, the system of fundamental rights protection as a whole represents a step backward compared to the 1989 Constitution. It is undoubtedly the greatest weakness of the FL that it does not ensure the possibility of a comprehensive review of and remedy for violation of the constitution by the legislature. This is because the FL reduces the scope of action of the Constitutional Court and maintains the procedural and material restrictions introduced in 2010 for an uncertain period. More specifically, the FL lays down that with regard to *ex post* norm control and constitutional complaint procedures, the Constitutional Court is prohibited from reviewing the content of or annulling acts on public finances, with the exception of four 'protected fields of fundamental

[1] Available at (with the amendments of 2010/11) http://www-archiv.parlament.hu/angol/act_xx_of_1949.pdf.

[2] All translations are from the official English translation of the Fundamental Law (consolidated version after the Fourth Amendment) available at http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARY\mostrecentversion01102013.pdf.

[3] See Venice Commission Opinion No. 614/2011, Strasbourg 28 March 2011, and Opinion No. 621/2011 on the new constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) points 29, 34. Many Hungarian scholars also criticised the tight time limits for the drafting, and the restricted possibilities for open political and social debate. See Arato et al. 2011, pp. 3–7.

rights', as long as the state debt exceeds half of the gross domestic product. A regulation adopted on 16 November 2010 that essentially corresponds to the content of Art. 37(4) of the FL which restricts the Constitutional Court's right of review and annulment, also fails to accord with the principles of European constitutional development, the traditions of Hungarian constitutionalism developed since 1989–1990 and democratic political culture. It violates the constitutional principles of the rule of law, legal security and separation of powers. As a result of the restriction of the procedure of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom of enterprise and the right to a profession) became 'defenceless'.

Parliament has modified the FL five times since 2011,[4] and has, *inter alia*, cemented the model of limited constitutional judicial review, attempted to break constitutional continuity, to restrict the exercise of the right to vote and freedom of expression and perpetuated the practice of overruling the Constitutional Court's decisions. The Constitutional Court has tried, sometimes with greater, sometimes with less determination, to protect the FL, with a varying degree of success. European bodies have followed this process with great interest: the Venice Commission of the Council of Europe continues to provide opinions on the significant amendments to the FL and on the cardinal laws,[5] and the European Parliament has adopted several resolutions as well. The sharpest criticism has been raised with regard to the fourth amendment to the FL, with which

- *lex specialis* rules were introduced in contrast to the fundamental principles of the rule of law, democracy and the protection of fundamental rights;
- regulations (e.g. relating to student contracts, the acknowledgement of churches, the concept of family) evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection;
- a specific procedural review and a new limit on interpretation were imposed with regard to constitutional judicial review (excluding substantial review of amendments to the FL, repealing Constitutional Court decisions adopted before the FL); and
- open infringement of EU law (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings)[6] was also risked.

The European Commission has initiated several infringement proceedings as well, on the basis of which the Court of Justice of the European Union (CJEU) has issued important judgments with direct constitutional implications: one on the subject of a radical lowering of the retirement age of judges and another on the

[4] See the amendments in Sonnevend et al. 2015, pp. 45–70.

[5] Cardinal laws are Acts of Parliament that can be adopted or amended with a two-thirds majority of votes of the MPs present.

[6] As the European Commission expressed its serious concerns about the conformity with EU law of the new article on CJEU judgments entailing payment obligations, the fifth amendment repealed this rule.

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subject of bringing to an end the term served by the Data Protection Supervisor. Hungary was held to have infringed EU law in both cases.[7]

The European Court of Human Rights (ECtHR) has also heard Hungarian cases which have arisen due to the elimination of the previous constitutionalism and from the arrangements based on the new FL – such as the recognition of churches, dismissal from employment without reason, lifetime imprisonment without compulsory review, premature termination of the mandate of the President of the Supreme Court and a ban on the parliamentary right of expression.[8] The ECtHR has found that the State of Hungary infringed the European Convention on Human Rights (ECHR) in every case.

There is no room here to provide a comprehensive analysis of all of the issues which have arisen and been debated at European forums;[9] however, expeditiously we can diagnose that the developments of the last 3–5 years question the commitment to liberal constitutional values such as the rule of law, democracy and individual freedom. The Constitutional Court still has some margin of appreciation on the basis of the constitutional text to safeguard the achievements of liberal constitutionalism and disregard political expectations, but the quality of reasoning and the decisive arguments of the Court have given rise to a very specific ideational framework that cannot be interpreted under liberal values of rule of law.[10]

1.2 The Amendment of the Constitution in Relation to the European Union

1.2.1 The amendment of the Hungarian Constitution related to EU accession was passed by Parliament in December 2002 (Act LXI of 2002), and introduced a new Art. 2/A into the text of the Constitution:

> By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union. The ratification and promulgation of the treaty referred to in subsection (1) shall be subject to a two-thirds majority vote of the Parliament.[11]

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[7] Case C-286/12 *Commission v. Hungary* [2012] ECLI:EU:C:2012:687; Case C-288/12 *Commission v. Hungary* [2014] ECLI:EU:C:2014:237.

[8] *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, ECHR 2014 (extracts); *K.M.C. v. Hungary*, no. 19554/11, 10 July 2012; *László Magyar v. Hungary*, no. 73593/10, 20 May 2014; *Baka v. Hungary*, no. 20261/12, 27 May 2014; *Karácsony and Others v. Hungary,* no. 42461/13, 16 September 2014.

[9] See e.g. Vörös 2014, pp. 1–20; Zeller 2013, pp. 307–325; Vincze 2013, pp. 86–97.

[10] Szente 2015, p. 185.

[11] The English translation of the former Hungarian Constitution is available at http://www-archiv.parlament.hu/angol/act_xx_of_1949.pdf.

Thus, in 2002, an authorisation was added permitting the signing of the Treaty of Accession, and a commitment to European unity was declared. Additionally, the rules on cooperation between the National Assembly and the Government in matters of EU integration were determined (for the wording see Sect. 1.4), and the constitutional definition of the National Bank of Hungary was modified. In addition, the rules on voting rights were changed in anticipation of European parliamentary and European local elections.[12] The relevant provisions provide as follows:

> Art. 32/D(1)
>
> The National Bank of Hungary shall define the country's monetary policy in accordance with the provisions of specific other legislation.
>
> Art. 70(2)
>
> All adult Hungarian citizens residing in the territory of the Republic of Hungary and all adult citizens of other Member States of the European Union who reside in the territory of the Republic of Hungary shall have the right to be elected in local ballots for the election of the representatives and mayors; they shall have the right to vote, provided that they are in the territory of the Republic of Hungary on the day of the election or referendum, and furthermore to participate in local referendums or popular initiatives.
>
> Art. 70(4)
>
> All adult Hungarian citizens residing in the territory of the Republic of Hungary and all adult citizens of other Member States of the European Union who reside in the territory of the Republic of Hungary shall have the right to be elected and the right to vote in elections for the European Parliament.

The second amendment to the 1989 Constitution in relation to EU membership took place in December 2007 before the ratification of the Lisbon Treaty (Act CLXVII of 2007). It was an embarrassing amendment and a surprise for experts, as it was not communicated by the Government and the amending process was very rapid. The aim of the amendment was to create constitutional authorisation for criminal law cooperation under the Area of Freedom, Security and Justice (AFSJ) provisions of the EU Treaty. The following text was inserted into Art. 57(4) – the *nullum crimen* rule – of the 1989 Constitution:

> No one shall be declared guilty and subjected to punishment for an offense that was not considered – at the time it was committed – a criminal offense under Hungarian law, or the laws of any country participating in the progressive establishment of an area of freedom, security and justice, and to the extent prescribed in the relevant EU legislation with a view to the mutual recognition of decisions, without any restrictions in terms of major fundamental rights.

The EU provisions in the FL broadly follow the above amendments, and are cited in Sect. 1.3.1.

1.2.2 The constitutional amendment procedure is provided in Art. S) of the FL. An amendment may be initiated by the President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly. The adoption

[12] Chronowski 2005, pp. 190–199.

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of a new FL or the amendment of the FL requires the votes of two-thirds of all the Members of the National Assembly. The amendment has to be signed by the President, who may refer the matter to the Constitutional Court if the President finds that any procedural requirement laid down in the FL with respect to adoption of the FL or amendment of the FL has not been met.

In the 1989 Constitution the rules were the same except for the possibility of *ex ante* constitutional review.

1.2.3 The Constitutional Court played a significant role in the wording of the 2002 amendments. The Constitutional Court proclaimed its jurisdiction for posterior review of the constitutionality of statutes (and other legal instruments implementing international treaties) in a decision in 1997.[13] In that decision the Court declared that a statute implementing an international treaty – and the international treaty – may be subjected to subsequent constitutional review. The reasoning of the Court is noteworthy:

> The Constitutional Court emphasizes that the constitutional review of international treaties forms part of the practice of the constitutional courts of countries applying the dualistic-transformational system as a general rule, also in respect of international treaties becoming part of the domestic law by this technique. For instance, Article 59 of the German Basic Law prescribes the dualistic-transformational system. The German Federal Constitutional Court, despite its lack of jurisdiction for preventive norm control, has extended its practice to the control of international treaties prior to their ratification. … It becomes clear from these decisions that in addition to 'naturally' exercising the competence concerning posterior norm control, the German Constitutional Court cannot fail in performing all parts of its duty to safeguard the constitution – especially in respect of the European Union treaties. … On this ground, the [Hungarian] Constitutional Court keeps the subordination to Community law under its continuous supervision – besides examining the implementing acts.[14]

Thus, in 1997, the Court was ready to examine the constitutionality of Community law. In this respect, Decision 30/1998 (VI. 25.),[15] assessing the constitutionality of a provision of Act I of 1994 on the Implementation of the Europe Agreement, is equally notable. Here, the Court treated the agreement as a traditional international treaty. In theory, it was correct in doing so, as Hungary was not then an EU Member State, although the agreement also had some supranational features. The decision declared that the Hungarian Parliament – in the absence of constitutional authorisation – is not entitled to act beyond the principle of territoriality in fields of law within the scope of the exclusive jurisdiction of state authority, nor may it amend the Constitution in a disguised manner by adopting and promulgating an international treaty. Thus, Decision 30/1998 had a significant impact on the drafting of the 2002 authorising provision (Art. 2/A, the so-called 'Europe Clause') of the Hungarian Constitution.

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[13] Constitutional Court Decision (hereinafter CC Decision) 4/1997 (I. 22.) AB.

[14] Ibid.

[15] CC Decision 30/1998 (VI. 25.) AB.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Article E(1) as the basis of European and Union cooperation essentially follows word by word the Art. 6(4) of the 1989 Constitution. Thus, the frame of interpretation remains unchanged;[16] this objective expresses the commitment to European (international or supranational) cooperation. FL Art. E) provides as follows:

(1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.
(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.
(3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.
(4) For the authorisation to recognise the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.

Article E) paras. (2) and (4), with some simplification, adopts the rules of Art. 2/A of the 1989 Constitution; however, the formulation differs in one aspect. The difference is that the two distinct clauses of Art. 2/A(1) ['exercise certain constitutional powers jointly with other member states …; these powers may be exercised independently and by way of the institutions of the European Union'] have been merged in Art. E(2) ['jointly with other Member States, through the institutions of the European Union']. However, according to the legal understanding, the Member States do not exercise their competences 'jointly' in the Union legislative processes, rather these are exercised by the institutions. Art. 2/A defined the 'way of institutions' as one form of joint exercise of powers in the EU. Yet in Art. E) of the FL, the exercise of powers 'through the institutions' is referred to as a joint exercise. While the Lisbon Treaty abolished the so-called pillar system and created a single institutional system, the supranational (i.e. Community) method has not become automatically dominant. The Lisbon Treaty intended to integrate the perspectives of supranational and intergovernmental methods, e.g. by respecting the constitutional identity of the Member States, the effective involvement of national parliaments and the consolidation of Member States' initiative in respect of some competences. Strictly speaking, the joint exercise of powers is not the same as exercise through the institutions.[17]

[16] See also Bragyova 2012, pp. 335–338; Blutman and Chronowski 2011, p. 329; Bárd 2013, p. 457.

[17] The Constitutional Court has also respected the relevance of the difference of exercising powers jointly and by the way of institutions. See CC Decision 143/2010. (VII. 14.) AB on the Act promulgating the Lisbon Treaty; press release is available at http://www.mkab.hu/letoltesek/en_0143_2010.pdf.

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Article E) contained originally only one new rule compared to Art. 2/A of the 1989 Constitution. In its para. (3) it states that '[t]he law of the European Union may … lay down generally binding rules of conduct'. From the domestic legal viewpoint, the ground for the constitutional validity of Union law becomes clearer than it used to be; however, this paragraph still does not solve the problem of primacy, i.e. that a domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the consistency of domestic and Union law still stems from the EU Treaties (i.e. by way of requesting preliminary rulings) and not from the Constitution itself.[18]

The National Assembly inserted a new sentence into Article E) para. (2) in 2018, by the seventh amendment to the Constitution, creating a solid basis for the Constitutional Court to protect the so-called national constitutional identity:

> The exercise of powers under this Paragraph must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system and form of governance.

There are further provisions with regard to fair trial in the context of the EU's Area of Freedom, Security and Justice, which are cited in Sects. 2.3.1–2.3.2.

1.3.2–1.3.3 Contrary to expectations and the activism of the Constitutional Court in 1998, the Constitutional Court succinctly explained the meaning of Art. 2/A after EU accession. Article 2/A 'defines the conditions and the framework of the membership of the Republic of Hungary in the European Union, and the status of Community law in the system of the sources of Hungarian law'.[19] Only in 2008 was the authentic interpretation of the authorising provision further enriched. The Constitutional Court highlighted the function of Art. 2/A in Decision 61/B/2005 AB:

> The purpose of including this provision in the Constitution was to establish the conditions and the framework of the participation of the Republic of Hungary in the European Union. The cited provision of the Constitution authorises the Republic of Hungary to conclude an international treaty under which certain of its competences deriving from the Constitution may be exercised jointly with the other Member States of the European Union and the joint exercise of competences may be implemented through the institutions of the European Union.

The Court clarified the limitations on the exercise of competences within the Union as follows:

> Competences may be exercised jointly to the extent required for the exercise of rights and fulfilment of obligations stemming from the founding treaties of the European Union; only the joint exercise of certain concrete competences deriving from the Constitution is authorised, in other words, the scope of competences exercised jointly is limited.

In respect of the exercise of jurisdiction of the Constitutional Court, this decision for the first time expressly rejected the examination of a collision with EU law: 'The

[18] Chronowski 2012, p. 111.

[19] CC Decision 1053/E/2005 AB, judgment of 16 June 2006.

[Act on the Constitutional Court] contains no competence authorising the Constitutional Court to examine a collision with community law. Pursuant to the rules of community law, this questions falls within the competence of the organs of the European Community, ultimately the European Court of Justice.' It also follows that a collision with EU law does not in itself serve as a ground for alleging unconstitutionality. As regards the position of EU law within the Hungarian system of sources of law, the Constitutional Court widened the meaning of the authorising provision by identifying it as the ground for the constitutional validity of EU (Community) law: 'Under Article 2/A of the Constitution, community law applicable in Hungarian law is just as valid as is law adopted by Hungarian legislation.' This interpretation opens the way for the possible examination by the Court of collisions between EU law and Art. 2/A.[20]

In its decision of 143/2010. (VII. 14), the Constitutional Court ruled that the Act of Promulgation of the Lisbon Treaty is constitutional. According to the Court, Art. 2/A of the Constitution cannot be interpreted in a way that would deprive the constitutional provisions on sovereignty and the rule of law of their substance. It referred to its former decisions on the limitation of the exercise of sovereignty and came to the conclusion that although the reforms introduced by the Lisbon Treaty were of foremost importance, Hungary remained a sovereign and independent state with a prevailing rule of law.[21]

In Decision 22/2012 (V. 11.) AB on the interpretation of paras. (2) and (4) of Art. E) of the FL, the Court stated that Art. E(2) contains a provision identical to that of Art. 2/A. The Constitutional Court held that the interpretation of Art. 2/A of the previous Constitution, which was provided in the Decision 143/2010 (VII. 14.) AB, is also valid for the interpretation of Art. E) of the FL. In that decision of 2010, the Constitutional Court clarified the question whether the requirement of qualified majority was only applicable to the Accession Treaty or to other treaties as well. The Court found that the qualified majority 'is necessary for every treaty that leads to transferring further competences of Hungary, specified in the FL, through the joint exercise of competences by way of the institutions of the European Union'. The Court continued:

> Provided that it is based on an international treaty, the requirement of qualified majority is also applicable to the implementation of the founding treaties and their supervision: it means that the implementing measures based on the founding treaties (adoption of secondary legal acts) are not sufficient any more, and therefore the implementation tools need to be amended, or new tools are needed. It is not a condition, however, that the treaty specify itself as the European Union's law, and neither is it a requirement that it should belong to the founding treaties of the EU.

1.3.4 EU law has been regarded as a separate legal system by the Constitutional Court and the courts of law since accession. As such, the supremacy and direct applicability of EU legal acts are recognised; in most cases the courts ensure the

[20] CC Decision 61/B/2005. AB, judgment of 29 September 2008.

[21] See the press release on CC Decision 143/2010 (VII. 14.) AB, supra n. 17.

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effectiveness of Community/Union law.[22] References to the principles of direct effect and supremacy are rather automatic;[23] See also Supreme Court Decision Kfv. I.35.052/2007/7, which referred to *Costa v. ENEL* and *Van Gend en Loos*. the courts follow the well-known textbooks on EU law or utilise the ministerial explanations attached to the bill of the applicable Hungarian law. The Curia (former Supreme Court) seems to be willing to establish the triangular relationship of EU law, the ECHR and domestic law, and interpret harmonised Hungarian legal acts in the light of the ECHR, if the implemented EC directive provides a minimum standard.[24]

So far, the Constitutional Court has established two principles marking the boundaries of future constitutional practice. First, it will not treat the founding and amending treaties of the European Union as international law for the purposes of constitutional review,[25] thereby setting up a three-tier system of legal rules applicable within Hungarian legal practice that distinguishes between national, international and EU law. Secondly, in the absence of jurisdiction to review substantive (un)constitutionality (as opposed to procedural constitutionality), the Constitutional Court does not regard a conflict between domestic law and EU law as a constitutionality issue,[26] and this mandates the ordinary courts to resolve such conflict of a sub-constitutional nature.[27]

1.4 Democratic Control

1.4.1 Article 19 of the FL provides:

> The National Assembly may request information from the Government on the government position to be represented in the decision-making procedures of the intergovernmental institutions of the European Union, and may take a position on the draft placed on the agenda in the procedure. In the course of the decision-making of the European Union, the Government shall act on the basis of the position taken by the National Assembly.

Through a scrutiny procedure regulated in Act XXXVI of 2012 on the National Assembly, the National Assembly takes part in the decision-making process

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[22] See Dezső and Vincze 2012, pp. 208–209.

[23] See e.g. the Decision of Szabolcs-Szatmár-Bereg County Court 5.K.20. 631/2010/4.: '… the Community Treaty has the highest rank in the hierarchy of legal norms. … [T]he relationship of EU law and national law is determined by the principle of primacy, as the Supreme Court stated in principle: national law shall be interpreted in a way that is appropriate to fulfil (i.e. implement) Community law (EBH 2006/1568).'

[24] The Supreme Court established that only refugees are covered by the scope of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ 251/12; however, in the light of Art. 8 of the ECHR, domestic law may recognise this right of other protected persons as well. The Supreme Court emphasised that Member States may maintain or introduce more favourable provisions than those laid down by the Directive. Supreme Court Kfv.III.37.925/2009/7.

[25] CC Decision 1053/E/2005. AB

[26] CC Decision 72/2006. (XII. 15.) AB.

[27] Blutman and Chronowski 2011, pp. 329–348.

indirectly, as the Government and the National Assembly cooperate according to special rules in formulating the national position regarding EU draft legislation. The National Assembly also monitors the activities of the Government in EU affairs. The instruments that already existed before accession have remained intact (such as interpellation, questions, committee hearings, parliamentary debates and committees of inquiry), and these instruments can also be used with regard to EU affairs. In addition, Art. 69 of the Act on the National Assembly defines further obligations for the Government in informing the Assembly.

Tasks stemming from subsidiarity checks are carried out by the Committee on European Affairs by virtue of Act XXXVI of 2012 on the National Assembly and Parliamentary Resolution 10/2014 (24 February 2014) on Certain Provisions of the Rules of Procedure. With regard to the *ex-ante* control of subsidiarity, if the Committee considers that a draft Union legislative act fails to comply with the principle of subsidiarity, it submits a report to the plenary on the adoption of a reasoned opinion. The adopted reasoned opinion is sent by the Speaker to the Presidents of the European Commission, the European Parliament and the European Council as well as to the Government of Hungary. With regard to the *ex-post* application of the subsidiarity principle, the Committee is entitled to propose to the Government that it bring an action before the CJEU on the grounds of infringement of the principle of subsidiarity in accordance with Art. 263 TFEU.

1.4.2 The referendum on accession to the EU was held on 12 April 2003, and 83.76% of the citizens who participated voted yes. This was 38% of all the electors. Of the 8 million citizens entitled to vote only 3.66 million voted, which means a participation rate of 45.6 %.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 As mentioned earlier, a Constitutional Court finding was of considerable significance in respect of the 2002 amendment of the 1989 Constitution. This amendment was based on a wide consent of the parliamentary parties of that time, and a special parliamentary committee discussed the questions of constitutional authorisation and the accession referendum. The prime minister established a so-called 'council of wise men' composed of former ministers of justice and constitutional court judges. The bill on the amendment was also sent to universities and other academic institutions, which provided expert opinions upon the request of the Government.

However, before the 2007 amendment no such public debate took place.

In the course of the constitution-making in 2010/11, no specific attention was devoted to the Europe Clause or the experiences of the application of EU-related rules in the 1989 Constitution. The entire drafting of the constitution was a closed and almost secret process, and thus public debate or expert advice did not influence the content of the FL.

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2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Under the title 'Freedom and Responsibility' the FL lists the catalogue of fundamental rights (Articles II–XXIX) in 28 articles. These articles include constitutional rights (including new rights such as the right to good administration, some social rights of employees and the right to self-defence), prohibitions (including the new prohibitions *ne bis in idem*, non-refoulement and biomedical prohibitions) and principles (including the new principles of equality before the law and social responsibility for property). In the field of social solidarity, however, the FL is restricted to constitutional objectives instead of rights (protection of the elderly and persons with disabilities, striving to provide decent housing).

It is worthwhile to add that during the drafting of the Hungarian constitution in 2011 the question arose – and the Hungarian Government inquired from the Venice Commission – whether and to what extent it was necessary to incorporate the EU Charter of Fundamental Rights (Charter) into the national constitution. The adopted FL originally contained more or less the same rights as the Charter in its relevant Chapter ('Freedom and Responsibility'), and some sentences of the Charter were ultimately incorporated; however, compared to the Charter, the content of the rights enumerated in the FL is less detailed and the text leaves the possibility for a wider limitation of rights. It is also worth referring to the preamble of the FL, according to which 'individual freedom can only be complete in cooperation with others'. The Charter applies a completely different approach, with emphasises in its preamble that the Union 'places the individual at the heart of its activities'. The Charter addresses individual responsibility only in connection with the enjoyment of rights.[28] Whereas the approach of the FL – considering also the numerous basic obligations – is communitarian and nationalist, the Charter focuses on the philosophy of individual freedom and supports pluralism.[29] The difference is not accidental. In the last decade, Hungarian society has become increasingly closed, exclusive and disunited, and discrimination, segregation, xenophobia and hate speech have become part of everyday life with the support of political populism. In the field of the most important human values, the FL has legalised and reaffirmed unprecedented solutions based on unacceptable societal practice.

[28] Charter Preamble: 'Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.'

[29] This difference is also pointed out in European Commission For Democracy Through Law (Venice Commission) Opinion No. 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, point 57.

2.1.2 Article I(3) provides as follows:

> The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

2.1.3 Article B) of the FL supports the most important principles of the 1989 Constitution – the rule of law and democracy. Art. C(1) of the FL explicitly provides the principle of division of powers. It is worth mentioning, however, that the division of powers should also be reflected in the rules on state organs in the FL and in constitutional practice.

An extremely alarming issue concerning the basic principles of the FL was that the Transitional Provisions supporting the entry into force of the FL (hereinafter TP-FL) undermined some rules of the FL itself.[30] The Constitutional Court declared that all provisions of the TP-FL that lack transitory character are invalid.[31] As a response, in 2013 the governing majority adopted the fourth amendment of the FL, which incorporated into the Constitution most of the abolished articles, and overrode several earlier Constitutional Court decisions. The Venice Commission expressed its serious concerns about the systematic shielding of ordinary law from constitutional review. The reduction (budgetary matters) and in some cases complete removal (constitutionalised matters) of the competence of the Court to review ordinary legislation on the one hand undermined the rule of law – as the constitutional protection of the standards of the FL became limited; and, on the other hand, infringed the democratic system of checks and balances – as the Constitutional Court lost its influence and is no longer able to provide effective control.[32]

Before the fourth amendment, some hope was given regarding 'constitutional continuity', in that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall its previous argumentation where the formulation of text of the FL was the same as the wording of the Constitution. According to the Court's judgment in 2012:

> In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. … The

[30] On the TP-FL and other cardinal acts read more in Halmai and Scheppele 2012.

[31] The Constitutional Court annulled approximately half of the articles of the TP-FL in its decision of 28 December 2012 (CC Decision 45/2012. (XII. 29.) AB).

[32] Opinion No. 720/2013 of the Venice Commission, point 87.

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> conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid.[33]

However, the fourth amendment of the FL repealed the decisions of the Constitutional Court delivered prior to the entry into force of the FL. This new regulation has reinforced the concern that the governing majority is ignoring the constitutional traditions of the last two decades.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 This issue has not been addressed in Hungarian judicial practice.[34] As indicated earlier, the Hungarian Constitutional Court has declined to recognise any formal competence to examine the compatibility of national legislation with EU law.[35] This excludes one of the main avenues in Hungarian law for contesting the order of priority of fundamental rights and fundamental economic freedoms.

The only, rather indirect indication of how Hungarian courts would approach the Court of Justice's balancing between fundamental rights and fundamental freedoms follows from an early judgment in the *Dog Breeders Association* case. In its ruling, the Budapest Metropolitan Court accepted that the fundamental rights jurisprudence of the Court of Justice is binding on Hungarian courts.[36] The judgment relied on Title I Article F(2) of the Maastricht Treaty and included citations from

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[33] CC Decision 22/2012. (V. 11.) AB, paras. 40–41.

[34] There are examples of legislation establishing a balance favouring local, assumedly value-based considerations against fundamental freedoms, see the regulation of student contracts in Sect. 110 (1)23 of Act 2011: CCIV and Government Regulation 2/1012 requiring students in state higher education to enter into employment in Hungary. In the related judgment of the Constitutional Court in Decision 32/2012 of 4 July 2012, it was deemed necessary to take the rights provided by the free movement of persons in EU law into account in determining the appropriate level of legal protection available in Hungarian constitutional law. In contrast, the dissenting opinions, with a different degree of robustness, emphasised that the majority interpretation put the communitarian values of the new Fundamental Law in jeopardy and considered the individualistic fundamental economic rights in EU law to be in conflict with local social values.

[35] See, for instance, CC Decision 1053/E/2005 of 16 June 2006 where the claim that the 1997 Act on Gambling, which prohibited the sale and advertising of gambling activities organised abroad, breached Art. 56 TFEU, was refused, as the Constitutional Court had no jurisdiction to examine the compatibility of domestic legislation with the EU Treaties.

[36] Case No. 3.K-30698/2006/33. The issue was not addressed in the judgment of the Supreme Court, Case No. Kfv.IV.37.256/2008/14. In Case No. 5.K.20.155/2010/13, the reference to Case 44/79 *Hauer* [1979] ECR 03727, and its detailed discussion was *obiter* and, ultimately, EU law, despite the insistence of the first instance judge, was irrelevant in the case.

Internationale Handelsgesellschaft,[37] *Nold I*[38] and *Rutili*.[39] The impact of the judgment was considerably weakened by the fact that it failed to clarify whether EU jurisprudence was relevant in the case and whether the case fell within the scope of EU human rights law.

2.3 Constitutional Rights, the European Arrest Warrant and EU criminal law

2.3.1–2.3.2 The presumption of innocence; *nulla poena sine lege*

As was seen in Sect. 1.2.1, the 1989 Constitution was amended with regard to the EU AFSJ. Further provisions on this were included in the FL, where Art. XXVIII (4)–(6) provides as follows:

> (4) No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.
> (5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for an act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.
> (6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

The *principle of nullum crimen sine lege* is and was the focal element of the constitutional legality of criminal law in Hungary. According to the Constitutional Court, it is not just a state obligation but the right of the individual that a person be found guilty and sentenced only according to law. Reference to EU law first appeared on the constitutional level at the time of the ratification of the Lisbon Treaty. The former Constitution had already been amended (see Sect. 1.2.1) to enable judicial cooperation in criminal affairs. A new element in the FL is that the text – as an exception to the rule – explicitly refers to an 'act, which was, at the time when it was committed, an offence according to the generally recognised rules of international law'. However, this is not completely new, since the Constitutional Court in 1993 stated that war crimes and crimes against humanity are to be punished even in the absence of Hungarian criminalisation at the time of commitment.[40] The explicit formulation of the principle of *ne bis in idem* is also a new

[37] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 01125.
[38] Case 4/73 *Nold* [1974] ECR 00491.
[39] Case 36/75 *Rutili* [1975] ECR 01219.
[40] CC Decision 53/1993. (X. 13.) AB.

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element in the FL compared with the 1989 Constitution; however, this was previously guaranteed by the Constitutional Court under the principle of the rule of law. A definite novelty is that foreign judgments can be recognised not only on the basis of EU law but also on the basis of international treaties.[41]

Under the 1989 Constitution neither the Framework Decision on the European Arrest Warrant[42] nor the implementing law were subjected to a constitutional challenge.

The Framework Decision was transposed into Hungarian law by Act CXXX of 2003, which was later replaced by Act CLXXX of 2012.

Unlike in other Member States, the prohibition of the extradition or surrender of own nationals is not constitutionally entrenched. Although the prohibition of extradition of Hungarian nationals as a general rule is laid down in Act XXXVIII of 1996 on international legal assistance in criminal matters, the law of CLXXX of 2012 prevails on the basis of the principle *lex posterior derogat legi priori*.

A more difficult question arises in the case of a potential constitutional challenge against the 2012 Act. First, the former Art. 69 of the 1989 Constitution and Art. XIV of the FL currently in force on the prohibition of expelling Hungarian citizens from the territory of Hungary, or the statement that Hungarians always have the right to return to Hungary, may be interpreted as encompassing the prohibition of extradition or surrender of Hungarian nationals.

Secondly, the other ground-breaking novelty of the European Arrest Warrant, the departure from the principle of double criminality, may also be challenged on the basis of the Constitution or may be disputed in light of the FL. Since there are potential clashes between EU law and the Constitution/FL of Hungary, the matter is more delicate. However, these issues have not yet been raised in front of the Constitutional Court.

In Decision 32/2008. (III.12.) AB, the first case in relation to the European Arrest Warrant (EAW), it was not the implementing domestic law but a related piece of legislation, the Hungarian law promulgating the Convention on the surrender procedure between the European Union on the one hand and the Republic of Iceland and the Kingdom of Norway on the other (hereinafter EUIN), which became the subject of constitutional scrutiny in March 2008. Using his constitutional right of veto, the President of the Republic initiated the constitutional review of the law promulgating the EUIN, which had been approved by the Hungarian legislature on 11 June 2007. The EUIN Convention extended the jurisdiction of the Framework Decision to the above-mentioned two non-EU members, Iceland and Norway. Therefore, the Convention forms neither part of the primary nor of the secondary legal sources of the EU.

[41] Jakab 2011, p. 229.

[42] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

In Decision 32/2008. (III.12.), the Constitutional Court ruled that certain passages of the challenged law were unconstitutional. The Constitutional Court examined the correspondence of both Art. 2 of the Constitution, whereby 'Hungary is a sovereign, democratic state', and Art. 57(4), which enshrined the legal principles of *nulla poena sine lege* and *nullum crimen sine lege* in the 1989 Constitution. The Court was of the opinion that the turn of phrase 'according to Hungarian law' in Art. 57(4) was primarily meant to refer to the Criminal Code, but it also covers obligations that become part of the Hungarian sources of law through the ratification of an international convention, thus making allowance for possible exceptions to the principle of *nullum crimen sine lege*, and therefore also including the possibility of retrospective legislation.[43] Therefore, Art. 7 of the 1989 Constitution on international law complements Art. 57(4), and the two should be applied in parallel. According to the Constitutional Court's decision, however, the EU *acquis* does not qualify as international law. The Union can promulgate an article of international law only within the framework of the third pillar, but according to the Constitution these conventions do not become 'part of Hungarian law'. In light of the above, the Constitutional Court reviewed the various articles of the EUIN Convention and came to the conclusion that several sections of the Act ratifying the Convention were in fact in contradiction with the Constitution.

In Decision 3144/2013. (VII. 16) AB, the applicant challenged Act CXXX of 2003 (replaced by Act CLXXX of 2012 by the time the decision was delivered) implementing the EAW Framework Decision in the form of a constitutional complaint. According to the Act, execution of an EAW has to be refused if the criminal prosecution or punishment of the requested person is barred by statute under Hungarian law, provided that the act in question falls within the jurisdiction of Hungary.[44] Justice Miklós Lévay wrote the decision rejecting the complaint for the court unanimously. He emphasised that mutual trust and cooperation were the basis of surrender according to the EAW. This, however, does not mean an unconditional or unverified acceptance of the issuing authority's evaluation of the case. According to Art. 11(1) of the implementing Act, the Budapest-Capital Regional Court shall hold a hearing where the requested person has the opportunity to challenge the existence of circumstances which might affect the conditions of his or her surrender. Should the Budapest-Capital Regional Court not be able to decide on surrender based on the available data and facts provided by the issuing authority, it may request, by way of the responsible minister, that the issuing authority in an urgent procedure provide it with additional information, with special regard to data that might lead to a possible refusal to execute the EAW, including data on the statute of limitations. Should the Hungarian judicial authority ultimately come to the conclusion that the statute of limitations has expired, it will deny the execution of the EAW.

[43] CC Decision 2/1994. (I. 14.) AB.

[44] Article 4 of Act CXXX of 2003 and Art. 5 point c) of Act CLXXX of 2012.

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In Constitutional Court Decision 3025/2014 (II. 17.), the judge of an ordinary court referred a constitutional issue in an on-going case to the Constitutional Court. The judge challenged Art. 15(3) of Act CXXX of 2003 implementing the EAW according to which, once located, the person requested has to be automatically arrested, i.e. the competent authority is not granted judicial discretion to opt for less rights-intrusive measures in lieu of arrest. The Constitutional Court's majority – in an opinion authored by Justice Mária Szívós – rejected the complaint.

The majority held that the regulation under review corresponds to the constitutional and international requirements on the limitation of fundamental rights. The limitation is prescribed by law. The limitation serves the aim of exercising state powers of criminal prosecution. In order to make the exercise of these powers efficient, the state organs need to have effective tools which by necessity severely limit certain rights. The necessity of employing these tools can be justified by the nature of criminal acts, which endanger or violate other persons' fundamental constitutional rights. The efficient enforcement of EAWs ensures the successful exercise of the state powers of punishment and necessarily involves rights infringing measures, such as arrest and detention.

Justice Miklós Lévay authored a dissenting opinion, joined by Justices Elemér Balogh, András Bragyova and László Kiss. In their view the Constitutional Court should have conducted a complex constitutional scrutiny (as opposed to examining surrender for the sake of execution of a sentence only) and it should have determined a violation of the FL. The dissenting opinion clarified that a Constitutional Court review conducted upon the initiative of a judge is an abstract review of the challenged provision. Often the Constitutional Court does not limit the scope of constitutional scrutiny to the subject or object of the case at hand, but reviews all elements of the attacked provision.[45] In the view of the dissenting judges, the only limitation is that the Constitutional Court must stick to the constitutional review of the provision to be invoked in the actual case at issue. Therefore, the majority Justices – in the opinion of the dissenting Justices – engaged in 'negative judicial activism' with regard to the scope of the constitutional scrutiny. In their view, a full constitutional analysis of the whole challenged provision should have been conducted. Neither the EAW Framework Decision nor the implementing domestic law differentiates between procedures conducted for the sake of a criminal proceeding and for the enforcement of a custodial sentence or detention order, which is a further reason to not limit the scope of constitutional review. In the view of the dissenting Justices, had the majority reviewed the whole provision, it would have come to the conclusion that the implementing legislation was, while necessary, disproportionate to the aim to be pursued and therefore unconstitutional.

In order to underpin his point, Justice Lévay also invoked EU law. He noted that the Constitutional Court must interpret domestic law – as far as possible – in line

[45] See e.g. CC Decision 37/2013. (XII. 5.) AB.

with the Framework Decision.[46] Although Art. 12 of the EAW Framework Decision leaves it primarily up to the Member States to decide whether a requested person should remain in detention after arrest, the main aim of this rights-infringing measure is the prevention of absconding. This provision thus does not oblige Member States to detain all requested persons. Quite to the contrary, in his view, severe doubts are raised regarding the compatibility of the Hungarian measures with EU law, with due regard to Art. 6 of the EU Charter of Fundamental Rights on the right to liberty and security of person.

2.3.2.1 Decision 32/2008. (III.12.) evoked harsh criticism among legal scholars who immediately reacted to the Constitutional Court's ruling.[47] It is quite telling that a Constitutional Court judge, Péter Kovács, authored one of the scholarly articles,[48] thereby departing from the well-established practice that constitutional court justices do not explain their decisions, and judgments shall speak for themselves. The majority of the experts in the field seem to agree with Justice Bragyova and have criticised the application of the *nullum crimen* principle to the law under scrutiny. As Krisztina Karsai and Katalin Ligeti have proved, whether and to what extent constitutional and other guarantees apply to procedures conducted in the framework of legal assistance depends on the branch of law. As the professors have rightly pointed out, the Constitutional Court entirely omitted such analysis and took it for granted that legal assistance in criminal matters belongs to the branch of criminal law,[49] although the various parts of an extradition procedure are characterised by their patchwork nature: on the one hand a certain duality between international and domestic law can be traced, and on the other the procedure has both criminal and administrative law elements. Compliance with a request for extradition or surrender is an administrative law decision, and cannot be regarded as an act where the criminal power of the requested state is being manifested, even if – like in the case of surrender – the principle of direct request applies, since the objective of the procedure is neither the establishment of criminal liability nor the imposition of sanctions.[50]

Although the rulings declaring the unconstitutionality of the domestic law giving effect to the international treaty which extended the ambit of the EAW to Iceland and Norway have created some difficulties, the overall situation is not as bad as it seems: in the day-to-day practice, this legal instrument more or less does the job. The overall experience indicates that in the face of all the constitutional worries, one-fifth of all arrest warrants end in effective surrender in the EU.[51]

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[46] Cases C-105/03 *Pupino* [2005] ECR I-05285; C-397/01 *Pfeiffer and Others* [2004] ECR I-08835; C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33.

[47] Karsai and Ligeti 2008, pp. 399–408.

[48] Kovács 2008, pp. 409–413, commenting on the article by Karsai and Ligeti.

[49] Karsai and Ligeti 2008, pp. 399–408, 400.

[50] Ibid., pp. 401–402.

[51] See the aggregate number of EAWs issued and resulting in effective surrender between 2005–2013, http://www.europarl.europa.eu/EPRS/140803REV1-European-Arrest-Warrant-FINAL.pdf.

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2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 The expert has come across and is aware of a number of cases that raise doubts with regard to *in absentia* judgments rendered in other Member States decades ago, but these cases have not yet been heard by the courts.

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1–2.3.4.2 Although constitutional issues did not directly arise in the following complex set of decisions, let us mention the perhaps best known EAW surrender case which has been extensively covered by the Hungarian and Irish media. The Tobin case illustrates the difficulties of the implementation of the EAW by the Member States.[52]

The case confirms that the European criminal justice that used to operate along the lines of intergovernmentalism was inefficient. A field of law that develops slowly on a case-by-case basis is not suitable for remedying the negative side-effects of an expanded freedom of movement.

Out of fear for loss of national sovereignty over criminal law, the Member States opted for mutual recognition-based instruments rather than harmonisation. However, mutual confidence has still not been fully achieved among the Member States. As long as certain states are worried about their citizens' basic rights and respect for their procedural guarantees due to different fundamental rights standards, they will leave shortcuts in their legislation to avoid the enforcement of EU law; they will interpret EU law in a restrictive way or even *contra legem*. Irish Justice Hardiman's opinion speaks volumes in this regard; he straightforwardly rejected the idea of mutual trust.[53] Had he adhered to the basics of EU criminal law, neither his devastating opinion about Hungarian criminal procedure nor his ignorance about the Hungarian legal system should have mattered. The fact that Hungary would not have extradited its own citizen but rather would have offered to execute the punishment itself should also have been irrelevant, since the EAW does not operate on the basis of reciprocity, but rather on the basis of confidence among the Member States.

Had the Member States not guarded their national sovereignty over criminal so jealously, a Luxembourg decision in the framework of a preliminary ruling procedure would have clarified how to interpret Irish law in conformation with EU law so as to correspond to the Framework Decision. Had the third pillar operated along the lines of supranationalism, the Commission or another Member State, including Hungary, could have initiated an infringement procedure for the wrongful

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[52] Buda Surroundings District Court, case number: 2.B.1308/2000/20, 7 May 2002., Pest County Court as court of second instance, case number: 2. Bf. 740/2002/6, 10 October 2002, High Court, *Minister for Justice Equality & Law Reform v. Tobin*, [2007] IEHC 15, 12 January 2007, Supreme Court of Ireland, *Minister for Justice, Equality & Law Reform v. Tobin*, [2008] IESC 3, 3 July 2007., High Court, *MJELR v. Tobin*, [2011] IEHC 72, 11 February 2011, Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, [2012] IESC 37, 19 June 2012.

[53] Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, [2012] IESC 37, 19 June 2012.

implementation of the Framework Decision. Had the Court of Justice had more powers, it could have condemned Ireland for disrespecting the maximum 90-day deadline applicable for the determination of a request for surrender, and the length of proceeding argument would not have arisen.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 The dissenting opinion of Justice Lévay to the EUIN decision, which clarified what procedural and substantive safeguards need to be available for the constitutional operation of the EUIN, seems to have embraced the necessity of mutual recognition and trust under the European framework for criminal cooperation. The separate opinion of Justice Bragyova, however, suggested that even though the *nullum crimen sine lege* principle may not constitute a constitutional limit to the EUIN, other constitutional principles, such as the right to asylum, the prohibition on the extradition of own nationals, the equal treatment principle, the right to a fair trial or the prohibition of the death penalty may offer sufficient constitutional grounds for the potential refusal of EU criminal cooperation measures.

The *EAW Transfer Detention* decision of the Constitutional Court[54] – reported above at Sects. 2.3.1–2.3.2 – was also not particularly critical of the mutual recognition principle. It merely took notice that criminal cooperation under the EU framework represented a closer system of cooperation among the Member States, and that the obligations of national criminal justice systems under the mutual recognition principle can be scrutinised domestically when the grounds for the execution of an EAW are examined by national courts. A more critical position was formulated in the dissenting opinion of Justice Lévay and others, arguing that the domestic implementation of the Framework Decision, which prescribed the mandatory detention of the person being transferred under an EAW and which did not regulate the possibility of using other alternative instruments, represented a disproportionate interference with the right to personal freedom. The EAW Framework Decision interpreted together with Art. 6 EU Charter contributed to the conclusion by the dissenting judges that the domestic regulation of mandatory detention following a mandatory arrest under an EAW was unconstitutional, as it represented a violation of the right to personal freedom by making the decision automatic and not subjecting it to a test of justification in the light of the circumstances of the individual case.

2.3.5.2 The Expert is not aware of any debates regarding the transplantation of mutual recognition from internal market to criminal law in Hungary.

Technically, the mutual recognition principle is an effective principle for the governance of large and diverse areas. It ensures that without engaging in politically treacherous and legally risky harmonisation, private and public activity across

[54] CC Decision 3025/2014 (II. 11.) AB.

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borders between the participating states can be secured, and conflicts between the different participating regulatory systems are settled. It places emphasis on horizontal cooperation and communication, and conflicts are settled in a bilateral framework. It creates an essentially decentralised framework for governance which, in harmony with the principle of subsidiarity, favours local discretion. Its safe operation, however, requires that exemptions from the obligation of mutual recognition be available. Mutual recognition, because of increased horizontal cooperation and communication between the participating states, may lead to voluntary harmonisation through the conduct of the individual participants.

2.3.5.3 The Expert is not aware of any such concerns raised with regard to the role of courts.

In the Expert's view, the mutual recognition principle assumes the approaches of both trust and cooperation and of protection. While there is pressure to cooperate horizontally and to safeguard the effectiveness of the overall governance framework, it is possible to protect locally formulated considerations in what is an essentially decentralised system. The sensitive issue is how these functions may be reconciled, and to what extent the protection function is allowed to be exercised in light of the inherent pressure to secure the effective operation of the governance framework. Again, this is a question of gradation.

In the Expert's view, a conflict between the different functions exercised by national courts is likely to arise in the area of cooperation in family matters. National courts are likely to be conflicted by their obligations to protect the rights of the child and to secure the effective execution of court orders issued in a foreign jurisdiction, in particular when the parents have initiated parallel proceedings concerning child custody in different jurisdictions.

2.3.5.4 In the Expert's view, it first needs to be considered whether the current safeguards available in the EU measures concerned enable effective protection in all circumstances and whether through the extension of the relevant safeguards at the EU level any hiatuses can be remedied. When the introduction of further nationally driven safeguards beyond these possibilities is considered, how they would affect the regulatory objectives of the relevant EU measures and whether they are liable to reproduce the procedural and other problems the relevant EU measures were intended to resolve in the first place needs to be taken into account. The Expert considers that while a reintroduction of judicial review could increase the level of protection of individuals, it is difficult to foresee the cross-border implications of such a solution. It must not be ignored that the effective resolution of cross-border matters is also in the interest of the individuals concerned.

Locally engineered responses could also raise the issue of different standards of protection being available to individuals in different Member States. It is not only questionable that the same institutions of judicial protection could be introduced in the different Member States in the different areas where the mutual recognition principle applies, but it is also unclear whether the relevant judicial remedies would have the same scope and intensity. These differences could reflect deeper divergences between the different legal systems and therefore, introducing a uniformly

applicable solution at the national level may be problematic not only as a matter of competences, but also substantively. Revisiting the rules of the existing EU measures in light of the experiences of the past year may offer a more easily achieved solution.

2.4 The EU Data Retention Directive

2.4.1 The implementation of the Data Retention Directive[55] did not raise constitutional issues in Hungary. The Hungarian Civil Liberties Union filed a petition with the Constitutional Court in 2008 against several articles of Act C of 2003 on electronic communications,[56] alleging that beyond the violation of several fundamental rights (e.g. right to privacy, right to protection of personal data, right to property) the domestic legislation also infringed Art. 2/A of the 1989 Constitution by implementing an ultra vires EU act. However, the Constitutional Court did not address the petition, and when the 1989 Constitution was repealed by the FL, the petitioner was unable to re-initiate the procedure as a constitutional complaint under the new legal conditions.

2.5 Unpublished or Secret Legislation

2.5.1 The principle of loyalty does not require the Member States to overlook the principles governing the legality of domestic administrative action completely, and it does not prevent the Member States from observing domestic legal requirements in the execution of EU measures, provided that the effectiveness of EU law is not placed in jeopardy. The Hungarian approach was placed under the scrutiny of the Court of Justice in its 22 May 2014 judgment in the *Érsekcsanádi Mezőgazdasági Zrt*. case.[57] The Court of Justice, as a matter of the formal requirements of EU law, confirmed the Hungarian practice by accepting that the adoption of national administrative decisions and administrative opinions for the execution of Commission Decisions are not excluded by those decisions.[58] This, however, does

[55] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

[56] Petition of the Hungarian Civil Liberties Union: http://tasz.hu/files/tasz/imce/Eht_AB_vegleges.pdf.

[57] Case C-56/13 *Érsekcsanádi Mezőgazdasági Zrt* [2014] ECLI:EU:C:2014:352.

[58] The Court of Justice paid no attention to matters arising in domestic law relating to the adoption of national measures for the execution of Commission Decisions – specifically, the use of an administrative opinion as opposed to an administrative decision to decide on the rights and

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not mean that as a matter of national law, and provided that EU law requirements are not violated, national courts cannot demand that the domestic requirements of administrative law be met.[59] This is particularly important in circumstances where the legality of administrative action, for example the choice of administrative instrument (here administrative decisions and a formally non-binding administrative opinion) restricting the rights of and imposing obligations on individuals, is questionable under domestic law. Arguably, the Court of Justice implied, whilst denying that it had competence to rule on the issue, that the lawfulness of the executing national measures may also depend on their meeting domestic legal requirements.[60] This follows from the fact that the questions referred to the Court of Justice were aimed at clarifying whether not providing compensation for damage caused by national executing measures is an acceptable practice in general considering, especially, the requirements following from EU law.

See also the *György Balázs* case in Sect. 2.8.1.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 It has been suggested that the declaration by the Constitutional Court that a domestic executing/implementing measure is unconstitutional could be considered as an indirect constitutional criticism towards EU market regulation, although formally it would have no effect on the legality of any EU instruments, and the Constitutional Court has always been cautious to indicate that its decisions do not involve an assessment of EU legislation.[61]

The *Agricultural Surplus Stock* decision[62] offers a clear image of the hesitant approach of the Constitutional Court, which placed more emphasis on domestic conundrums of constitutional adjudication than on investigating the potential for

obligations of individuals, and it was only interested in the effective execution of the Commission decisions, which did not specify the rules of their domestic implementation (paras. 40–43).

[59] This question was not put to the Court of Justice, and it is likely that the Court may not have jurisdiction to answer the question in its entirety.

[60] See paras. 47–49, 51–56, and 62–65 of the judgment. The Court of Justice held that in the absence of explicit requirements in EU law, it is exclusively for the national legislature to decide whether a system of compensation for any damage caused by the executing national protection measures should be established. In the relevant questions referred to the Court of Justice, the referring court wanted to clarify whether the principles of EU law would require the Hungarian state to set up a system of compensation, or liberate it from any such (European and domestic) obligation.

[61] Fazekas 2014, p. 53.

[62] CC Decision 17/2004 (V. 24.) AB. Annotated in Albi 2009, pp. 46–69; Sajó 2004, pp. 351–371 and Uitz 2006, pp. 41–63.

diverging constitutional standards of economic regulation at the European and the national level. The main limitation of the decision is that, unlike the Estonian Supreme Court and the Czech Constitutional Court,[63] the Constitutional Court refused to acknowledge that it is necessary to examine matters under EU law. Therefore, only the domestic implications of the relevant EU regimes were examined on the basis of domestic constitutional law. This enabled the Hungarian court to avoid the constitutional controversies of addressing the constitutional deficits of EU regulation and of giving precedence to EU law over the Hungarian Constitution.

The Court claimed that that 'the question about the provisions challenged in the petition concerns the constitutionality of the Hungarian legislation applied for the implementation of the EU regulations, rather than the validity or the interpretation of the EU regulations themselves. This meant that the act was reviewed on the basis of the standing jurisprudence of the Constitutional Court on the principle of legal certainty, which resulted in a declaration that several provisions of the act were unconstitutional. The Constitutional Court confirmed, in particular, that the payment obligations were introduced retroactively, and that the temporal complications of implementing the EU regulations in the first half of 2004 compromised the constitutional principle of legal certainty. The Commission regulations were subjected – albeit indirectly – to the control offered by Hungarian constitutional requirements.[64] Although the intention to uphold core domestic constitutional requirements, such as the rule of law, was evident,[65] it is far from certain that this was inspired by the suspected more relaxed demand for legal certainty in EU law. Similarly, the Constitutional Court did not specify whether the decision might be regarded as a challenge to the supremacy of EU law (of the Commission regulations) over the Hungarian Constitution.[66]

There is perhaps a clearer indication of what the Constitutional Court thinks of the standard of fundamental rights protection at the EU level in the jurisprudence in which the protection of rights as offered by EU legislation is contrasted indirectly with national requirements.[67] As noted in the Hungarian commentary, these cases reveal a more receptive attitude towards the EU dimensions of constitutional

[63] EU legislation on transitional agricultural measures also caused constitutional problems immediately after EU accession in Estonia and the Czech Republic. See Albi 2009.

[64] Fazekas 2014, p. 53.

[65] As Fazekas noted, it is unclear 'whether legal certainty was given precedence because it was one of the most significant constitutional principles of the democratic Hungarian state based on the rule of law, or other provisions of the constitution would also be treated in this way'. Ibid., p. 53.

[66] Fazekas argued that the Constitutional Court, first among the constitutional courts of the new Member States, was under considerable pressure to avoid a solution which would have represented a limitation of state sovereignty and independence, and of the constitutional values of Hungarian democracy. Fazekas 2014, p. 55.

[67] The *Lisbon Decision* made it clear that the Charter of Fundamental Rights binds the Member States and they are subjected to the jurisdiction of the Court of Justice under the Charter. It also accepted that the Lisbon Treaty reinforced fundamental rights protection in the EU.

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disputes than the cases – discussed above – that deal with more visible conflicts between national and EU constitutional law.[68]

There are several cases where EU law has enhanced the protection of employees and equal treatment on the grounds of gender.

Finally, it needs to be considered that recent jurisprudence from the Constitutional Court concerning the constitutional benchmarks of economic regulation by the Hungarian state under the FL seems to be pursuing a rather reduced constitutional agenda. The rulings, which aimed to lay down the foundations of economic constitutionalism under the FL, recognise a particularly broad discretion for the legislature to interfere with the economy, and they, therefore, seem to contradict any expectation that EU economic regulation may fall below Hungarian constitutional benchmarks, as now regulated under the FL. Nevertheless, the relevant decisions may serve as a source of conflict between EU economic regulation and Hungarian constitutionalism. While they do not represent an outright denial that the economic constitution under the FL follows the idea of a market economy,[69] their conclusions are based on explicit – if rather misunderstood – criticisms of global and regional market integration, and on concerns for the devastating consequences of unregulated markets. They also recognise the global fiscal and economic crisis as a ground for curbing back the market and expanding the influence of the state. This, in the interpretation of the recent jurisprudence, entails that normal rule of law requirements may be accorded lesser relevance and that the right to property and the freedom of enterprise may need to tolerate more robust interventions by the state. At this point, it must be noted that there is no evidence that the examination of the individual grounds by the Constitutional Court has actually been affected by these considerations. Beyond general declarations, the decisions in question have all failed to establish a link between the crisis/regulatory failure/globalisation and the legal provisions in question.

The June 2014 decision in the *Cooperative Banking Restructuring* case[70] indicated that in matters of economic policy and regulation, the Constitutional Court is prepared to trust the judgement of the Government. It also made it clear that the right to property and the freedom to pursue an economic activity represent a rather undemanding constitutional limitation on government discretion, and it seems to have set the benchmarks for justifiability, rationality and necessity applicable to economic regulation comparably lower than in the jurisprudence under the 1989

[68] Fazekas 2014, pp. 65–68.

[69] In Art. M), the Fundamental Law holds that the Hungarian economy is based on value-producing work and on the freedom of enterprise, and that Hungary ensures the conditions of fair and undistorted competition in the market. Contrast this with Art. 9(1) and (2) of the 1989 Constitution, which holds that the Hungarian economy is a market economy in which the equality of private and public ownership are guaranteed, and that Hungary recognises and supports the freedom of enterprise and the freedom of competition in the market.

[70] CC Decision 20/2014 (VI. 30.) AB.

Constitution.[71] The decision was allegedly influenced by the exigencies of post-crisis economic and fiscal recovery. The Court was anxious to make the general point that global and regional market integration and the governance of global and regional markets have proved to constitute a risk for the Hungarian social and economic order, but without any elaboration on how this might actually affect constitutional standards.

The socially and politically highly controversial November 2014 *Foreign Currency Consumer Loan* decision[72] ruled that Act XXXVIII of 2014 implementing the 'uniformity decision' by the Curia (uniformity decision in civil law 2/2014) concerning the fairness of foreign currency consumer loan contracts delivered on the basis of the *Kásler* judgment of the EU Court of Justice,[73] did not constitute a violation of legal certainty, the prohibition of retrospective legislation or the right to a fair trial. The Act had sought to alleviate the exposure to currency fluctuations of individuals affected by foreign currency mortgages. In setting the premises, the Constitutional Court claimed that the contested legislation needed to be interpreted in the light of the commitment of the FL to protect vulnerable individuals, in particular poor and vulnerable consumers. While this in principle is unproblematic, there is no evidence that the assessment of the Constitutional Court of the individual grounds was influenced by such commitment.

Concerning the requirement of legal certainty, the Constitutional Court held that the extremely limited amount of time available between the adoption and the entry into force of the act in question – although it was recognised as unusually short – cannot be regarded as unconstitutional, as in the circumstances of the case the financial institutions affected by the legislation were in fact able to make the necessary preparations. Fundamentally, it argued that the Act contained nothing new which the financial institutions affected would not have known from judicial practice or from other pieces of legislation, and that the Act, although it introduced considerable negative consequences for the financial institutions affected, did not contain provisions which would have required lengthy preparations.

Regarding the claim relating to retrospective legislation (and in this connection to legal certainty), the Constitutional Court stated that the conditions of contractual fairness as regulated by the Act – although not as explicitly as made out in the Act – had in fact been part of the Hungarian legal system before the introduction of foreign currency consumer loans in the Hungarian market. It argued that the fairness of consumer contracts have always been regulated clearly and unambiguously in Hungarian law and that the explicit conditions of the Act on contractual fairness,

[71] See, also CC Decision 3194/2014 (VII. 7.) AB on the regulation of the sale of tobacco products, which by examining only the manifest unreasonableness of the regulatory instrument in light of its general objectives has created an extremely low constitutional benchmark for economic regulation, aiming to re-regulate and re-partition entire sectors of the economy. The generally applicable benchmarks, such as transparent and non-discriminatory regulation, and the adequate regulation of the discretion made available to the public body concerned, were ignored.

[72] CC Decision 34/2014 (XI. 14.) AB.

[73] Case C-26/13 *Kásler and Káslerné Rábai* [2014] ECLI:EU:C:2014:282.

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which followed directly from the judgment of the EU Court of Justice in *Kásler* interpreting Directive 93/13/EC, have been part of Hungarian law since the implementation of the directive into Hungarian law. In reaching this conclusion, the Constitutional Court was not disturbed by the fact that until the judgment in *Kásler*, the uniformity decision 2/2014 and the adoption of the Act, the particular meaning of contractual fairness as specified in length by the Act had not been defined at all in Hungarian law or in Hungarian judicial or other practice. It seemed satisfied that the vulnerable position of consumers and the information deficit favouring financial institutions should have been sufficient to allow for an interpretation of fairness in consumer contracts as determined in legislation in 2014.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1 There is no evidence that any constitutional discussions on the Treaty Establishing the European Stability Mechanism (ESM Treaty) have taken place in Hungary, which is not a eurozone country and has not ratified the ESM Treaty.

The Constitutional Court decision dealing with the constitutionality of the Treaty on Stability, Coordination and Governance (TSCG) dealt with the interpretation of the 'Europe clause' (Art. E(2) and (4) of the FL).[74] It focused, in particular, on the issue of whether the binding nature of the TSCG, which regulates policy and institutional matters relating to the EU framework, should be considered under Article E of the FL, which requires a two-thirds majority in the Hungarian Parliament in the ratification process. The technical reasoning of the decision, which did not address the substantive legal and policy consequences of the TSCG, examined under these premises whether the TSCG should be classified as a treaty constituting the European Union, or as a treaty modifying or supplementing the rights and obligations laid down in the treaties constituting the European Union. Ultimately, it found that if the TSCG does not affect the transfer of constitutional competences under the EU framework, the provisions of Art. E(2) and (4) need not be applied. The reasoning is far from clear, and the use of the conditional in the conclusion ('if')[75] was not particularly helpful for the legislator in determining whether the TSCG in fact required a two-thirds majority for ratification by Parliament. The refusal of the Constitutional Court to look into the substance of the TSCG was based on the fact that its review powers were limited by the application

[74] CC Decision 22/2012 (V. 11.) AB.

[75] On the basis of EU constitutional law and as indicated in Art. 3(1) of the TSCG, the TSCG cannot be regarded as constituting a transfer of competences for their exercise under the EU framework, and the TSCG (therefore) was not adopted as a modification of the Founding Treaties. There are, nevertheless, TSCG provisions which affect – beyond explicit EU legal obligations – the fiscal sovereignty of its signatories (Arts. 3(1)a, 3(1)e, 3(2), and 11), which should justify its recognition as a treaty falling under Art. E) of the FL.

in the given case, which did not touch upon substantive issues. The Court nevertheless indicated that it was prepared to examine the substance of the Hungarian legislation incorporating the TSCG in light of the FL, provided that it receives an admissible application in that matter.

2.7.2 There have been no constitutional discussions regarding Eurobonds in Hungary.

2.7.3 As seen earlier, the constitutional order established after 2010 in Hungary went particularly far in guaranteeing unrestrained discretion for the Government to tackle the economic and social impact of the financial and economic crisis. The partial suspension of the jurisdiction of the Constitutional Court in reviewing economic regulation enabled the Government to make the necessary reforms through legislation. This is reflected in the constitutional case law dealing with the admissibility of petitions against fiscal and economic legislation aimed – supposedly – at managing the crisis, which despite inventing the potentially useful instrument of interpreting the right to human dignity together with the non-discrimination principle have left Governmental discretion untamed. However, the fact that these constitutional provisions were left in force in 2015 and that they are potentially of unlimited temporal applicability begs the question of whether their aim was ever to guarantee effective crisis management by the Government, and it is extremely controversial that these immunities apply to the non-crisis related re-regulation and re-partitioning of different markets in Hungary. More importantly, the essence of these constitutional changes has never been the reinforcement of democratic controls, rule of law requirements, transparency or the adequate balancing of rights with regard to Government austerity/bail out/emergency and other nationalisation measures. Conversely, their intention was to exclude any form of potential control over Government policy-making.

This, necessarily, can be explained by some form of new government philosophy regarding the post-crisis role of the state in the market and by a newly found emphasis on solidarity and social rights in fiscal and economic regulation, as attempted in the previously commented recent case law of the Constitutional Court. The FL is also available to provide a potential communitarian interpretation of these changes, with the argument that the interest of the community of Hungarian people should enjoy priority over the rights and interests of individuals, economic operators or particular social groups. Nevertheless, there is no convincing evidence available that these interpretations of the Hungarian social order comprehensively influence government policy-making and regulation, and that austerity and other crisis management measures have been introduced to satisfy citizens' demand for control, transparency and accountability. It is a more likely interpretation that liberal constitutionalism has been suspended while the Government is 'at work'.

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2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 The Expert is aware only of one instance in which the invalidity of the relevant EU measure was raised and the respondent petitioned for a reference for a preliminary ruling to this end.[76] It was claimed that Art. 5(3)j of Directive 2001/29/EC[77] – governing one of the exceptions and limitations to EU copyright law – violated Arts. 50 and 95 EC, without clarifying the grounds of that claim. The regional appeal court refused to refer the case to the CJEU. It indicated that the directive was irrelevant for the facts of the case and that the Treaty provisions cited were wrongly raised in the case.
There were two other cases in which this matter was addressed, although very indirectly. The question in *GSV* was whether the Common Customs Tariff was enforceable against individuals when its Hungarian version, containing an obvious mistake, supported the legal position of the individual in question.[78] In a preliminary ruling, the Court of Justice held that the linguistic discrepancy 'is not liable to entail the annulment (of the tariff classification under EU law) made by the customs authorities on the basis of all the other language versions (of the Common Customs Tariff and the related regulations).[79] In *György Balázs*, a question was put to the CJEU in a preliminary reference on whether the unavailability of legal measures in the national language had an impact on the lawfulness of their application under the relevant EU legislation (Directive 98/34/EC[80]) by domestic public authorities.[81]

2.8.2 The Expert has found no evidence of discussion on the standard of review by the EU courts in Hungary. The focus of all actors – the ordinary courts, the Constitutional Court and the administration – has been on ensuring that EU law is given effect in a manner required by the relevant principles of EU law and as it follows from the FL and the accession documents. The main indication that the scope and effectiveness of judicial review may actually matter for the political and constitutional order under the FL is the notorious delimitation in the constitutional text of the competences of the Constitutional Court in questions of fiscal policy and of the related economic policies. In the instances where in the Expert's view the effective application of EU law has not been adequately ensured, the cause of non-enforcement must be sought in individual professional incompetence rather

[76] Budapest Regional Appeal Court 8. Pf. 21.417/2011/6.

[77] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10.

[78] Case C-74/13 *GSV* [2014] ECLI:EU:C:2014:243.

[79] Ibid., para. 53.

[80] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 204/37.

[81] Case C-251/14 *György Balázs* [2015] ECLI:EU:C:2015:687.

than in conscious resistance against expanding, strictly enforced but judicially inadequately controlled EU law. Nonetheless, considering the increasingly critical approach of the Constitutional Court to global and regional economic integration, it is not excluded that it will strike a more critical tone with regards to the legality and the impact of EU economic regulation. Although it is bound to obey EU law under domestic constitutional law and it would be extremely reluctant to contradict a formal obligation laid down in law, it is not completely excluded that the Constitutional Court – in circumstances where Hungarian interests are gravely affected, relying on the social and communitarian values of the FL as a rather thin veil hiding its true intentions – would question the applicability of EU law based on this or other gaps in EU constitutional law.

Considering that with the introduction of the FL and the recent jurisprudence on the economic constitution in Hungary the availability of judicial review against domestic economic and social legislation has been considerably reduced, arguments comparing the standard of judicial review before EU Courts and before the Constitutional Court do not appear particularly convincing. Both avenues of judicial review seem to acknowledge and defer to the discretion of the legislator, and both are prepared to annul legislative provisions in the case of a manifest breach of the requirements of legality. Since the examination by the EU Courts – in terms of the justification, regulatory design, balancing of competing objectives and the availability of sufficient regulatory and other safeguards – seems better executed than that of the Constitutional Court, compared to the current state of Hungarian jurisprudence, the judicial review carried out by the EU Courts appears to have a more solid legal footing.

2.8.3 As a necessary disclaimer to the assessment of Hungarian jurisprudence, a clear dividing line must be drawn between the approach of the 'old' and the 'new' Constitutional Court. Because of the new approach taken in recent years – predominantly following considerations of political nature – towards the constitutional limits and controls of legislative action, the jurisprudence cannot be conceived as having developed in a linear fashion under more or less constant institutional supervision.[82]

2.8.4 See also the answer in Sect. 1.3.4.

In Decision 61/2011 (VII. 13.) AB, as a direct continuation of the thoughts first quoted, the Court adjusted the domestic level of constitutional protection of fundamental rights to the international level, not on a hierarchical basis, but as a consequence of the *pacta sunt servanda* principle:

> In case of certain fundamental rights, the Constitution defines the substance of the fundamental right in the same way as it is in some international treaty (for example the Covenant on Civil and Political Rights and the European Convention on Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court may in no instance be lower than the level of international protection of rights

[82] Szente 2015, p. 186.

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> (typically elaborated by the Strasbourg Court of Human Rights). As a result of the *pacta sunt servanda* principle [Section 7(1) of the Constitution, Article Q(2)-(3) of the FL], the Constitutional Court is required to follow the Strasbourg jurisprudence and the level of protection of fundamental rights defined therein, even if they did not necessarily arise from its own previous case law.[83]

Later, the Court broadened the international determination of the level of protection of fundamental rights to include the stipulations of EU law; moreover, it considered the above quoted conclusion to be 'even more true' for the law of the European Union, having regard to Art. E(2)–(3) of the FL (compared to the rules of the Constitution, however, it did not elaborate in detail the meaning of the new Article E(3)).[84]

2.8.5 The Expert is not aware of concerns about the standard of review by the CJEU having been raised in Hungary. As indicated earlier, the discussions have focused on the adequate and effective implementation and application of EU law as it follows from the formal legal provisions which bind the relevant national actors in EU matters.

In the Hungarian context, there is a more directly damaging gap in judicial protection under EU law, which follows from the above-mentioned refusal of the Constitutional Court to assume jurisdiction to examine the compatibility of national legislation with EU law, which forces individuals to seek redress in litigation before ordinary courts.

The Expert understands the practical rationale for presuming equivalent standards of review in an environment characterised by the overlap of multiple constitutional jurisdictions. The Expert also understands that the threshold for the rebuttal of the presumption of equivalent standards was determined at such a high level in order to avoid disagreement between the affected courts on minor issues concerning the balance established between the policy aims pursued and the fundamental rights protected, or concerning the right combination of safeguards available for the protection of rights, and to confine inter-systemic constitutional conflicts to matters where there is a manifest breach of requirements or a fundamental backsliding in the standard of protection offered.

Considering that the presumption of equivalence is rebuttable as established in *Bosphorus* (and in the jurisprudence of national courts), the resulting gap in judicial protection does not seem as threatening and damaging as perhaps suggested by the question. Although the different assessment of EU legislation on fundamental rights grounds by different courts is not excluded, it does not seem likely that genuine fundamental rights concerns would be overlooked by one court and declared as vital by another. The state of the Strasbourg jurisprudence itself indicates that the protection of human rights by courts is not a task that could not be fulfilled by other courts within their jurisdiction, and that adequately prepared legislative measures, which duly incorporate the legal signposts indicated by human rights law, would

[83] CC Decision 61/2011. (VII. 13.) AB.

[84] CC Decision 32/2012. (VII. 4.) AB.

not have much to fear in Strasbourg or Luxembourg. With intensive cross-fertilisation between the Strasbourg and the Luxembourg jurisprudence, the potential for divergent judicial treatment of EU legislation and a gap in judicial protection does not seem particularly high. It is also unclear whether the Strasbourg court because of its institutional position as a transnational court would not guarantee the same, or even greater, deference to the intention of the EU legislator in matters of policy as expressed in an otherwise adequately drafted and designed piece of EU legislation. It must not be overlooked that the Strasbourg jurisprudence regards international cooperation and effective transnational governance as a significant common objective of European states which, as expressed in *Bosphorus*, must be given some form of recognition in the judicial control of EU or other transnational legislation.

2.8.6 The Expert is not aware of concerns regarding the equal treatment of citizens falling under the scope of EU law and falling under the scope of domestic law having been raised in Hungary. The Expert notes that similar concerns have been raised in the academic literature regarding the legal treatment of individuals in the Member States that qualify and do not qualify as EU citizens. In the Expert's view, this has less to do with the constitutional credentials of EU legislation and more with the political willingness and unwillingness of the Member States to address the situation at the European and at the national level.

2.9 Other Constitutional Rights and Principles

2.9.1 The Hungarian case regarding surplus sugar stocks noted in the Questionnaire has partly been explored above in Sect. 2.6.1.

2.10 Common Constitutional Traditions

2.10.1 In the Expert's view, the common constitutional traditions of the Member States as sources of EU constitutional law have indeed failed to fulfil the role(s) assumedly intended for them in previous jurisprudence. The concept – with a few exceptions – has proved to be unworkable and impractical in judicial practice, and a substitute was found in the more practical and workable law of the ECHR. In other instances (e.g. the fundamental rights guarantees in EU competition enforcement procedures), a genuinely European solution needed to be found, as the common constitutional traditions of the Member States appeared to be unable to provide workable legal principles, and they would not have been able to offer legal solutions suiting the particular context. The doctrinal, conceptual and other differences in that particular area in the then developing national legal orders were irreducible, and there was no common approach which would have satisfied both the constitutional

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demands and the interests of the effective administration of EU policies. Furthermore, judicial practice showed that principles of EU law could be developed and then applied on a whim, without taking into account their origins and workability as common constitutional traditions. Nevertheless, this does not mean that they have not influenced EU legislation and EU Treaty reform. The Treaties do in fact recognise – mainly, at the level of declarations – a number of shared constitutional norms and values, and the EU now seems unable to legislate without having regard to requirements recognised in national constitutions and also in European treaties governing the human rights dimension of human activity (e.g. the autonomy and informed consent of patients, the value of human life and human biological material).

In other words, the listing of common constitutional traditions depends on what normative content is expected to be expressed and how that normative content is expressed. In the case of *nulla poena sine lege*, finding common ground among the Member States as to its normative content – also considering that its guarantees have been subject to dilution – does not seem particularly problematic. However, establishing consensus regarding how that normative content may be regulated, especially in the European setting, may be more difficult, as the potential technical rules/arrangements and safeguards provided, as in the EAW, may not satisfy all expectations. Regarding the German expectation of citizens' private lives not being recorded, the fundamental question is how its assumed normative content can be expressed in EU legislation. If it can find expression in a limitation or exceptions clause agreed by the Member States, then within that framework it can be recognised as a common constitutional tradition of the Member States. In a similar manner, the requirement under legal certainty in Central and Eastern European Member States that adequate time must be afforded to enable preparations for the application of tax measures, as it emerged in the sugar quotas affairs, can be expressed in the shared, neutral requirement that the EU legislative process must have regard to the exigencies of the domestic implementation of EU instruments.

2.10.2 As noted earlier, the exploration of common constitutional traditions could be impractical and unworkable, it could lead to a downscaling of the protection offered or it could entail technical difficulties in expressing the qualifications, reservations, exceptions, etc., that could be attached to common requirements. These problems apply mainly with regard to the judicial recognition of common constitutional traditions. Their expression in EU legislative or other processes may be less problematic, although examples show that finding common constitutional ground can delay the adoption of EU legislation considerably (e.g. Directive 98/44/EC on biotechnological inventions). The democratic and other credentials of a judicial exploration of common constitutional traditions may also be problematic, as it may contradict the different conceptions in the different Member States of the extent and of the role of judicial power, and also because the method and the execution of a comparative exercise leading to the establishment of common constitutional traditions – as discussed in the academic literature on the difficulties and distortions of such comparative exercises – are not foolproof.

Furthermore, unless it is carried out with the purpose of highlighting that in a particular Member State a particularly high standard of protection is applicable, urging EU Courts to develop their judgment on the basis of a genuine exploration of common constitutional traditions may not be particularly relevant. Arguably, it may be more important to direct EU Courts towards the right assessment and the right balancing of considerations relevant in the legal appreciation of the case than to develop a legal test or legal formula genuinely shared among the Member States, which could be deduced from EU or ECHR law. For example, in the classic judgment in *Hauer*,[85] a thorough comparative analysis regarding the constitutional protection of property rights would not have added much to the legal formula that was available through less complicated sources or to the final assessment of the interference with focus on its justifiability and on the availability of safeguards/compensation.

2.11 Article 53 of the Charter and the Issue of stricter Constitutional Standards

2.11.1 There is very little evidence that the issue of the ECHR setting a minimum floor influences deliberations and decisions in the Hungarian courts. Borrowing from foreign jurisdictions and from ECHR law has always been standard practice in Hungarian constitutional law; therefore, the ECHR predominantly represents a standard to adhere to, and not a standard adherence that should be criticised.

In the Expert's view, Art. 53 of the Charter needs to be interpreted together with the actual provisions of EU law in relation to which the application of a right or freedom included in the Charter is raised. As demonstrated by *Omega* and *Schmidberger*,[86] the structure made available for the application of the fundamental freedoms of the Single Market enables – as reinforced by judicial deference to the national level by the EU Court – the application of higher national standards in a scenario in which the Charter is clearly applicable. Also, EU legislative instruments, such as Directive 98/44/EC on biotechnological inventions, through their clauses that allow for derogations from the main obligations in the protection of national constitutional values (e.g. human dignity), can ensure the enforcement of higher national standards under the scope of the Charter. Finally, there are EU measures in the case of which the standard of rights protection will depend on the conduct of national authorities in the implementation and enforcement of the measure in question.[87] In such instances, it is the responsibility of the national public authorities to provide at least the minimum protection demanded by EU law.

[85] Case 44/79 *Hauer* [1979] ECR 03727.

[86] Case C-36/02 *Omega* [2004] ECR I-09609 and Case C-112/00 *Schmidberger* [2003] ECR I-05659.

[87] See, for example, Joined cases C-411/10 and C-493/10 *N.S.* [2011] ECR I-00865.

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Therefore, the scenario envisaged by the question could only arise in circumstances where the structure developed for the application of EU law does not allow for the vindication – in one way or another – of domestic constitutional concerns. Arguably, *Melloni* represented such an occasion, as the preliminary reference by the Spanish Constitutional Court was returned with the EU Court refusing to give effect to higher national standards. That judgment, however, must be interpreted in light of the fact, also indicated by the EU Court, that the regulation of the EAW reflects a 'consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons'.[88] This implies that in the EU Court's interpretation, the Member States, in the interest of the effective operation of a system for administering cross-border justice based on mutual trust and recognition, have waived their entitlement to enforce their higher national constitutional standards.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 These points are not relevant in the context of Hungary's recent constitutional developments.

In the Expert's view, when important constitutional issues have arisen and have been referred to the Constitutional Court at the stage of implementing EU law, the present system and the preliminary ruling procedure allow sufficient space for democratic deliberation at the EU level. In the Hungarian context, the problem is that the Constitutional Court has not clarified its position on the relationship between EU law and the constitutional protection that had been controversially developed in the previous jurisprudence. It also does not seek formal contact, in the form of requests for a preliminary ruling, with the CJEU; this would have been possible not only in the case of the retirement of judges but also in the review of the Hungarian regulation on the implementation of the EAW. In the latter case, it could have inquired about the harmony of the rules with the Charter, thus contributing to development of the protection of fundamental rights at EU level. The Constitutional Court also did not invoke the procedural bond between the ordinary courts and the CJEU, i.e. the procedure of a preliminary ruling with constitutional emphasis on the interpretation of the right to a legitimate judge to establish if EU legal conditions have been met.[89] According to the permanent jurisprudence of the German Federal Constitutional Court, the CJEU may also be a 'legitimate judge' by virtue of Sentence 2 of Art. 101(1) of the German Basic Law. Namely, if a German judge

[88] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para. 62.

[89] CC Order 3110/2014. (VI. 17.) AB; reinforced by CC Order 3165/2014. (VI. 23.) AB. The petitioners argued in both cases that the court had not fulfilled the request to initiate a preliminary ruling in the base case and Art. XXVIII(1) of the FL had therefore been infringed.

fails to request a preliminary ruling even though the relevant EU conditions are met, then reference may be made to the infringement of the right to a legitimate judge within a constitutional appeal procedure.[90] According to the Hungarian Constitutional Court, this is not a constitutional issue but a technical legal issue falling within the scope of the judge of the proceedings. Although the Constitutional Court does not refuse or endeavour to actively participate in the network of cooperative constitutionalism, it might nevertheless emphasise the importance of a Europe-friendly interpretation of the Fundamental Law in a political environment in which rejection of an otherwise constructive European criticism, questioning of the decisions of Strasbourg and Luxembourg and a generally anti-EU rhetoric are typical. It appears that the political circumstances do not favour an extensive and activist constitutional judicature.

2.13 *Experts' Analysis on the Protection of Constitutional Rights in EU Law*

2.13.1 The Expert has not found evidence of EU law – unquestionably, systematically or fundamentally – having affected the protection of constitutional rights or the rule of law in a negative manner.

When addressing the standard of the EU's performance, it must not be ignored that EU constitutional requirements have been developed for a collective of different states in an environment characterised by a high degree of diversity. Finding common ground in such circumstances entails finding what could be expressed as optimum requirements which go beyond the minimum but which may not reach the maximum expectations. A certain degree of levelling out is necessary to be able to provide workable constitutional rules for a polity such as the EU. As a result, it is arguable that the development of common requirements cannot exclude the lowering of standards as recognised in individual Member States. This circumstance is particularly important when claims concerning the negative impact of EU law on the protection of constitutional rights and rule of law requirements are considered.

2.13.2 As stated earlier, the levelling out of standards could be necessary for the legal order of a collective polity such as the EU to develop common standards of protection of constitutional rights. The Expert also believes that while the protection offered in individual instances could be open to criticism, it would be controversial to formulate general conclusions concerning the performance of EU law in this domain on this basis. The Expert is willing to accept the argument that any levelling out of standards in EU law has been necessary to establish a collective polity and a collective system for the enforcement of common rights and obligations.

[90] *BVerfGE 73, 339, 366 ff.; 75, 223, 233 ff.; 82, 159, 192 ff.; 126, 286, 315 ff.*, latest in 2010: *1 BvR 1631/08* http://www.bundesverfassungsgericht.de/entscheidungen/rk20100830_1bvr163108.html.

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Nevertheless, in frameworks establishing essentially horizontal systems of governance among the Member States, which aim to negotiate between the benefits of mutual trust/recognition and the fundamental rights implications of the regulated activity, because of the weaknesses of these governance structures, the guarantees offered by EU law may not be satisfying in all circumstances.

2.13.3 In the Expert's view, the responsiveness of the EU Court and also of national courts to national constitutional concerns depends primarily on the ethos of the different institutions, and also on individual factors, such as the preparedness, sensitivity, etc., of individual judges. Courts of law – national and international – seem quite satisfied to present themselves as special adjudicatory agencies with the task of resolving legal disputes and matters of legal interpretation in a continuously growing number of cases. They are keen to explore avenues to increase administrative efficiencies, and are likely to have an interest in getting involved in the cases before them only to the extent necessary. The prevailing institutional culture – e.g. decision by consensus, lack of dissenting or other opinions, etc. – may also dictate a reserved approach to matters of broader relevance. In their everyday operation as agencies, the understanding of matters of context, of local priorities, of the anticipation of individuals of their decisions, or of the potential and often controversial domestic implementation of their rulings could be limited. Unless the national constitutional concerns are adequately presented – by the referring national court which is assumed to be aware of them, or by the intervening governments – their relevance can be lost in such an institutional environment.

A strict reading of the jurisdiction of the EU Court – certainly before the Treaty changes commencing in the 1990s – could exclude any responsiveness from the EU Court towards national constitutional concerns. Its mandate covers interpreting and upholding the law developed in the collective enterprise among European states that is the EU polity. On the other hand, its institutional position and legitimacy as a transnational court, and its role in governing the participation of national administrative and judicial systems in the enforcement of EU law make it absolutely necessary to pay attention to concerns raised at the domestic level on constitutional grounds. The overall image of its jurisprudence indicates that national constitutional concerns – directly or indirectly – have been taken on board. This, however, does not mean that in individual, often very significant cases, the EU Court does not follow a strict reading of its mandate under the Treaties and sidelines the constitutional dilemmas raised by particular Member States. The attitude of the EU Court might, however, be changed by Art. 4(2) TEU on the protection of national (constitutional) identities, which has made the commitment of the Member States to conserve their positions in EU integration explicit. Nevertheless, it is still unclear how Art. 4(2) might influence the adjudication of Member State compliance before the EU Court, and whether the principle might represent a categorical departure from the EU as a collective enterprise and legitimate Member State particularism beyond the traditional constitutional remits.

The references for a preliminary ruling from the Hungarian courts have not raised national constitutional concerns in a manner that would have affected the EU Court's judgments.[91]

2.13.4 In the Expert's view, the possible institutional, procedural and substantive instruments are already available at the national level. Constitutions are rather explicit about the mandate of national constitutional organs, and also about the constitutional values and principles which should be safeguarded by them. National courts, although they are bound to apply EU law on the terms of the EU Court as it follows from national law, are not prevented from raising constitutional concerns regarding the application and interpretation of EU law in a particular case. National parliaments have been granted the right under national law to control their government's action in EU decision-making, in the course of which they are not prevented from raising their own constitutional concerns. Provided that national actors approach these matters with appropriate individual and institutional attitudes, it seems rather difficult, and perhaps unnecessary, to develop further instruments for safeguarding national constitutionalism at the national level. This may even be true for Member States which have experienced a recent regression in constitutionalism and constitutional protection. The Expert holds the view that if adjustments are indeed necessary at the national level, they must focus on attitudes, knowledge and understanding instead of rules and institutions.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 The conduct of international co-operation is governed by Art. Q(1) of the FL: 'In order to establish and maintain peace and security and to achieve the sustainable development of mankind, Hungary shall endeavour to co-operate with all peoples and countries of the world.' The provision is modelled on the text of Art. 6(2) of the 1989 Constitution,[92] but unlike its immediate predecessor, it explicitly mentions two objectives of international co-operation: the establishment and maintenance of peace and security, and the achievement of the sustainable development of humanity. These objectives were most likely incorporated into the text for exemplificative purposes. This constitutional clause is supplemented by a declaration in the National Avowal of the FL, which expresses the intention of members of the

[91] The reference in Case C-328/04 *Vajnai* [2005] ECR I-08577 would have raised significant issues of national constitutional law; however, the EU Court ruled – correctly – to decline its jurisdiction since the case fell outside the scope of EU law.

[92] 'The Republic of Hungary shall endeavour to co-operate with all peoples and countries of the world.'

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Hungarian nation to strive to co-operate with every nation of the world. Although the wording of the provisions concerned is extremely broad, a comprehensive interpretation reveals all the essential details of international co-operation, including the potential partners, the scope of discretion, the primary objectives and the relevant limitations.[93]

The Rome Statute of the International Criminal Court, although it was ratified as early as 30 November 2001, has yet to be promulgated in Hungary. There was an unsuccessful attempt to promulgate the Rome Statute at the time of ratification, but the relevant bills were subsequently withdrawn. It has been assumed by members of the scholarly community that the long-awaited promulgation of the instrument would probably necessitate the amendment of the FL. The previously planned promulgation of the Rome Statute would also have required the amendment of the Constitution to permit the criminal prosecution of the President of the Republic by an international judicial organ. A new bill on the promulgation of the Rome Statute was submitted to the National Assembly in 2016, but at the time of writing, it has yet to be adopted.

The expression of consent by Hungary to be bound by an international treaty is governed by the FL and Act L of 2005 on the Procedure Relating to International Treaties (hereinafter APRIT). The authorisation to express consent to be bound is granted either by the National Assembly for treaties falling within its functions and powers,[94] or by the Government for all other treaties (Art. 1(2)(d) FL; Art. 7(1) APRIT). The authorisation itself is contained in the law promulgating the treaty (Art. 7 (2) and Art. 10(1)(a) APRIT). Following the adoption of the promulgating law, the minister of foreign affairs must immediately initiate the expression of consent to be bound by the President of the Republic, if the authorisation has been granted by the National Assembly, or if the treaty provides that the consent to be bound must be expressed by the head of state. The consent to be bound by the treaty is then expressed by the President of the Republic, and the related instrument is exchanged or deposited, or the required notification to the other party or parties is provided by the minister of foreign affairs (Art. 9(4)(a) FL; Art. 8(1)–(2) APRIT). The consent to be bound by all other international treaties is expressed, as appropriate, by the minister of foreign affairs, or if the treaty provides that the consent to be bound must be expressed by the head of government, by the Prime Minister. The exchange or deposit of the related instrument is likewise performed by the minister of foreign affairs (Art. 8(4) APRIT).

3.1.2 The constitutional provisions on treaty ratification and international co-operation were, without exception, introduced by the adoption of the FL, and were designed to replace the corresponding provisions of the 1989 Constitution. Nevertheless, there is a close textual resemblance between the old and new provisions, and the former apparently served as a model in the formulation of the latter.

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[93] Sulyok 2013a, pp. 464–489.

[94] Treaties in the field of EU cooperation (pursuant to Art. E(2) of the FL); the subject matter of the treaty is already regulated by an Act of Parliament or pursuant to the FL, it shall be regulated in a cardinal or other Act of Parliament; the treaty influences other matter belonging to the competence of the Parliament on the basis of Art. 1(2) (a)–(c) and (e)–(k) of the FL.

In the preliminary stages of the making of the FL, selected state organs, representative bodies, social organisations and the scholarly community were requested to submit proposals regarding the future constitution. The few submissions that touched upon the provisions concerned include the detailed proposals presented by the Institute for Legal Studies of the Hungarian Academy of Sciences.[95] The actual impact of these proposals is largely unknown: some were manifestly disregarded; others may have been accepted.

3.1.3 In spite of occasional criticism by members of the scholarly community, amendment of the provisions concerned, to our knowledge, has not been seriously raised since the adoption of the FL. Previously, in the period between the political transition and the entry into force of the FL, the 1989 Constitution was amended, *inter alia*, upon Hungary's accession to the North Atlantic Treaty Organization[96] and to the European Union.[97] The unsuccessful attempt to promulgate the Rome Statute of the International Criminal Court, as has been mentioned, would also have required the amendment of the Constitution.

3.2 The Position of International Law in National Law

3.2.1 The application and position of international treaties in the domestic legal system are governed by the FL and APRIT. The second sentence of Art. Q(3) of the FL provides that '[o]ther sources of international law shall become part of the Hungarian legal system by promulgation by law'. This provision can only be interpreted in the light of the first sentence of the same paragraph, which concerns the generally recognised rules of international law, including customary international law, the general principles of law and the peremptory norms of international law.[98] Hence the scope of the second sentence covers the other sources of international law: international treaties, binding decisions of international organisations, judicial decisions and unilateral acts of states.

International treaties become part of domestic law by promulgation by law. The detailed reasoning of Bill T/2627 on the FL of Hungary placed special emphasis on the requirement of promulgation: 'Accordingly, the Bill expresses that other rules of international law binding on Hungary, including above all international treaties, only become part of the Hungarian legal system and applicable in the procedure of

[95] Magyar Tudományos Akadémia Jogtudományi Intézete (2010), *Javaslatok a Magyar Köztársaság Alkotmányának szabályozási koncepciójához* [Proposals for the Regulatory Concept of the Constitution of the Republic of Hungary], pp. 16–21.

[96] Act XCI of 2000 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary. See also CC Decision 5/2001. (II. 28.) AB.

[97] See supra n. 11. See also CC Decision 30/1998. (VI. 25.) AB.

[98] 'Hungary accepts the generally recognised rules of international law.'

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Hungarian law enforcement agencies by promulgation by law'.[99] Earlier, the Constitutional Court had also pronounced that ensuring harmony between international law and domestic law demands the promulgation of international treaties, including self-executing treaties, and the inadequate or incomplete promulgation of treaties does not meet the constitutional requirements.[100]

The detailed rules of promulgation are laid down by APRIT. The Act, as amended in 2011 in the wake of the adoption of the FL, provides that treaties falling within the functions and powers of the National Assembly must be promulgated by a Parliamentary Act; other treaties must be promulgated by Government decree.

Similarly to the 1989 Constitution,[101] Art. Q(2)–(3) of the FL do not determine the position of promulgated international treaties in the domestic hierarchy of sources of law. Their position may nevertheless be explored by recourse to a range of related provisions. The provisions of the FL on the competences of the Constitutional Court and the provisions of Act CLI of 2011 on the Constitutional Court relating to procedures that may promote harmony between international law and domestic law, contain particularly useful guidelines.[102] The same holds true for the case law of the Constitutional Court. These guidelines indicate that the position of international treaties in the domestic hierarchy formally corresponds to the level of the promulgating law. However, promulgated international treaties function differently than, and have precedence over, ordinary sources of domestic law. This precedence is largely based on procedural factors.

The requirement of faithful observance of international treaties, in addition to the relevant rules in international law, may be derived from several interrelated constitutional provisions. These provisions include Art. B(1) and Art. Q(2)-(3) of the FL on the constitutional principle of the rule of law,[103] on ensuring harmony between international law and domestic law,[104] and the domestic incorporation of norms of international law, respectively. The Constitutional Court has also pronounced that

[99] Bill T/2627 on the Fundamental Law of Hungary, Detailed reasoning to Art. P, 38.

[100] CC Decisions 30/1998. (VI. 25.) AB; 54/2004. (XII. 13.) AB; 7/2005. (III. 31.) AB; 30/2005. (VII. 14.) AB.

[101] 'The legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall ensure harmony between obligations assumed under international law and domestic law.' 1989 Constitution, Art. 7(1).

[102] FL Art. 24(2)–(3); Act CLI of 2011 on the Constitutional Court (hereinafter ACC), Art. 23–25, 32, 37–38, 40–42, and 46. The provisions of the FL prohibiting conflicts between various sources of law also offer guidance. FL Art. T(3), Art. 15(4), 18(3) 23(4) 32(3), 41(5).

[103] 'Hungary is an independent, democratic rule-of-law State.' FL Art. B(1).

[104] 'In order to fulfil its obligations under international law, Hungary shall ensure harmony between international law and Hungarian law.' FL Art. Q(2). The Venice Commission welcomed the incorporation of the provision into the Fundamental Law. European Commission for Democracy through Law, *Opinion on the New Constitution of Hungary*, CDL-AD(2011)016, 10, para. 42.

> [t]he implementation of an international commitment … is a duty originating from [the constitutional provision] containing the rule of law, including the fulfilment in good faith of obligations under international law, as well as from [the constitutional provision] demanding the harmony of international law and domestic law that exists from the moment from which the international treaty binds (in the sense of international law) Hungary. … Those obliged by international treaties are, as a general rule, the states parties to the treaty. It is the duty of these states to ensure the implementation of the treaty.[105]

3.2.2 The relationship of international law and domestic law traditionally ranks among the most problematic issues of Hungarian constitutionalism. The first constitutional clause to explicitly regulate the matter, Art. 7(1) of the 1989 Constitution, received a tremendous amount of criticism for its infamously imprecise and vague wording which left room for conflicting interpretations. The Constitutional Court ultimately pronounced that the provision established a dualist system,[106] but even this authoritative interpretation could not put an end to the debate. Following several failed initiatives, the drafting of the FL offered an opportunity to remedy the theoretical and practical shortcomings by introducing a progressive new provision. However, Art. Q(2)-(3) of the FL were formulated on the model of their predecessor, the text of which seems to have been simply rearranged, partly rephrased and modestly supplemented. Due to the close resemblance of the two provisions, the early commentators of the new regulation mostly observed that essentially nothing had changed.[107] The FL is authoritatively interpreted so as to maintain the dualist tradition, wherein the generally recognised rules of international law and other sources of international law become part of domestic law by general transformation and by special transformation, respectively. The possibility of conflicting interpretations nevertheless remains.

3.3 Democratic Control

3.3.1 Parliamentary involvement in the initial negotiation of international treaties is rather limited in Hungary. The FL at present does not contain detailed provisions on the early phases of treaty-making, leaving the regulation of the process to Act L of 2005 on the Procedure Relating to International Treaties (APRIT). This Act assigns the relevant functions and powers to the Government in order to reduce the workload of the National Assembly.[108] Hence the conclusion of international treaties is initiated and arranged by the competent minister, with the consent of the minister of foreign affairs, and in observance of the foreign policy principles laid

[105] CC Decision 7/2005. (III. 31.) AB. (Inserts added).

[106] CC Decision 53/1993. (X. 13.) AB.

[107] E.g. Blutman 2014a, p. 30; Kovács 2011, pp. 75–76; Molnár 2013, p. 60; Sulyok 2013b, pp. 48–49.

[108] Molnár 2013, p. 117.

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down by the National Assembly and by the Government (Art. 4(1) APRIT). The authorisation to adopt the text of the treaty and to designate the person representing the state in the process is granted by the Government, or in exceptional cases, between two sessions of the Government, by the Prime Minister. The granting of authorisation is initiated by the minister who has proposed the conclusion of the treaty, with the consent of the ministers of foreign affairs and justice (Art. 5(2) APRIT). If the treaty falls within the functions and powers of the National Assembly, the resolution authorising the adoption of the text of the treaty and the available text of the treaty must be forwarded to the competent parliamentary committee (Art. 5(3) and 7(1) APRIT). The National Assembly is certainly not precluded from expressing its political opinion on a treaty, and may even request or endorse the Government in a resolution to adopt the text of a treaty.[109] The National Assembly, therefore, may discuss various issues related to international treaties. Parliamentary discussion is most likely to take place upon the granting of authorisation to express consent to be bound by/promulgation of a treaty, or at any later stage following the promulgation.

3.3.2 Similarly to Art. 28C(5)(b) of the 1989 Constitution, Art. 8(3)d) of the FL explicitly prohibits the holding of a national referendum on 'an obligation arising from an international treaty'.[110] This provision only applies to existing international treaty obligations and does not prohibit the holding of referendums before the assumption of such obligations. These referendums may pursue several interrelated objectives, such as to consult the public in the preliminary stages of decision-making or to enhance the legitimacy of outstandingly important foreign-policy decisions. National referendums were indeed held prior to Hungary's accession to NATO on 16 November 1997 and to the European Union on 12 April 2003. Both referendums were valid and conclusive. The Constitutional Court later pronounced that the holding of a referendum on the accession to NATO did not entail that a similar referendum could also be held on the question of withdrawal.[111] More recently, two politicians of the opposition initiated a national referendum on the planned expansion of the Paks Nuclear Power Plant, the only nuclear power station in Hungary, but the initiative was rejected by the National Election Commission on 17 February 2014.[112] The Commission pointed out that the initiative was incompatible with the constitutional prohibition concerned, as it would have affected existing international obligations arising from the Convention between the Government of Hungary and the Government of the Russian Federation on the Conduct of Co-operation in the Field of Peaceful Use of Nuclear Energy.

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[109] Ibid., pp. 117–118.

[110] See also Act CCXXXVIII of 2013 on the Initiation of a Referendum, the European Citizens' Initiative, and the Referendum Procedure. For more details, see Csatlós 2014, pp. 337–346.

[111] CC Decision 35/2007. (VI. 6.) AB.

[112] National Election Commission Decision 91/2014. The decision was upheld by Curia Order Knk.IV.37.178/2014/3, and the subsequent constitutional complaint was rejected by Constitutional Court Order IV/938/2014.

3.4 Judicial Review

3.4.1 National courts are not in a position to perform a review of promulgated international treaties or binding decisions of international organisations; they are only expected to apply them appropriately.[113] Recent investigations have nevertheless exposed considerable reluctance on the part of the judiciary to invoke international law, particularly when ordinary domestic provisions are equally sufficient to decide a given case.[114] Domestic judges are further expected to turn to the Constitutional Court upon encountering conflicts between international law and domestic law. The Constitutional Court has several procedures in its inventory in which international treaties may be subjected to scrutiny. (The provisions of Act CLI of 2011 on the Constitutional Court do not explicitly mention the binding decisions of international organisations.) These procedures include the *ex ante* review of conformity with the FL (preliminary norm control),[115] the *ex post* review of conformity with the FL (posterior norm control but of the domestic promulgating law rather than of the treaty),[116] the judicial initiative for norm control in concrete cases[117] and the examination of conflicts with international treaties.[118]

3.5 The Social Welfare Dimension of the Constitution

3.5.1 As noted earlier, over the summer of 2014 the Hungarian Constitutional Court made an attempt to develop the bases of a new economic constitution under the FL, which would reinstate the roles and the power of the Hungarian state as stabiliser, regulator and provider. The relevant decisions either build on a fervent criticism of economic regionalisation and globalisation, or they rely on the social provisions of the FL and the resulting social obligations of state actors.[119] As criticised earlier, these observations are often rushed and wrong, and they never surpass the crude level of detail of simple declarations. More importantly, they do not seem to have affected the actual scrutiny of the Constitutional Court beyond accepting the discretion of the Government and rolling back the usual standards of constitutional

[113] E.g. Blutman 2014b, pp. 167–179; Chronowski and Csatlós 2013, pp. 7–28.

[114] E.g. Chronowski et al. 2011, p. 278.

[115] ACC Art. 40(3).

[116] FL Art. 24(2)e); ACC Art. 24(1).

[117] FL Art. 24(2)b); ACC Art. 25(1).

[118] FL Art. 24(2)f); ACC Art. 32.

[119] See also CC Decision 3062/2012 (VII. 26.) AB on price regulation in the district heat market, where the Constitutional Court accepted that, inter alia, the impact of the global financial and economic crisis necessitated the local reregulation of the public and private law framework available for determining prices in the sector, despite legitimate expectations for the previous framework to remain in place.

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control of Governmental economic governance. The Constitutional Court seems to be prepared to support the Government's efforts by failing to question the legitimacy and validity of the purpose of Government action, and by refusing to investigate the suitability and the necessity of the relevant measures. The Constitutional Court is satisfied with a rather relaxed circumregulation of the discretion made available to the responsible bodies under the measures in question, it raises no issue with the rather low standards of legal safeguards and remedies, and it is rather untroubled by the actual impact on individuals of the measures in question and by the potential for the application of the measures in question to lead to further violation of constitutional guarantees. Overall, the new economic constitutionalism in Hungary emerging in the wake of the crisis is less concerned with transparency, classical state roles in capitalist markets, and with issues of solidarity and social protection than with assisting the restructuring of the market in Hungary following undisclosed (or rather well-known but not openly advertised) economic policy priorities. Having regard to the apparent exclusionist, protectionist and possibly chauvinist economic policies of the Government, the anti-globalisation and anti-regionalisation agenda of the Constitutional Court seems to support a very particular transformation of the economy and society in the final years of the decade after the crisis.

Hungarian economic and social policies[120] and the erosion of the constitutional environment available to keep Government policies under control in light of social protection or other policies indicates that the states are equally responsible for the demise of the social dimension of constitutions. Following Bartolini, it may not seem controversial to suggest that the threat of globalisation and regionalisation on local social regulation and on local systems of social protection has resulted from conscious decisions by local political elites to transfer sensitive decisions of economic and social policy to the transnational level in order to avoid the confines of national constitutions and the control of national parliaments and courts.[121] Furthermore, while pressures for deregulation, privatisation and liberalisation may come top-down from the global and/or regional level, states – the economies of which seem to benefit from these changes – are not prevented from compensating for any negative impacts of these transformations. Often, in structures of social governance favouring subsidiarity, they are even urged to make autonomous choices as to the compensatory measures or regarding the suitable extent and intensity of these changes in the particular domestic environment. The responsibility for failing to exploit these opportunities to level out the negative social effects of economic policies must be borne by states and their governments.

The Expert, therefore, would be very reluctant to argue that the social welfare dimension of constitutions is threatened only by global and regional governance,

[120] E.g. a flat income tax rate, tax benefits to high earners, the increase of VAT, the deregulation of employment law, the reduction of social benefits, an export driven exchange rate for the domestic currency, financing public debt through high premium sovereign bonds, etc.

[121] Bartolini 2005, p. 405.

and that attempts by states to safeguard their social constitutions are thwarted by the binding rules of global and regional economic regulation. States can pursue economic, social, fiscal, etc., policies which are known to compromise social protection and social regulation.

3.5.2 Hungary participated in a post-crisis bailout programme administered jointly by the World Bank, the IMF and the EU[122] including an IMF Stand-by Arrangement,[123] but with the change of Government in 2010, this participation was reconsidered. It is suspected that the Government insisted on excluding these international partners because it aimed to regain control over matters of domestic economic policy in order to bring about the restructuring of markets and the rechannelling of market based income without being confined by demands of transparency, accountability, sustainability and balanced rationality. It is likely that the fairly obvious plans of the Government for the Hungarian public and private economy would have been thwarted if they had been carried out under the close supervision of an international agency.

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[122] http://www.imf.org/external/pubs/ft/survey/so/2008/car102808b.htm.

[123] http://www.imf.org/external/np/sec/pr/2008/pr08275.htm.

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Part VII
Reforming the National Constitution in View of Global Governance

Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland

Raffaela Kunz and Anne Peters

Abstract The Swiss Constitution is unique in Europe in the way it organises international co-operation. Three features stand out: the very strong democratisation of foreign policy-making (through Parliament and through involvement of the people by virtue of referendums and popular initiatives), the relatively reluctant judicial review of measures based on international legal acts against the benchmark of fundamental rights, and, finally, the federal elements in conducting international relations. The Swiss case underscores both the desirability and the difficulties of compensatory constitutionalism as a normative programme. Switzerland, with its strong direct-democratic tradition, has started to react early to the impact of all types of global governance measures. However, major reforms, mainly with a view to strengthening the element of democratic control through domestic democratic institutions, have so far not succeeded in soothing popular aversion to 'foreign' and undemocratic international law and institutions. With regard to the second main element of contemporary constitutionalism, namely fundamental rights protection and judicial review, the reluctance of the Swiss Federal Tribunal to assume a role in

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protecting constitutional (or European) fundamental rights when implementing international law has led to conflicts with the ECHR. It is likely that the ECtHR, in compelling Switzerland to exercise such review, might in the end work more in favour of compensatory constitutionalism through the pressure it creates.

Keywords The Constitution of Switzerland · The Swiss Federal Tribunal ECHR · Absence of constitutional review · Parliamentary participation in foreign policy · Direct democracy and international law · Democratic legitimacy Primacy of international law · Judicial review of targeted sanctions Compensatory constitutionalism · Conflict of law · Constitutional tolerance

1–2 An Overview of the Swiss Constitution

1.1 The Swiss Constitution and system of government are often portrayed as a 'special case'. This has to do with several particular features. These include direct democratic rights of citizens' participation, a strong federal element and a collective government composed of seven members vested with equal rights (directorial system). Unlike in parliamentary or presidential systems, typical instruments of checks and balances between the Parliament and the Government, such as a motion of censure or the possibility to veto legislative acts, do not exist. Conversely, the people have a say on many important matters, through referendums and popular initiatives.

The Constitution of the Swiss Confederation[1] belongs to the category of 'rigid' constitutions, amendable only by a qualified procedure: any modification of the Constitution is mandatorily put to a vote by the people and the Cantons (i.e. the member states of the Swiss Confederation; Art. 140(1)(a) of the Constitution, as will be further explored in Sect. 3.1).[2] Nonetheless, in practice the Swiss Constitution has proven to be of a rather dynamic nature and has often been amended.

The constitutional cornerstones are democracy, the rule of law, solidarity and federalism.[3] The overarching objectives of the Constitution are first, the organisation of the state, secondly the protection of individuals' constitutional rights and liberties, the rule of law and the separation of powers with due checks and balances,

[1] *Bundesverfassung der Schweizerischen Eidgenossenschaft* of 18 April 1999 (SR 101). The official English translation is available at https://www.admin.ch/opc/en/classified-compilation/19995395/index.html.

[2] The Constitution *may be totally* (Art. 193*) or partially* (Art. 194) *revised at any time* (Art. 192 (1)). There is no specific procedure for revising the Constitution; it generally follows the legislative process (Art. 192(2)).

[3] *Botschaft des Bundesrates über eine neue Bundesverfassung* of 20 November 1996, BBl 1997 1, pp. 14–17.

and thirdly the definition of the overall aims and directions of the state.[4] The instrument of the popular initiative, which allows citizens to suggest new *constitutional* provisions that are not, however, limited to proposals of constitutional value, leads to the insertion of provisions that by their nature rather belong to the level of ordinary laws into the Constitution.[5]

There is no constitutional court designated as such in Switzerland, but the Federal Tribunal, which functionally is a supreme court with general jurisdiction, also exercises constitutional control. This control, however, has an important limit: the Federal Tribunal cannot review and quash federal acts (i.e. statutes). Art. 190 of the Constitution, which states that federal acts and international law are to be *applied* by the Federal Tribunal and the other judicial authorities, 'immunises' federal statutory law (but not cantonal law) from judicial review. Nonetheless, in practice, the Federal Tribunal at times scrutinises the constitutionality of federal acts, which is understood as an invitation to Parliament to take the necessary steps. The court interprets Art. 190 as a duty to apply federal acts, but not as a prohibition to examine their constitutionality. Because international law is mentioned together with federal acts in Art. 190, the Federal Tribunal, based on the principle of primacy of international law in the Swiss legal order, can refuse to apply federal acts that contradict international law. International law in practice thus compensates for the lack of a mechanism of constitutional review, which is in this sense introduced 'through the backdoor'.

Overall, from a comparative perspective, the Swiss Constitution is not a particularly 'sacred' document. It contains more than just important and general provisions, and includes neither a separate constitutional court to uphold constitutionality nor specific principles for constitutional interpretation (as opposed to the interpretation of laws).[6]

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1–2.1.3 The first, relatively comprehensive, chapter of the second title of the Constitution (Arts. 7–36) is dedicated to fundamental rights and is clearly influenced by the European Convention on Human Rights (ECHR).[7] The Constitution contains a general provision on the restriction of fundamental rights. Any restriction requires a legal basis, must be justified by the public interest or the protection of the fundamental rights of others, and must be proportionate. The essence of a fundamental right may never be impaired (Art. 36(1)–(4)).

[4] Biaggini 2007, pp. 49–50.

[5] Hangartner 2000, para. 816. Examples include Art. 73(3), prohibiting the construction of minarets, and Art. 75b on second domiciles.

[6] BGE 116 Ia 359 (1990), E. 5.; more recently 131 II 13 (2004), E. 7.1.

[7] European Convention on Human Rights of 4 November 1950 (213 UNTS 221); Keller 2011, para. 4.

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Different aspects of the rule of law are enshrined in the Constitution in the form of constitutional principles which are generally only enforceable in courts in connection with a constitutional right (Art. 5).[8] International law is explicitly mentioned as one element of the rule of law: Art. 5(4) provides that the Confederation and the Cantons 'shall respect international law'.

3 Constitutional Issues in Global Governance

3.1 Constitutional Rules on International Organisations and the Ratification of Treaties

3.1.1 Ratification of treaties by Parliament and the Government The Swiss Constitution contains specific provisions on the ratification of treaties, but not on the transfer of powers to international organisations (IOs). The only provision dealing with IOs concerns the participation of *citizens* ('the people'): the accession to certain IOs is subject to a referendum, as will be discussed below.

Because Switzerland is a federal state, the 'vertical' separation of powers is important with regard to the conclusion of treaties. The overall responsibility in matters of foreign relations lies with the federal level (Art. 54(1) of the Constitution). However, the powers of the Cantons 'shall be respected' and their 'interests protected' (Art. 54(3)). The Cantons may, in matters lying within their powers, conclude treaties (Art. 56(1)); but due to the general federal powers, these cantonal powers are only subsidiary and may be superseded. By way of compensation, the Cantons participate in the conclusion of treaties (Art. 55).[9]

In terms of the 'horizontal' separation of powers, the Federal Council (hereinafter the Government) and the Federal Assembly (hereinafter Parliament) share the power to assume international legal obligations; they exercise their competences *jointly*.[10] The Government holds the overall responsibility in foreign relations, subject to the participatory rights of Parliament (Art. 184(1)). Parliament 'participates in shaping foreign policy and supervises the maintenance of foreign relations' (Art. 166(1)). Accordingly, the Government is competent to *sign* and *to express the will to be bound on the international plane* in the sense of Art. 14 of the Vienna Convention on the Law of Treaties[11] (VCLT) (Art. 184(2)), but needs the *approval*

[8] *Botschaft BV*, n. 3, p. 133; BGE 130 I 388 (2004), E. 4.

[9] Peters 2016a, p. 198. Cantonal participation in foreign politics is further spelt out in a federal act; see *Bundesgesetz über die Mitwirkung der Kantone an der Aussenpolitik des Bundes (BGMK)* of 22 December 1999 (SR 138.1).

[10] *Botschaft BV*, n. 3, pp. 392–393.

[11] VCLT of 23 May 1969 (1155 UNTS 331).

of Parliament (Art. 184(2) and Art. 166(2)). Additionally, the citizens and the Cantons are involved in the conclusion of certain treaties by way of referendum, as will be discussed below.

If a treaty is subject to a referendum, Parliament can include the domestic amendments necessary to implement the treaty already in its decision on approval of the treaty (Art. 141a of the Constitution, allowing for so-called 'package votes').

The Government may *provisionally apply* a treaty before approval by Parliament 'in urgent circumstances or when it is necessary to safeguard important Swiss interests' (Art. 7b(1) of the Government and Administration Organization Act).[12] In such case, it shall first consult the parliamentary committees for foreign affairs (Art. 152(3bis) of the Parliament Act).[13]

The Constitution foresees exceptions to the requirement of parliamentary approval which permit the Government to conclude treaties independently from Parliament in certain cases (Art. 166(2)); this is known as the 'simplified procedure'. These powers are substantiated in the Government Act: a delegation norm in a federal act or treaty approved by Parliament is required, and the treaties may only be of *limited scope* (Art. 7a(1)–(2)). Moreover, the Government has to provide Parliament with an annual report on treaties entered into under the simplified procedure (Art. 48a(2) of the Government Act). Based on this report, Parliament can request the *ex post* submission of a treaty for approval.[14]

Popular rights in connection with the conclusion of treaties Importantly in the case of Switzerland, certain treaties are subject to a referendum. This instrument allows for popular participation in the form of a veto right (control function), and thus ensures legitimacy through the mere possibility of popular involvement. Due to structural differences between law-making on the national and international planes, however, the referendum encounters particular challenges when applied to the international context. On the national level, the use of this instrument may lead to a dialogue between the different actors involved and contribute to a more acceptable and balanced solution. On the international level, however, when a treaty is rejected by one side, new negotiations might be precluded. The referendum thus bears the risk of impairing Switzerland as an actor on the international plane, and was disputed for that reason, as will be discussed below. At the same time, due to the special nature of law-making on the international level (negotiations, package deals, the important role of the executive branch), the main function of the referendum – the involvement of the people in decision-making – arguably cannot be

[12] *Regierungs- und Verwaltungsorganisationsgesetz (RVOG)* of 21 March 1997 (SR 172.010); hereinafter 'Government Act'.

[13] *Bundesgesetz über die Bundesversammlung (Parlamentsgesetz, ParlG)* of 13 December 2002 (SR 171.10); hereinafter 'Parliament Act'.

[14] *Bericht der Staatspolitischen Kommission des Nationalrates, 'Parlamentarische Initiative Geschäftsverkehrsgesetz. Anpassungen an die neue BV'* of 7 May 1999, BBl 1999 4809, p. 4830; for the latest report, see *Bericht über die im Jahr 2016 abgeschlossenen völkerrechtlichen Verträge* of 24 May 2017, BBl 2017 4573.

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fulfilled for questions related to foreign policy. For this reason, so the argument runs, popular rights are increasingly being 'eroded' in the course of the growing importance of international regulation.[15] An example is the political decision of the Government and Parliament to continue the agreement between Switzerland and the EU on the free movement of persons and at the same time to extend it to Bulgaria and Romania. These two questions were jointly submitted to a referendum, so that the people could only accept or reject them together.[16]

There are three types of referendums:

- mandatory treaty referendums;
- optional treaty referendums; and
- unwritten, extraordinary treaty referendums.

It is mandatory to hold a referendum for Switzerland's accession to 'organizations for collective security or to supranational communities' (Art. 140(1)(b) of the Constitution). Such decisions must be put to a vote of the people *and* the Cantons. A referendum vote is passed if a majority of the citizens *and* a majority of the Cantons approve the proposal (Art. 142(2)), with the position of each Canton determined by its internal majority. Mandatory referendums thus create a twofold legitimacy, consisting of a democratic and a federal element. Their rationale is the legitimisation of the areas of foreign relations that are considered to be the most important and far-reaching.[17] So far, the only actual vote conducted has concerned the Swiss accession to the UN in 1986, which was rejected by a clear majority of 75.7% of the people and by all of the Cantons. UN accession took place only in 2002 following a popular initiative under Art. 140 of the Constitution.

The involvement of the people is *optional* for certain treaties, and this is regulated in Art. 141 of the Constitution. An optional referendum means that a vote only takes place if it is actively *requested* by at least 50,000 citizens within 100 days of the official publication of the underlying act. Then, only a majority of the people (and not the Cantons as well) have to accept the treaty in a vote.

Three types of treaties fall in the scope of an optional referendum: (a) treaties of 'unlimited duration and that may not be terminated' (which do not contain a withdrawal clause); and (b) treaties that foresee the 'accession to an international organization', the primary criterion thus being the *duration* of an international obligation; and since a reform in 2003 also (c) treaties which contain 'important legislative provisions' or whose 'implementation requires the enactment of federal legislation'.

[15] For a detailed overview, see Diggelmann 2005, pp. 35–61; see also Linder 2012, p. 324. On current challenges for direct democracy generally, see Auer 2013.

[16] Accepted by popular vote on 8 February 2008.

[17] *Botschaft des Bundesrates über die Neuordnung des Staatsvertragsreferendums* of 23 October 1974, BBl 1974 1133, p. 1156.

In practice, optional referendums have rarely been called for, and never has a treaty been rejected in a vote sought bottom-up by the citizens. This suggests that Switzerland is not overly handicapped by this instrument when acting on the international plane. Since its introduction in its current form in 1977,[18] 28 treaties of unlimited duration, including e.g. the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, have been in the scope of the first alternative of the optional referendum, but the necessary threshold of 50,000 signatures has never been reached so as to request that a vote actually take place.[19] Thirty-eight treaties have fallen under the second alternative in Art. 141(1)(d) (accession to an IO) since 1977, including the Rome Statute of the International Criminal Court (2001) and the agreement establishing the European Bank for Reconstruction and Development (1990). A referendum vote has been held only once, in 1992, concerning accession to the institutions of Bretton Wood, which was approved.

Since the introduction of the option to hold a referendum on treaties containing important legislative provisions (141(1)(d)(3)) in 2003, 182 treaties have been declared by Parliament to fall under this form of referendum (as of July 2014), as compared to only 37 treaty-related referendums in all of the preceding years together. A referendum has, however, been requested by the citizens only eight times since 2003 and only once previously (in 2000 with regard to the bilateral treaties between Switzerland and the European Community); the necessary number of signatures was attained five times, including for the single referendum before the 2003 reform. All of the referendums have concerned bilateral treaties with the EU, and in all five cases, the citizens approved the treaties in the referendum vote.[20]

The third type of referendum is possible under a somewhat disputed unwritten rule ('extraordinary referendum'): Parliament may submit *further* treaties to a popular vote. Such referendum would be 'mandatory' in the sense that no signatures would need to be collected by citizens to request it. It is thus ordered top down. This last happened in 1992 regarding the Swiss accession to the European Economic Area, which was rejected.

Values in, and limits to, international co-operation The provisions on the conclusion of treaties do not contain explicit references to objectives sought or values to be upheld in international co-operation. Neither are there provisions with regard to specific international organisations. Nevertheless, the state bodies entering into international obligations can only act within the limits of the law (the principle of legality, Art. 5(1)) and within the framework of the Constitution. They therefore

[18] On the legal history of the treaty referendum, see Sect. 3.1.2.

[19] For statistics on the use of popular rights in Switzerland, see c2d.ch. Data on the use of popular rights is available under https://www.bk.admin.ch/bk/de/home/politische-rechte/gebrauch-der-volksrechte.html. See further the study on the use of the referendum by Kübler et al. 2012, pp. 6–10.

[20] The votes were held in May 2009, February 2009, September 2005, June 2005 and May 2000.

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have to respect the formal requirements (procedure, form, etc.) as well as substantive standards set out by the Constitution. The latter include respect of the general aims of the Swiss Confederation, as spelt out in Art. 2 of the Constitution,[21] as well as fundamental rights. The state institutions also have to respect the objectives of foreign policy, which are as follows (Art. 54(2)):

> The Confederation shall ensure that the independence of Switzerland and its welfare is safeguarded; it shall in particular assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful coexistence of peoples as well as the conservation of natural resources.

For treaties concluded by the Cantons, explicit limitations exist: they 'must not conflict with the law or the interests of the Confederation, or with the law of any other Cantons' (Art. 56(2)).

A so-called 'eternity clause' does not exist, and in principle, any provision of the Constitution could be amended, although some authors have argued that certain constitutional core values like democracy and federalism should be resistant to amendments.[22] Except with regard to these values, the Constitution could thus be modified in order to allow the conclusion of treaties that would otherwise contradict the Constitution (on the limits for the revision of the Constitution, see below Sect. 3.2.1).

3.1.2 In order to adapt to new realities and to the growing importance of international law, the Swiss Constitution has undergone major amendments concerning three areas since the 1990s. The first set of amendments concerned *parliamentary participation* in foreign policy. Reforms were undertaken first in 1992, and again with the complete revision of the Constitution in 1999. Smaller adjustments have also been undertaken later at the level of ordinary legislation. The second set of amendments aimed at extending the possibility of *popular participation* with regard to treaties in order to bring direct democratic rights in line with the growing number of concluded treaties. An even further extension, proposed through a popular initiative, was rejected in 2012.[23] Thirdly, with the complete revision of the Constitution in 1999, two new provisions were inserted in order to strengthen the position of the *Cantons* regarding foreign policy in response to losses of cantonal autonomy due to the growing internationalisation (Arts. 55 and 56).

Parliamentary participation in foreign policy With the complete revision of the Constitution in 1999, the relationship between Parliament and the Government in the area of foreign policy was fundamentally redefined. According to Art. 166(1) of

[21] These include, inter alia, the liberty and rights of the people, the independence and security of the country, common welfare, equality of opportunity among citizens and the preservation of natural resources. *Neutrality* is not an aim, but a means to reach independence and security.

[22] See for references Ziegler and Odendahl 2014, para. 36.

[23] Popular initiative *'Für die Stärkung der Volksrechte in der Aussenpolitik (Staatsverträge vors Volk!)'*, rejected by popular vote on 17 June 2012.

the Constitution, Parliament 'shall participate in shaping foreign policy and shall supervise the maintenance of foreign relations'. While the former Constitution had already allowed for participation in foreign policy, the role of Parliament in this regard had been rather passive, limited to approving treaties; the executive branch had almost 'monopolised' the conduct of foreign relations.[24] During the GATT negotiations of the Uruguay Round (1986–1994), the power shift from Parliament to the Government resulting from the growing importance of international law-making was for the first time clearly perceived.[25] Soon after, Parliament undertook steps to strengthen its role in foreign policy.[26] Express mention was made of the changed circumstances: 'The legislative function of Parliament underwent some major changes, leading to a loss of influence.'[27] According to one of the initiators, the growing importance of foreign policy, engendering an incremental overlap of internal and external affairs, required the adaptation of Parliament to the new realities.[28] Further driving factors were the accessions of Switzerland to the European Economic Area and to the European Union, which were under discussion in the 1980s and early 1990s.

In 1992, a new provision was inserted into the former Parliament Act[29] (Art. 47bisa), strengthening the role of Parliament in the stage of treaty negotiations.[30] The second step followed at the occasion of the complete revision of the Constitution in 1999. The aim was to codify the achievements of the 1992 reform also on the constitutional level. The definition of the relationship between the executive and legislative branches in this area, however, led to major debate.[31] The most far-reaching proposal was made by two parliamentary committees, and would have given Parliament the powers to 'determine the fundamental aims in the area of

[24] *Bericht der Kommission des Nationalrates zur Parlamentsreform* of 16 May 1991, BBl 1991 617, p. 649, citing Aubert J.-F. (1967) Traité de droit constitutionnel Suisse, vol I. Dalloz, Paris, para. 188.

[25] Diggelmann 2005, p. 9; the 1991 report concerning the reform of the Parliament mentioned in n. 24 expressly refers to those negotiations (p. 649). Already in a 1978 report on the 'future of Parliament', a parliamentary committee had noted the growing importance of treaty law and had demanded a stronger involvement of Parliament during treaty negotiations. See *Schlussbericht der Studienkommission der Eidgenössischen Räte, 'Zukunft des Parlaments'* of 29 June 1978, BBl 1978 996, pp. 1018, 1097.

[26] Parliamentary initiatives Rhinow, *Amtliches Bulletin der Bundesversammlung* IV 1990, p. 653, and Petitpierre, *Amtliches Bulletin der Bundesversammlung* IV 1990, p. 1624; motion Portmann, *Amtliches Bulletin der Bundesversammlung* IV 1991, p. 1508.

[27] *Bericht NR Parlamentsreform*, n. 24, p. 650.

[28] R. Rhinow, explanation in an e-mail of 25 September 2014, on file with the authors, available upon request.

[29] *Bundesgesetz über den Geschäftsverkehr der Bundesversammlung sowie über die Form, die Bekanntmachung und das Inkrafttreten ihrer Erlasse (Geschäftsverkehrsgesetz)* of 23 March 1962 (SR 171.11) (abolished on 1 December 2007).

[30] *Bericht NR Parlamentsreform*, n. 24, pp. 649–650.

[31] Ehrenzeller 2014, para. 4.

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foreign policy and to participate in their design'.[32] The authors argued that in the light of progressing internationalisation, a modification of the existing balance of power between the branches with regard to foreign policy was necessary, and proposed giving Parliament the *lead* in determining the basic guidelines.[33] They expressly referred to the recommendation of a scholar asking for the extended participation of Parliament with binding effect in the area of foreign policy.[34]

This parliamentary proposal was successfully opposed by the Government, arguing that it would imply a *paradigm shift*, leaving only marginal and executory powers to the Government, and render the conduct of foreign affairs too inflexible.[35] Both chambers of Parliament in the end voted for the 1996 draft of the Government. A remnant of the discussion is reflected in Art. 184(1) of the Constitution, which expressly subjects the responsibility of the Government for foreign relations to the participatory rights of Parliament.[36]

The new provision did not lead to fundamental changes, but established more clearly that the democratically elected Parliament shall play an important and active role in the area of foreign relations.[37] The new Constitution thus does not merely allow parliamentary participation, it rather commands it.[38] Indeed, it has been noted that parliamentary participation is no longer a *right*, but a *duty*.[39]

More recently (2015), two provisions concerning the powers of the Government vis-à-vis Parliament with regard to treaties were revised: the provisions on the conclusion of treaties without the approval of Parliament ('simplified procedure', Art. 7a of the Government Act) and on the consultation of Parliament in the course of the provisional application of yet to be approved treaties (Art. 7b of the Government Act and Art. 152(3bis) of the Parliament Act).[40]

Two incidents involving the problematic exercise of governmental powers gave rise to these adjustments. First, a politically controversial agreement of 2001 between Switzerland and Germany on airport noise was applied provisionally by the Government, but later Parliament refused to give its consent to the treaty. In consequence, Switzerland could not ratify the treaty and had to re-enter into difficult negotiations. The incident revealed the risk that the provisional application of

[32] *Zusatzbericht der Staatspolitischen Kommissionen der eidgenössischen Räte zur Verfassungsreform* of 6 March 1997, BBl 1997 245, p. 313.

[33] Ibid., p. 281.

[34] Ibid., p. 282, referring to Ehrenzeller 1993, pp. 570–571. Ehrenzeller had argued for a stronger parliamentary involvement on the basis of the 'old' Constitution.

[35] *Stellungnahme des Bundesrates zum Zusatzbericht der Staatspolitischen Kommissionen der eidgenössischen Räte zur Verfassungsreform* of 9 June 1997, BBl 1997 1484, pp. 1496–1497.

[36] Zellweger 2001, p. 262, fn. 32.

[37] Ehrenzeller 2014, para. 19 speaks of a 'shift of emphasis' (our translation).

[38] Ibid., para. 16.

[39] Diggelmann 2005, p. 173, fn. 50.

[40] AS 2015 969 (in force as of 1 May 2015). The reform goes back to two parliamentary motions: *Nr. 10.3354 der Aussenpolitischen Kommission des Ständerates (APK-S)* of 27 May 2010 and *Nr. 10.3366 der Kommission für Wirtschaft und Abgaben des Nationalrates (WAK-N)* of 2 June 2010.

treaties by the Government could leave Parliament with a *fait accompli*, given that non-approval would lead to legal uncertainty and damage the credibility of Switzerland as a treaty partner.[41] As a consequence, in 2004 the powers of the Government to provisionally apply treaties were codified and more clearly defined.[42]

A further adjustment took place in the aftermath of a dispute between the United States and Switzerland regarding the handing over of client data of the Swiss bank UBS (the 'UBS case'). In 2009, the Federal Council signed an agreement to resolve the issue. It did so under the simplified procedure, i.e. without the involvement of Parliament. However, the Federal Administrative Tribunal subsequently prohibited the handing over of data based on the 2009 agreement.[43] This led the Government to conclude an adaptation protocol to the agreement. Despite the negative statements of Parliament, which had been consulted under Art. 152(3bis) of the Parliament Act, the Government provisionally applied the politically disputed instrument, arguing that important interests of Switzerland were at stake in an emergency situation.[44] Ultimately, in 2010, Parliament approved the 2009 agreement adapted by the protocol without submitting it to a referendum.[45]

In reaction to this incident, the powers of the Government were limited by law. First, the list of treaties that can be concluded without parliamentary approval was narrowed down further, and secondly, the possibilities to prevent the provisional application of treaties were strengthened by granting Parliament an actual veto right.

Regarding the first point, certain treaties are now explicitly excluded from the simplified procedure. These include, inter alia, those fulfilling the conditions of the optional treaty referendum (Art. 141(1)(d)) and those with considerable financial implications.[46] The aim of the reform was to circumscribe the powers of the Government more clearly without overly narrowing them, in order not to overload Parliament with questions of minor importance. Furthermore, and in line with the idea of bringing democratic oversight at the national and international levels in line ('principle of parallelism'), which will be further discussed below, the aim was to

[41] *Bericht der Staatspolitischen Kommission des Ständerates*, '*Parlamentarische Initiative Vorläufige Anwendung von völkerrechtlichen Verträgen*' of 18 November 2003, BBl 2003 761, p. 764 and 769.

[42] *Botschaft zum Bundesgesetz über die Kompetenz zum Abschluss völkerrechtlicher Verträge von beschränkter Tragweite und über die vorläufige Anwendung völkerrechtlicher Verträge (Änderung RVOG)* of 4 July 2012, BBl 2012 7465, pp. 7477–7478.

[43] Federal Administrative Tribunal, *A. gegen Eidgenössische Steuerverwaltung*, A-7789/2009, Decision of 21 January 2010.

[44] *Botschaft zur Genehmigung des Abkommens zwischen der Schweiz und den Vereinigten Staaten von Amerika über ein Amtshilfegesuch betreffend UBS AG sowie des Änderungsprotokolls* of 14 April 2010, BBl 2010 2965, pp. 2988–2989.

[45] *Bundesbeschluss über die Genehmigung des Abkommens zwischen der Schweiz und den Vereinigten Staaten von Amerika über ein Amtshilfegesuch betreffend UBS AG sowie des Änderungsprotokolls* of 17 June 2010, AS 2010 2907.

[46] See *Botschaft Änderung RVOG*, n. 42, p. 7481.

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exclude the conclusion of treaties containing significant provisions without parliamentary involvement.[47]

In the second amendment concerning the provisional application of treaties, the tension between the demand for more parliamentary involvement on the one hand and for safeguarding the necessary flexibility of the executive branch on the other hand was mirrored in the parliamentary debate. In the end, both chambers of Parliament agreed on a form of veto right for the parliamentary committees in charge of these questions.[48]

Popular participation in the ratification of treaties Attempts to strengthen the participation of citizens in the making of international law started as early as 1921.[49] The constitutional clause of 1921 subjected treaties of 'unlimited duration' (not containing a withdrawal clause) or concluded for 'more than 15 years' to an optional referendum. Moreover, the Government and Parliament submitted certain treaties to referendum without any explicit constitutional basis, e.g. the accession to the League of Nations in 1920 (accepted) and a free trade agreement with the European Community in 1972 (accepted).

Relying on the duration of a treaty as the decisive factor, however, was soon considered to be unsatisfactory because this excluded the people from having a say on the majority of treaties, no matter how far-reaching and important they were, if they contained a withdrawal option. Neither the accession to UNESCO in 1946, to the OECD in 1948, to EFTA in 1960, to the Council of Europe in 1963 nor to the ECHR in 1974 fell within the scope of the referendum.[50] Only approximately five percent of all treaties were subject to the possibility of a referendum, and only on three occasions was a referendum actually requested by citizens.[51]

As a consequence, a major reform was undertaken in 1977, extending the possibility for citizens to request a referendum. Those new rules on the referendum essentially remained the same during the complete revision of the Constitution in 1999. The aim was to achieve more popular participation, enhancing democratic legitimacy in the area of foreign policy without overly restricting the executive branch.[52]

A further extension followed in 2003. The reason was that many treaties, especially bilateral treaties, still did not fall within the scope of the referendum, which led to a gap between the national and the international level. In light of the growing number of treaties, this was considered problematic.[53] As a consequence,

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[47] Ibid., pp. 7480–7481.

[48] The modified provisions entered into force on 1 May 2015.

[49] See *Botschaft Staatsvertragsreferendum*, n. 17, pp. 1135–1136; see also NZZ of 9 April 2013, *Ein Lösegeld für den Gotthard*.

[50] Lombardi and Thürer 2002, para. 4.

[51] *Botschaft Staatsvertragsreferendum*, n. 17, p. 1140.

[52] Ibid., p. 1153.

[53] *Bericht der Staatspolitischen Kommission des Ständerates zur parlamentarischen Initiative 'Zur Beseitigung von Mängeln der Volksrechte'* of 2 April 2001, BBl 2001 4803, p. 4825.

Parliament proposed to strengthen the role of citizens in the approval of treaties and to align the possibility of a veto by the citizens on the national and the international plane.[54] On the national level, all 'important' provisions that establish binding legal rules must be enacted in the form of a federal *legislative* act by Parliament, subject to an optional referendum (as opposed to ordinances which can also be adopted by the Government and which are *not* subject to a referendum). It was proposed that the same criterion should also be decisive for popular involvement regarding treaties – all *important* treaties should become subject to a referendum. It was argued that this 'parallelism' would furthermore reduce the risk of a referendum against subsequent domestic legislation implementing a treaty. Hence, the idea was to guarantee both popular participation and Switzerland's credibility as a partner on the international plane.[55]

The Government objected to the proposal, arguing that it would lead to a myriad of possible referendums and endanger Switzerland's credibility as a treaty partner.[56] The wording finally adopted in 2003 nonetheless corresponds to the more extensive parliamentary proposal. As has been shown above (Sect. 3.1.2), the number of treaties that have since been open to popular participation has significantly increased without at the same time leading to a similar increase in requests for a treaty referendum. The fears of the Government have therefore not materialised in practice, and the reform can – in quantitative terms – be qualified as a success.[57]

At the same time, the provision on 'package votes' (Art. 141a of the Constitution) was adopted. It allows Parliament to write down the text of the domestic amendments necessary to implement a treaty already in its decision on approval of the treaty. The aim is to avoid contradictory popular votes, a risk that has increased after the extension of the referendum.[58] This time, the Government got its way, relying successfully on the importance of such a provision for the enhanced credibility of Switzerland as a treaty partner, against the resistance of Parliament.[59]

3.1.3 A number of studies have been conducted on the impact of the internationalisation of the law on the fundamental principles of the Constitution, especially with regard to democratic legitimation in the area of foreign policy, the separation of powers between Parliament and the Government, and on the federal structure.[60]

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[54] Ibid., pp. 4804 and 4826.

[55] Ibid., p. 4825.

[56] Ibid., p. 4826.

[57] A 2012 study finds that the current system is coherent and balanced. See Ehrenzeller 2012, p. 50.

[58] *Botschaft BV*, n. 3, p. 443.

[59] *Stellungnahme des Bundesrates zur parlamentarischen Initiative 'Beseitigung von Mängeln der Volksrechte'* of 15 June 2001, BBl 2001 6080, p 6093; for the position of Parliament, see *Bericht SPK-S*, n. 53, p. 4827.

[60] Diggelmann 2005; Ziegler 2004; Baumann 2002; Cottier et al. 2001; Sturny 1998; Saladin 1995; Ehrenzeller 1993.

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The Government also, in detailed reports, has addressed issues that have arisen due to the changed circumstances in foreign policy. Mention is to be made of the reports on the continued relevance of Swiss neutrality,[61] on the relationship between national and international law[62] and on the Swiss-EU relationship.[63] No major reforms are currently under discussion.[64]

3.1.4 See Sect. 3.7.

3.2 The Position of International Law in National Law

3.2.1 Switzerland has traditionally been a (moderate) monist state. The Constitution is silent on this matter; however, the Federal Tribunal's case law follows the monist scheme.[65] Consequently, provisions of international law form part of the Swiss legal order without any act of transformation. In addition, a treaty norm is considered to be self-executing (directly applicable by domestic authorities and courts) if it contains rights or duties of individuals, is phrased in an unconditional and concrete way, and is therefore suited to form the legal basis of, and be applied in, an individual case, i.e. it is not addressed to the legislative branch.[66] Within the domestic hierarchy of norms, the Constitution is the highest-ranking source of law, followed by federal acts and finally federal ordinances. Cantonal law is subordinate to all federal law (Art. 49(1)). With regard to *treaties*, no clear hierarchy exists. Several constitutional provisions make reference to international law and are relevant for the determination of its position in the internal legal order. Viewed together, they display a considerable openness towards international law.

First, the Constitution explicitly states that 'the Confederation and the Cantons shall respect international law' and names international law as one aspect of the rule of law (Art. 5(4)). Furthermore, *ius cogens* forms a material limit to partial or complete revision of the Constitution (Arts. 139(2), 193(4) and 194(2)). Finally, the

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[61] *Bericht des Bundesrates zur Neutralität, Anhang zum Bericht über die Aussenpolitik der Schweiz in den 90er Jahren* of 29 November 1993, BBl 1994 153.

[62] *Bericht des Bundesrates 'Das Verhältnis von Völkerrecht und Landesrecht'* of 5 March 2010, BBl 2009 2263, complemented by the additional report *Zusatzbericht des Bundesrats zu seinem Bericht vom 5. März 2010 über das Verhältnis von Völkerrecht und Landesrecht* of 30 March 2011, BBl 2011 3613.

[63] *Europabericht 2006* of 28 June 2006, BBl 2006 6815 and *Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik* of 17 September 2010, BBl 2010 7239.

[64] For a parliamentary initiative regarding the extension of parliamentary participation with regard to the OECD, see below, Sect. 3.3.1; for the discussion on the position of international law within the Swiss legal order and a shift to a dualist system, see below, Sect. 3.2.2.

[65] Since BGE 7 782 (1881).

[66] BGE 120 Ia (1994), E. 5b; for a recent example, see BGE 138 II 42 (2012), E. 3.1. See further *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2303.

Federal Tribunal and other judicial authorities are bound to apply federal acts and international law (Art. 190).

Due to the lack of an absolute rule, many questions regarding the position of international law remain disputed, especially with regard to its position vis-à-vis the Constitution.[67] It is uncontroversial that *ius cogens* takes precedence over any conflicting Swiss law. Furthermore, international law has primacy over all *cantonal law* and over federal *ordinances*.[68] Concerning conflicts between treaty law and *federal acts*, the Federal Tribunal has developed a differentiated approach. The more recent jurisprudence suggests that the Federal Tribunal in principle proceeds from the primacy of international law over all domestic law, including the Constitution.[69]

Conflicts between international law and federal acts Article 190 of the Constitution does not give an answer to the question of what happens in the event of a conflict between international law and federal (parliamentary) acts. It names both international law and federal acts as 'decisive' and thereby leaves the choice to the organs applying the law.[70] The Federal Tribunal takes the idea of the primacy of international law as a starting point, invoking Arts. 26 and 27 VCLT as well as Art. 5(4) of the Constitution.[71] The *lex posterior* rule does not apply to the relationship between international and national law.[72] However, an exception applies: if the federal legislator deliberately contradicts a treaty and thus accepts a conflict with an existing international provision, the newer legislation prevails (the so-called *Schubert* rule).[73] Later, the Federal Tribunal created a counter-exception: *Schubert* does not rule when international norms for the protection of human rights are at stake (the so-called *PKK* rule).[74] In 2007, the Federal Tribunal gave precedence to an agreement on the free movement of persons (with the EU) over a provision of a federal act explicitly adopted to implement that agreement.[75]

Conflicts between international law and the Constitution There is also no clear rule for conflicts between international law and the Constitution. This constellation has become practically relevant in the last years due to a proliferation of popular initiatives that contradict international law and especially the European Convention on Human Rights (ECHR).[76] The most frequently used variant of this direct

[67] See for references Ziegler and Odendahl 2014, para. 55.

[68] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2306.

[69] BGE 139 I 16 (2012), E. 5.1; BGE 142 II 35 (2015), E. 3. See already 125 II 417 (1999), E. 4d; 135 II 243 (2009), E. 3.1; 138 II 524 (2012), E. 5.1.

[70] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2310.

[71] See BGE 139 I 16 (2012), E. 5.1 and 138 II 524 (2012), E. 5.1; BGE 142 II 35 (2015), E.3.1.

[72] BGE 122 II 485 (1996), E. 3a; repeated in 138 II 524 (2012), E. 5.1.

[73] BGE 99 Ib 39 (1973) (*Schubert*) E. 3-4; repeated in 139 I 16 (2012), E. 5.1.

[74] BGE 125 II 417 (1999) (*PKK*), E. 4d.

[75] BGE 133 V 367 (2007), E. 11.6; see also BGE 142 II 35 (2015), E.3.1.

[76] E.g. popular initiative on preventive detention ('*Verwahrungsinitiative*'), accepted on 8 February 2004; on the ban of minarets ('*Minarettverbotsinitiative*'), accepted on 29 November 2009; deportation initiative ('*Ausschaffungsinitiative*'), accepted on 28 November 2010; initiative

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democratic instrument allows 100,000 signatories to submit a concrete proposal for a constitutional provision that is, if valid under the conditions provided for in the Constitution, voted upon and adopted in its exact wording (Art. 139 of the Constitution). The Constitution contains only few limitations to this instrument. Peremptory norms (*ius cogens*) build the only substantial limitation. Initiatives violating *ius cogens* norms must be declared invalid by Parliament and are not brought to vote (Art. 139(3)). The constitutional term 'peremptory norms of international law' is interpreted broadly and includes norms at the margins of the international concept, such as the non-derogable rights under the ECHR. It follows that initiatives that are not in conformity with international law, outside the nationally determined circle of peremptory norms, can become constitutional norms.

The implementation and application of such provisions has led to considerable difficulties, leaving the organs concerned and especially Parliament with the situation that either the Constitution or conflicting international obligations have to be disregarded. This Catch-22 has led to an extensive debate on possible limitations of direct democratic rights in the name of the rule of law.[77] However, attempts to tackle the problem have hitherto failed.[78] In 2012, confronted with a constitutional provision introduced through a popular initiative on expulsions that foresaw far-reaching restrictions of the fundamental rights of foreigners, the Federal Tribunal, by way of *obiter dictum*, pronounced itself on the matter and stated that international law and in this case especially the ECHR would prevail over the conflicting constitutional provision.[79] It reached this conclusion by applying Art. 190, which mentions only federal acts and international law as being 'decisive' for the authorities applying the law. The Tribunal concluded *e contrario* that the Constitution (not explicitly mentioned) must cede to international law. Importantly, the Tribunal did not apply the *Schubert* exception to this constellation, which would have allowed a deliberate popular initiative to supersede pre-existing international law. The consequence of this far-reaching decision is that conflicts between constitutional norms and international law are now in principle to be resolved in favour of international law, granting it a quasi-supra-constitutional status. This leads to a restriction of the instrument of the popular initiative 'through the backdoor'.

This triggered a heated political debate. The populist party, author of the successful popular initiatives of the last years, launched a new initiative, which aimed

against mass immigration ('*Masseneinwanderungsinitiative*'), accepted on 9 February 2014. For an academic assessment, see e.g. Auer 2013, pp. 158–160.

[77] For an overview of the reform proposals, see *Zusatzbericht Verhältnis von Völkerrecht und Landesrecht*, n. 62.

[78] See regarding the most recent attempts, *Bericht des Bundesrates zur Abschreibung der Motionen 11.3468 und 11.3751 der beiden Staatspolitischen Kommissionen über Massnahmen zur besseren Vereinbarkeit von Volksinitiativen mit den Grundrechten* of 19 February 2014, BBl 2014 2337.

[79] BGE 139 I 16 (2012), E. 5.3. See already (less clear) 133 II 450 (2007), E. 6; 133 V 233 (2007), E. 3.5.

to explicitly endorse the primacy of the Constitution over international law (with the exception of *ius cogens*). The proposal also foresaw that conflicting international obligations were to be re-negotiated or even terminated. The core argument brought forward was that international law and 'foreign judges', i.e. particularly the judges in Strasbourg, impinge too much on the 'will of the people' as expressed in direct democratic votes. In the end, the proposal was clearly rejected.[80] An approval would probably have had far-reaching consequences for Switzerland, one of them being a withdrawal from the ECHR. Most of all, the majority of the citizenry would then have been in the position to make laws with an almost unfettered discretion, to the detriment of minority rights.[81]

While it is certainly true that internationalisation and the greatly increased activity of international bodies in times of global governance constitute challenges to direct democracy, we think that the proposed solution missed the point. It first of all projects the debate on the proper balance between direct democracy and rule-of-law-induced limits of democracy, which is an inherently *constitutional* debate, onto international law and especially onto the ECHR. Furthermore, the supposedly simple solution proposed, granting the Constitution priority in any case, would have led to a myriad of new problems, while the rigid priority granted to the Constitution would not have provided the flexibility needed in the face of the pluralistic and complex legal reality.

3.2.2 A move to a dualist system has been repeatedly discussed in Parliament,[82] with emphasis on state sovereignty and legitimacy concerns.[83] The Government has consistently refused to shift to dualism.[84] Its argument is that the leeway for legislative implementation of international law is not greater in dualist states, because Arts. 26 and 27 VCLT bind those states as well. Furthermore, the Government has pointed to the fact that direct democratic participation has been extended (see Sect. 3.1.2), and nearly parallel conditions for popular involvement in the adoption of national and international norms have been established.[85] A shift to dualism would not contribute to the resolution of pending problems, namely with regard to the position of international law in the Swiss legal order, the implementation of popular initiatives or the discontent in Switzerland about the role of 'foreign' judges.

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[80] The initiative which was named 'popular initiative on self-determination' ('*Selbstbestimmungsinitiative*') was voted upon on 25 November 2018 and rejected by a majority of 66 percent of the voters and all the Cantons.

[81] See for an overview *Botschaft zur Volksinitiative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'* of 5 July 2017, BBl 2017 5355.

[82] The most recent request, *Motion 14.3221 (Reimann), 'Dualismus statt Monismus'* of 21 March 2014 was rejected by the first chamber of Parliament in March 2016.

[83] As in the reasoning of the *Motion Reimann*, n. 82.

[84] *Bericht Völkerrecht und Landesrecht*, n. 62, pp. 2285–2286, 2302–2303, 2320–2321; statement of the Government of 28 May 2014 regarding *Motion 14.3221 ('Dualismus statt Monismus')*. http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20143221.

[85] See statement of the Government regarding Motion 14.3221, n. 84.

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3.3 Democratic Control

3.3.1 In Switzerland, as in most other states, Parliament is involved in the conclusion of treaties (see above Sect. 3.1) The Swiss Constitution, however, does not confine its participation to the ratification stage. It rather contains a provision that opens the door for parliamentary participation already prior to the approval of a treaty. Parliament partakes in the negotiation phase, but also beyond ratification, e.g. in subsequent negotiations within IOs. The intensity of parliamentarisation seems to be unique in a comparative perspective.[86]
The starting point for parliamentary involvement in foreign policy is Art. 166(1) of the Constitution which states that the Federal Assembly 'shall participate in shaping foreign policy and shall supervise the maintenance of foreign relations'. The Constitution itself does not define the term 'participation'. The Parliament Act specifies that Parliament 'shall follow international developments' and 'participate in the decision-making process on important foreign policy issues' (Art. 24(1)). Additionally, Parliament shall 'participate in international parliamentary conferences and cultivate relations with foreign parliaments' (Art. 24(4)).

Parliament disposes of several instruments to this end: on the one hand, general parliamentary instruments and, on the other, instruments specifically designed for the area of foreign policy. The first group includes federal legislation concerning the area of foreign policy (marginal in practice), the parliamentary supervisory powers (Art. 169 of the Constitution) and finances (Art. 167), as well as the different types of procedural requests under the Parliament Act.[87] Several important legal developments, including the 1992 reform of parliamentary participation in foreign policy, go back to the use of these instruments. Of great practical importance for foreign policy are so-called *motions*, whereby Parliament can request that the Government submit a bill to the Federal Assembly or take certain action (Arts. 120 et seq. of the Parliament Act).

Examples of the use of the general parliamentary instruments include two parliamentary initiatives (Art. 160(1) of the Constitution and Art. 107 of the Parliament Act) regarding regulatory activities within the OECD. Both requested a stronger parliamentary involvement, arguing that OECD recommendations often lead to international standard-setting, ultimately resulting in international law with no democratic legitimation and control at all.[88] An example is the OECD approach to combatting tax avoidance by multinational enterprises as part of the organisation's

[86] Ehrenzeller 2014, para. 14.

[87] Tripet 2012, pp. 23–25 offers some examples.

[88] *Parlamentarische Initiative Nr. 14.424*, '*Parlamentarische Einflussnahme bei Regulierungsaktivitäten durch die OECD'* of 18 June 2014. Another initiative requests in the same vein consultation with Parliament in OECD matters. See *Parlamentarische Initiative Nr. 14.433, 'Empfehlungen und Beschlüsse der OECD und ihrer Sonderorganisationen. Pflicht zur Information und Konsultation der zuständigen Legislativkommissionen*' of 20 June 2014. Both initiatives were rejected by Parliament.

action plan on 'base erosion and profit shifting' (BEPS), which in Switzerland has contributed to the launch of a corporate tax reform.[89]

Parliamentary 'acts of general principle and planning' are another general instrument. These are acts stating that 'certain goals must be achieved, principles and criteria must be observed or measures must be planned' (Art. 28(2) of the Parliament Act). This instrument is strong in legal terms – the Government may refuse to follow these decisions only if it provides justification (Art. 28(4)) – but of marginal practical relevance.[90]

The specific instruments relating to foreign policy are mainly instruments of *information* and *consultation*. First, the Government shall regularly report to Parliament on Switzerland's foreign policy (Art. 148(3) of the Parliament Act). Since 2011, the Government must submit an *annual report* providing a general overview of all activities in the area of foreign policy.[91] Further reports may be explicitly required by law (Art. 148(1) of the Parliament Act). Examples include the 'Foreign Economic Policy Reports' based on Art. 10 of the Federal Act on Foreign Policy Measures.[92] In these reports, the Government explains its main focus in the preceding year and the activities pursued to this end; furthermore, it provides information about foreign economic activities during this period, including the status of ongoing negotiations as well as the conclusion of negotiations.[93] Additionally, the Government may submit reports whenever it deems appropriate (Art. 148(1)).

Although reports are usually issued only for the information or attention of Parliament (Art. 148(1) of the Parliament Act), Parliament can, on its own or on the initiative of the Government, adopt an above-mentioned 'act on principle and planning' in reaction to important plans and reports (Art. 148(2) and (4)). So far, the Government has never submitted a report together with an invitation to take such a decision. Observers note that Parliament discusses the annual foreign policy reports less intensely than it did the more general pre-2009 reports. Furthermore, only few

[89] OECD press release of 16 September 2014, 'OECD releases first BEPS recommendations to G20 for international approach to combat tax avoidance by multinationals'; Federal Department of Finance press release of 22 September 2014, 'Federal Council launches consultation on third series of corporate tax reforms'.

[90] Tripet 2012, p. 18. The only instance (under the former law) so far is a draft federal decree with regard to a popular initiative proposing accession to the European Union. See *Entwurf Bundesbeschluss über Beitrittsverhandlungen der Schweiz mit der Europäischen Union*, BBl 1999 3830, p. 3839 (rejected by the second chamber of Parliament).

[91] *Aussenpolitischer Bericht 2009* of 2 September 2009, BBl 2008 6291, p. 6293. Before 2009, the reports were issued on an irregular basis. The reports are available at https://www.eda.admin.ch/dea/de/home/dienstleistungen-publikationen/berichte/berichte-aussenpolitik.html.

[92] *Bundesgesetz über aussenwirtschaftliche Massnahmen* of 25 June 1982 (SR 946.201).

[93] In 2014, these included i.a. the entry into force of a bilateral free trade agreement with China, the conclusion of free trade agreements with Costa Rica and Panama, as well as the commencement of negotiations regarding a Swiss-EU institutional framework. See *Bericht zur Aussenwirtschaftspolitik 2014* of 14 January 2015, p. 3.

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requests (in the form of the general instruments) have been submitted by members of Parliament to the Government in reaction.[94]

Further specific instruments are the information and consultation mechanisms in concrete situations which address not the parliamentary plenum but the Foreign Affairs Committees (FAC) of both chambers of Parliament (Art. 152 of the Parliament Act). The Government shall *inform* the presidents of the chambers and the FACs 'regularly, comprehensively and in good time of important foreign policy developments' (Art. 152(2)). If the information is classified, the recipients are bound by official secrecy (Art. 8). The FACs or other relevant committees can *request* to be informed or consulted (Art. 152(5)). The initiative to request information is, contrary to Art. 152(2) of the Parliament Act, mainly taken by the committees themselves.[95] An example is the request for information about the conclusion of negotiations concerning the multilateral Anti-Counterfeiting Trade Agreement (ACTA).[96]

The *consultation* mechanism is one of the most important instruments of participation in foreign policy, allowing Parliament to exercise influence *prior* to negotiations: the Government shall 'consult the FACs on important plans as well as on the guidelines and directives regarding mandates for important international negotiations before it decides on or amends them'. In the same vein, the Government 'shall inform these committees of the status of its plans and of the progress made in negotiations' (Art. 152(3) of the Parliament Act).

The term 'important international negotiations' not only encompasses treaty negotiations but, more generally, all important foreign policy plans. It may also apply to soft law as far as it is important for the international standing of Switzerland.[97] Parliament can actively influence such negotiations by making statements during the consultation procedure.[98] The Government is not obliged to follow the statements, but must take them into account.[99]

In the last four-year legislative period (2011–2015), 39 consultations took place, including on the aviation agreement between Germany and Switzerland and the UN Conference on Sustainable Development (Rio+20). Furthermore, the FACs were consulted on the mandate for negotiation concerning the WTO Ministerial Conferences in Bali and Nairobi. Another consultation concerned the mandate for

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[94] Graf 2014, paras. 19–20.

[95] Tripet 2012, p. 46; Tripet Cordier 2014, para. 24.

[96] See *Bericht der Aussenpolitischen Kommission des Nationalrates*, '*Rückblick 1. Hälfte der 49. Legislaturperiode 2011–2013*', p. 8, http://www.parlament.ch/d/dokumentation/berichte/berichte-legislativkommissionen/aussenpolitische-kommission-apk/Documents/legislaturrueckblick-apk-n-2011-2013-d.pdf.

[97] See *Notiz des Sekretariats der Aussenpolitischen Kommissionen, 'Mitwirkungsrechte der eidgenössischen Räte im Bereich Aussenpolitik'*, p. 3, http://www.parlament.ch/d/organe-mitglieder/kommissionen/legislativkommissionen/kommissionen-apk/Documents/mitwirkung-aussenpolitik-apk-d.pdf.

[98] See *Bericht der Staatspolitischen Kommission des Nationalrates zur Parlamentarischen Initiative Parlamentsgesetz* of 1 March 2001, BBl 2001 3467, p. 3604.

[99] Lanz 2014, p. 27.

negotiations with the EU to resolve institutional questions. Both committees approved the mandate, while adding a clarification.[100]

The FACs usually approve proposed mandates; only in exceptional cases do they propose amendments or ask that negotiations be abandoned.[101] A study finds a growing tendency to consult with Parliament.[102] The Government seems to recognise the importance of the instrument of consultation, and Parliament actively exercises its powers.[103]

It can thus be concluded that the reforms regarding the stronger involvement of Parliament in foreign policy have been successful – Parliament has assumed its role and proactively engages in foreign policy. This strong parliamentary involvement in Swiss foreign policy must be seen against the backdrop of some particular features of the Swiss system: the prevailing model of 'consensus democracy' as opposed to 'majoritarian democracy', and the far-reaching popular participation in treaty approval ('threat' of a referendum). While it is generally acknowledged that parliamentary involvement might negatively impact on flexibility during international negotiations, involving Parliament already in the stage of the framing of mandates for negotiations arguably has a positive impact on the acceptance of treaties, thus reducing the risk of a referendum. This might even strengthen the position of the Government during international negotiations.[104] Therefore, parliamentary involvement and especially consultation already during the shaping of mandates would be worth considering also in systems with no direct democratic participation, as this helps mitigate the power shift from the legislative to the executive branch and leads to a more legitimate and acceptable result.

3.3.2 See above, Sect. 3.1 on popular rights in connection with the conclusion of treaties, and Sect. 3.1.2 on the 2003 amendments on referendums.

3.4 Judicial Review

3.4.1 Rules on judicial review Treaties and acts of international organisations are not challengeable in Swiss courts. Several authors as well as a governmental report have claimed, however, that the essence of constitutional fundamental rights should form a limit to the application of international law.[105]

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[100] For an overview, see the report *Die Aussenpolitische Kommission des Nationalrates in der 49. Legislaturperiode, 2011–2015*, https://www.parlament.ch/centers/documents/de/legislaturrueckblick-apk-n-2011-2015-d.pdf.

[101] Tripet 2012, p. 62.

[102] Ibid., p 96: 12 consultations in the legislative period 2003–2007; 24 consultations in 2007–2011.

[103] Lanz 2014, p. 27.

[104] Ibid., pp. 27–28; Tripet Cordier 2014, para. 30.

[105] *Bericht Völkerrecht und Landesrecht*, n. 62, p. 2322; Schindler and Tschumi 2014, para. 87 for more references.

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The object of judicial review is normally an individual act; federal legislative acts (statutes) are not challengeable.[106] As foreign relations lie in the responsibility of the Confederation (Art. 54(1) of the Constitution), most acts in the area of foreign relations emanate from the federal sphere. Federal administrative acts are usually first challengeable before a federal complaint authority, and then before the Federal Administrative Tribunal, with the Federal Tribunal as a last instance.

In the so-called administrative procedure, acts can, inter alia, be challenged for violation of *federal law*, which also includes the Constitution and international law (Art. 49(a) of the Federal Act on Administrative Procedure).[107] Before the Federal Tribunal, the benchmark will mainly be *federal law* as well as *international law* and the rights of persons derived from the *cantonal Constitutions* (Art. 95(a)–(c) Act on the Federal Tribunal).

The jurisdiction of both the Federal Administrative Tribunal and the Federal Tribunal is limited with regard to 'acts of government', i.e. acts considered to be mainly political and non-justiciable.[108] This means that appeal is precluded with regard to 'rulings relating to the internal and external security of the country, neutrality, diplomatic protection and the other matters relating to external relations' (Art. 32 (1)(a) Act on the Federal Administrative Tribunal[109] and Art. 83(a) Act on the Federal Tribunal[110]). Nevertheless, a counter-exception provides again for an appeal: if 'international law confers the right to have the matter judged by a court', judicial review is granted (last sentence of both provisions). This counter-exception was introduced in 2005 in order to comply with the obligations of Switzerland under Art. 6(1) of the ECHR.[111] In cases not falling under this counter-exception and thus not subject to *judicial* review, the Federal Council serves as a non-judicial appeal authority (Art. 72 of the Federal Act on Administrative Procedure).

An obstacle to setting aside international legal acts is contained in Art. 190 of the Constitution. This provision states that both federal acts and international law are '*decisive*' for the Federal Tribunal and for other law-applying authorities (see above Sect. 3.2.1). The term 'international law' which is 'decisive' and therefore must be

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[106] Article 44 in conjunction with Art. 5 of the Administrative Procedure Act (*Bundesgesetz über das Verwaltungsverfahren [Verwaltungsverfahrensgesetz]* of 20 December 1968 (SR 172.021)). Federal *ordinances*, however, can be subject to an ancillary control together with the challenged individual act. If a court finds that they are incompatible with a higher norm, it may refuse to apply them (but not invalidate them). Furthermore, acts of the Cantons may be challenged before the Federal Tribunal (Art. 82(b) Act on the Federal Tribunal).

[107] See e.g. BGE 130 I 312 (2004).

[108] *Botschaft zur Totalrevision der Bundesrechtspflege* of 28 February 2001, BBl 2001 4202, p. 4387; BGE 1A.157/2005 (2005), E.3.

[109] *Bundesgesetz über das Bundesverwaltungsgericht (Verwaltungsgerichtsgesetz)* of 17 June 2005 (SR 173.32).

[110] *Bundesgesetz über das Bundesgericht (Bundesgerichtsgesetz)* of 17 June 2005 (SR 173.110).

[111] *Botschaft zur Totalrevision der Bundesrechtspflege* of 28 February 2001, BBl 2001 4202, p. 4388.

applied encompasses not only treaty law, but also customary international law, the general principles of law as well as the decisions of IOs binding on Switzerland.[112]

This provision does not prohibit the courts from reviewing and criticising the legal acts under scrutiny.[113] However, even when an international legal act is incompatible with the Constitution and with constitutional fundamental rights, the judiciary is bound to *apply* the conflicting legal act, e.g. the domestic act on implementation of a UN Security Council (SC) resolution.[114]

Judicial review in practice The issue of (direct or indirect) judicial review of acts of international organisations has arisen in Switzerland several times regarding national measures implementing targeted sanctions against individuals. Such measures are generally based on the Federal Act on the Implementation of International Sanctions[115] and issued by the Federal Council in the form of ordinances (Art. 2(3) of that Act).

In the leading case of 2007 (*Nada*), the Federal Tribunal decided that the appeal of a targeted individual against the authorities' refusal to remove him from a list annexed to the Swiss ordinance[116] implementing UN SC Resolution 1267 on sanctions against the Taliban,[117] resulting in a travel ban and the freezing of the applicant's assets, was admissible. Although formally, the issue was not the review of an individual act, but the modification of an *ordinance*,[118] the Tribunal held that the inclusion in a list with the effect of restricting the exercise of individual rights had the same effect as an individual *ruling* affecting fundamental rights. Therefore judicial review should be allowed.[119] As the rights of the applicant under Art. 6(1) ECHR were affected, the Tribunal applied the counter-exception to the act-of-government exception and found the complaint admissible.[120] On the merits, however, the Court held that scrutiny of such measures with regard to their conformity with constitutional rights and international human rights guarantees was not allowed. First, *constitutional guarantees* could not serve as benchmarks. While the Federal Tribunal expressly acknowledged that judicial review was lacking at the UN level,[121] the Tribunal considered itself unable to remedy the situation. The reason was the Swiss authorities' constitutional obligation 'to apply' international

[112] Botschaft BV, n. 3, pp. 428–429; BGE 133 II 450 (2007), E. 6.1.

[113] See BGE 129 II 249 (2003), E. 5.4.

[114] BGE 133 II 450 (2007) (*Nada*), E. 6.1; 2A.783/2006 (2008) (*Al-Dulimi*), E. 7.1.

[115] *Bundesgesetz über die Durchsetzung von internationalen Sanktionen (Embargogesetz)* of 22 March 2002 (SR 946.231).

[116] *Verordnung über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung 'Al-Qaïda' oder den Taliban* of 2 October 2000 (SR 946.203).

[117] SC Resolution 1267 (1999) of 15 October 1999.

[118] See on the justiciability of ordinances n. 106.

[119] BGE 133 II 450 (2007) (*Nada*), E. 2.1.

[120] Ibid., E. 2.2–2.3.

[121] Ibid., E. 8.3.

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law (Art. 190 of the Constitution).[122] The Tribunal therefore felt bound by its obligation under Art. 25 of the UN Charter to implement the UN resolution which – according to the Federal Tribunal – left no leeway.[123] With regard to the *international obligations* to respect human rights under the ECHR and the ICCPR, the Tribunal applied Art. 103 of the UN Charter, according to which 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[124] The Tribunal held that *ius cogens* would, however, constitute a limit to the duty to apply SC resolutions.[125]

In 2012, the ECtHR decided that by prioritising the SC resolutions over respect for ECHR rights, Switzerland had violated Arts. 8 and 13 of the ECHR. It did not accept the defence that Switzerland had had no discretion when implementing the SC resolutions, but rather examined whether Switzerland had done everything in its power to minimise the conflict between the UN SC resolutions and the obligations arising from the ECHR, and concluded that this had not been the case.[126]

In the *Al-Dulimi* case concerning the implementation of Iraqi sanctions resulting from UN SC Resolution 1483,[127] the ECtHR again found Switzerland to be in breach of the Convention.[128] The Federal Tribunal had, in three judgments rendered on the same date,[129] repeated its previous stance that it was not entitled to examine the merits of the complaints, because Switzerland was bound to apply international law due to Art. 190 of the Constitution,[130] and because Security Council resolutions enjoy priority over potentially conflicting treaty norms due to Art. 103 UN Charter (except for *ius cogens*).[131] Given the fact that SC Resolution 1483 contained a *strict* obligation, and because the right of access to an independent and impartial court does not belong to the body of international peremptory norms, the Federal Tribunal refused to examine the applicants' listing in substance, arguing that to do so would potentially deprive Art. 25 UN Charter of its *effet utile*.[132] As Switzerland was not in a position to achieve the de-listing of the applicants, the Federal Tribunal

[122] Ibid., E. 6.1.

[123] Ibid., E. 8.1.

[124] Ibid., E. 6.2.

[125] Ibid., E. 7.

[126] *Nada v. Switzerland* [GC], no. 10593/08, § 185–199, ECHR 2012.

[127] Resolution 1483 (2003), adopted by the SC at its 4761st meeting on 22 May 2003. The implementing legislation is the *Verordnung über Wirtschaftsmassnahmen gegenüber der Republik Irak* of 7 August 1990, amended on 20 May 2003 to adapt to UN SC resolution 1483 (BBl 2003 1887).

[128] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, ECHR 2016.

[129] BGE 2A.783/2006; 2A.784/2006; 2A.785/2006 (*Al-Dulimi*); all of 23 January 2008. In these cases, the challenged act was an *individual* ruling (an administrative decision on confiscation of 16 November 2006).

[130] BGE 2A.783/2006 (2008) (*Al-Dulimi*), E. 7.1.

[131] Ibid., E. 7.2.–7.3.

[132] Ibid., E. 9.2; 10.1.

considered that Switzerland's behaviour neither violated the Swiss Constitution nor Arts. 6 and 13 of the ECHR.[133]

The Grand Chamber did not accept this defence. It found that although the Swiss courts' refusal to review the complaint pursued the legitimate objective of maintaining international peace and security, the denial of any substantive review was disproportionate and therefore impaired 'the very essence of the applicant's right of access to a court'.[134] According to the ECtHR, SC resolutions must be interpreted as allowing for an appropriate review by domestic courts unless the resolution explicitly rules this out: '[w]here a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention.'[135] The ECtHR then found that before freezing the assets 'the Swiss authorities had a duty to ensure that the listing was not arbitrary. … The applicants should … have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary.'[136] Because the Swiss authorities, including the Swiss Federal Tribunal, completely refused to examine the complaint, they violated the Convention. Even though the ECtHR sought to strike a compromise and to avoid the hard consequences of Art. 103 UN Charter, it still leaves the ECHR member states that now have to apply an undefined arbitrariness test in a Catch-22 between the ECHR and the UN Security Council.[137]

Experts' view The procedural elements of constitutionalism may be more important than the substantive ones; what counts are not only material guarantees but even more so the mechanisms to implement them, including judicial review. If such mechanisms exist only on the domestic plane, they need to be exploited. However, diverging interpretations and application of international primary and secondary law will persist in any case.

National courts play an important role at the intersection of legal orders: they are 'servants' to international law within the domestic realm and act as pivotal safeguards for the effectiveness of international law. At the same time, they remain answerable to the dictates of domestic law and act as gatekeepers for the protection of national values, as often enshrined in the constitution. In this dual function, national courts may be faced with the dilemma of obeying either national (constitutional) law or international law. As shown, the Swiss Federal Tribunal has so far proved reluctant to assume a role in protecting constitutional (or European) fundamental rights against encroachment by international legal acts, but rather has implemented measures prescribed by international law faithfully.

[133] Ibid., E. 11.2.

[134] *Al-Dulimi* [GC], n. 129, para. 151.

[135] Ibid., para. 140.

[136] Ibid., paras. 150–151.

[137] See for a critical appraisal of the case Peters 2016b.

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In Switzerland as in other states, courts have so far been confronted with conflicts between international law and constitutional law mainly with regard to targeted sanctions, which arise less from a conflict of values and more relate to a lack of judicial review of the acts of the Security Council.

In other constellations, international and domestic (constitutional) standards diverge only in nuances rather than pointing in opposite directions. Here, harmonising approaches by national courts seem adequate. They should take international law into consideration in good faith and should interpret the domestic constitution in the light of international law.

If a normative conflict cannot be interpreted away, courts need to decide which norm should prevail. It is submitted here that priority should be given not by pointing to the formal sources, i.e. whether a norm is codified on the constitutional level or based in international law, but on the basis of their substance. Accordingly, less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). Within such a flexible scheme, the practical outcome would greatly depend on *who* interprets and applies the law.

Arguably, if the application of international law risks violating the core principles of the domestic constitution, the 'constitutional identity', (some) domestic courts (maybe only courts of last instance) might exceptionally and temporarily be released from their duty to apply international law. However, they should exercise this emergency power in the spirit of pressing for international legal reform.[138] Also, such domestic judicial review seems to be warranted only 'as long as' adequate review of international acts is lacking on the international plane and must be abandoned once the international level has been sufficiently constitutionalised.

3.5 The Social Welfare Dimension of the Constitution

No significant issues arise.

3.6 Constitutional Rights and Values in Selected Areas of Global Governance

On individuals affected by UN terrorist blacklists, see Sect. 3.4.1. Regarding other rights, in 2014, the ECtHR found that Switzerland, in applying the Dublin

[138] See Peters and Preuss 2013, pp. 41–42 for a more detailed reasoning.

Regulation,[139] had violated Art. 3 of the ECHR by sending an asylum seeking Afghan family with small children back to Italy.[140] Italy was the country of their registration in Europe, but had a problematic reception system.

The primary objective of the Dublin Regulation is to determine which state bears responsibility for examining an asylum application in order to avoid multiple applications and to ensure that only one state deals with any single case (Art. 3 and Chapter III of Regulation No. 604/2013). It therefore establishes a nearly automatic procedure. The Federal Administrative Tribunal had previously held that 'while there [were] shortcomings in the reception and social welfare arrangements …', there was no evidence in the file capable of 'rebutting the presumption that Italy complie[d] with its obligations under public international law'.[141]

The ECtHR, however, considered that Switzerland was obliged to undertake a further examination. It argued that the current situation in Italy was not comparable to the situation in Greece which the Court had examined in the case of M.S.S.[142] However, in light of the current state of the reception system in Italy and the fact that children are a particularly vulnerable group, it was incumbent on Switzerland to obtain assurances from the Italian authorities that the family would be received in facilities and conditions adapted to the age of the children.[143]

The decision to return the applicants to Italy did not strictly fall within Switzerland's international legal obligations, because the Dublin II Regulation left some leeway and allowed a state to examine applications for asylum lodged with it, even if the particular state is not obliged to do so under the Dublin criteria.[144] Consequently, the *Bosphorus* presumption did not apply in the present case, and Switzerland remained fully responsible under the ECHR.

Taking into account the need to coordinate different legal regimes, this ECtHR judgment might be viewed critically. The Dublin system is based on the principle of mutual confidence and on the presumption that the participating states respect the

[139] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1. The Dublin Regulation is applicable to Switzerland under the terms of the association agreement of 26 October 2004 with the European Community regarding criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Switzerland, [2008] OJ L 53/1.

[140] *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

[141] Federal Administrative Tribunal, *A. et al. contre Office fédéral des migrations (ODM)*, Judgment of 9 February 2012, D-637/2012, p. 7, in the translation of *Tarakhel*, n. 140, para. 18. The judgment related to the previous Dublin II regulation (Regulation 343/2003)

[142] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

[143] *Tarakhel*, n. 140, paras. 120–122.

[144] Under the 'sovereignty clause', Art. 3(2) of the Dublin II Regulation of 2003 and Art. 17 'discretionary clauses' of the Dublin III Regulation of 2013.

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fundamental rights laid down in the ECHR. According to the Court of Justice of the European Union, this presumption is only rebutted in the event of systemic flaws. The judgment of the ECtHR introduced a stricter standard of scrutiny, obliging Member States to deviate from the principle of mutual confidence and to examine individual cases beyond extreme cases of systemic deficits. This could undermine the balance and the effectiveness of the Dublin system. However, it leads neither to a Catch-22 for the Member States, nor does it preclude the application of the Dublin Regulation. It rather obliges Member States to use the exception clause foreseen in the Regulation and to ask for 'detailed and reliable information' concerning the reception conditions when particularly vulnerable categories, including children, are involved.[145] The *Tarakhel* judgment provides a more effective protection of human rights *within* the existing EU regime and thus allows harmonisation of the two different regimes (ECHR and EU law). Such an approach is in line with the idea of the maximum standard as expressed both in Art. 53 of the EU Charter of Fundamental Rights and in Art. 53 of the ECHR.

We submit that as long as there are no sufficient institutions and procedures on the international level to compensate for the 'hollowing out' of constitutional principles and processes ('compensatory constitutionalisation'), national actors (courts and parliaments) should continue to play an important role in upholding such principles. However, they need to practice constitutional tolerance. This means that they should not demand identical standards on every level of governance, should employ techniques of accommodation (conflict-avoiding clauses, harmonious interpretation, etc.), and not reify fixed normative hierarchies established between different legal orders.

The Swiss debate about the meaning of the constitutional reference to 'international peremptory norms' (see Sect. 3.2.1) illustrates the relevance of mutually adjusting domestic (constitutional) and international standards. This reference is unique in setting an international law-conscious limit to constitutional amendment. It is in principle legitimate to 'domesticate' the *ius cogens* standard, as long as domestication works immediately or indirectly in support of international coordination and co-operation. This is the case here, since the domestic interpretation has so far extended the range of international legal norms to be respected in amending the Constitution.

The institutional setting (procedures for constitutional amendment, jurisdiction of courts, etc.) needs to be designed so as to allow such accommodation and tolerance. For example, in Switzerland, the right to initiate a popular initiative could be further restricted, so as not only to stop short of international peremptory norms (in their 'extended' Swiss interpretation) but also to respect all or a core set of international (or European) human rights guarantees.

[145] Cf. *Tarakhel*, n. 140, para. 121.

3.7 Conclusions

Overall assessment The Swiss Constitution is unique in Europe in the way it organises international co-operation. Three features stand out: the very strong democratisation of foreign policy-making (through Parliament and through the involvement of the people), the relatively reluctant judicial review of international legal acts against the benchmark of fundamental rights and, finally (less importantly), the federal elements in conducting international relations. This constitutional design for accommodating international law and for acting on the international plane may have several reasons.

First, it appears to be an outgrowth of the internal constitutional design in which democracy (including the strong elements of direct popular participation) stands in the foreground and is only weakly checked by constitutional review. The relatively far-reaching cantonal competences in international relations mirror the strong Swiss federalism.

Importantly, the spectre of a popular referendum adds to the usual power struggle between the Government and Parliament in the conduct of international relations. As in probably all other democratic states, the Swiss Government time and again points to the need for reacting swiftly and flexibly, and to speak with one voice in order to justify its own competences in foreign affairs, unencumbered by too much parliamentary involvement. The current Swiss Constitution accommodates this concern but allows more room for Parliament than other European constitutions. The reason is that Parliament's involvement is apt to forestall the people from calling for a referendum which in turn would risk slowing down and confusing foreign affairs even more. Thus, overall, the purely 'internal' aspect of the Constitution and the outward-looking structures and mechanisms fit together.

Secondly, Switzerland as a small country surrounded by powerful neighbours has a long and strong tradition of investment in international law in order to pursue its national interests (host state of numerous IOs; depositary of the International Humanitarian Law Geneva Conventions; neutrality in war). Thirdly, the relevant constitutional provisions (and accompanying statutory law) date from the 1990s and the first decade of this millennium. This period was characterised by an increased awareness of globalisation and global interdependence, by a belief in the merits of international co-operation, and by the expectation that international governance would continuously become stronger and was in principle necessary and beneficial.

Overall, the Swiss constitutional reforms mirrored the zeitgeist and, at the same time, the result reflects four Swiss idiosyncrasies, namely the country's proactive use of international law for its own benefit, the extremely elaborate and far-reaching democratic procedures, strong federalism, and the country remaining outside the EU (in contrast to most other Western European states).

The importance of the tension between the rule of (undemocratic) international law and domestic democracy has been fully realised only in the past decade. The resulting scepticism towards the incorporation, accommodation, implementation and prioritisation of international law in the domestic legal order is an attitude

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which Switzerland shares with other states. This Europe-wide trend is not least a consequence of the increased practical relevance and reach of international legal acts which is felt within nation states. However, the backlash seems to be more intense in Switzerland than in other states because of the high value placed on the sovereignty of the (Swiss) people.

The seeming inconsistency between the current phenomenon of Swiss constitutional reforms triggered by popular initiatives in disregard of international standards on the one hand, and the faithful implementation of SC resolutions (in disregard of domestic constitutional fundamental rights and ECHR rights) on the other, is not a real contradiction. To the contrary, it precisely follows the internal order of constitutional values, namely the priority of democracy ('peoples' rights') over fundamental rights and judicial review. The Swiss courts' (relative) neglect of ECHR rights in this picture reflects Swiss ambivalence towards Strasbourg: although the constitutional catalogue of fundamental rights was copied from the text of the ECHR in 1999, the ECtHR's adjudicatory authority is viewed with scepticism, notably when it threatens to undo laws adopted not only by the democratic legislature but by the people itself.

Lessons for compensatory constitutionalism The Swiss case underscores both the desirability and the difficulties of compensatory constitutionalism as a normative programme.[146] On the triple premise that economic globalisation and global problems will persist, that these require a global or at least harmonised governance response (as opposed to isolated national responses), and that constitutional achievements reached within nation states should be preserved, the constitutionalisation of international (primary and secondary) law and its institutions indeed seems the only way forward.

The alternative strategy, namely to stop or cut back international law-making, is revealed as unfeasible, *inter alia*, by Swiss discussions such as on denouncing the ECHR. Also, the Swiss Parliament's demand to be involved not only in the elaboration of hard international law but also of soft law (OECD acts in the field of taxation) illustrates the impact felt by all types of international governance measures which in turn triggers the quest for creating a democratic basis for them.

As regards the difficulties of compensatory constitutionalism, it is worth noting that the important Swiss reforms, mainly with a view to strengthening the element of democratic control (Sect. 3.3) through domestic democratic institutions, have so far not succeeded in soothing popular aversion to 'foreign' and undemocratic international law and institutions. However, the way out, namely the democratisation of international law- and policy-making directly within the international institutions themselves, is fraught with normative and practical problems and will in the end only marginally be able to accommodate the (democratic) decision-making processes within very small sub-units (such as the Swiss people) feeding into the global law-making process.

[146] Peters 2006.

With regard to the second main element of contemporary constitutionalism, namely the rule of law (fundamental rights protection and judicial review (Sect. 3.4)), the Swiss case also provides lessons. At first sight, the Swiss readiness to implement SC resolutions, sacrificing fundamental rights (below *ius cogens*) and judicial review, might be praised for its acknowledgment that the constitutional standards need not be identical on the international and domestic levels of governance. However, this Swiss stance might be much less a manifestation of 'constitutional tolerance' towards international governance than it appears to be at first glance, but rather the result of a parochial scepticism towards judicial review. The ECtHR, in compelling Switzerland to exercise such review, might in the end work more in favour of compensatory constitutionalism through the pressure it creates (deployed through an ECHR member state) to reform the UN sanctions system.

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